

Michigan Education Savings Program Act (MESP)

By Chip Behler, Attorney

In June, the Governor signed into law the Michigan Education Savings Program Act (MESP) which lets consumers deduct contributions to individual college savings accounts on their state income tax returns. Account earnings grow free from Michigan income tax, and federal income taxes are deferred until the account is tapped. The MESP enables any Michigan family to start savings for their child's college experience by requiring as little as \$25.00. The MESP also covers a wide range of likely education related expenses, including private or out-of-state

tuition, room and board, books, required supplies and vocational or technical training. If a family plans to use the MESP account for educational costs, this is a great technique to avoid federal gift estate taxes and defer the federal income taxes until the money is withdrawn by the child, who will presumably then be in a low income tax bracket while in college.

While the interaction between this Michigan legislation and IRC §529 is still somewhat "unclear," another benefit of the MESP is its possible estate planning ramifications. Parents or grandparents can now

contribute significantly more, gift tax free, to their children or grandchildren's education. rather than contribute \$10,000 per year to the account (the current federal gift tax annual exclusion limit) a donor can "prefund" his/her annual exclusion for five (5) years, so that \$50,000 can immediately be set aside to grow on a tax deferred basis toward their educational goals (or \$100,000 per couple.) While only \$10,000 of this contribution would benefit from the Michigan income tax exclusion, the remaining \$40,000 could be transferred federal gift tax free.

Smith Haughey
Rice & Roegge

200 Calder Plaza Building
250 Monroe Avenue, NW
Grand Rapids, MI 49503-2251

1400 Abbott Road
Suite 410
East Lansing, MI 48823-1902

100 City Centre Plaza Building
202 East State Street, PO Box 848
Traverse City, MI 49685-0848

Printed on recycled paper.

BULK RATE
U.S. POSTAGE
PAID
Grand Rapids, MI
PERMIT NO. 771

LEGAL EASE

Winter 2000

Notice
Anything
Different?

By Chip Behler, Attorney

Smith Haughey Rice & Roegge has a brand new look and this renamed, redesigned newsletter is just the first of many changes you'll see in the coming months.

We'll soon debut a new format for our Legal Alerts, which summarize legal developments relevant to your interests. We're about to introduce expanded practice descriptions to go along with our revamped informational brochure. We've already launched an upgraded version of our web site (www.shrr.com.) And if you look real close, you'll see that we've even made a subtle alteration to our logo.

Why the changes? First, we wanted to establish a fresher, more contemporary aesthetic that reflects our reputation as a progressive, innovative law firm. Even more importantly, we wanted to reorient all of our communications to emphasize our unique benefits: That we provide clients with a level of comfort and a sense of control in addition to excellent legal skills. That we utilize a partnership approach that makes each client an integral part of the legal team. That we are a firm of specialists, each adept in the unique complexities individual clients must face.

Legal Ease, then, is more than just the new name of our newsletter. It's the unifying theme of all our communications with clients. It's why we've redesigned our materials. It's why we make it possible to e-mail your attorney. And it's why you can always pick up the phone and call your attorney on his or her direct line.

The bottom line is this: We're still providing the same personal, responsive service as always. We just look a whole lot better!

Prenup, Antenuup, Postnup = Antinup?

By Randy Velzen, Attorney

What is up with Nups? What is a Nup?

People talk about "prenups." What are they talking about? Basically this is short hand for prenuptial agreement. (Which is simply an agreement or contract that parties reach prior to marriage concerning the disposition of assets in the event of a death or divorce of one or both spouses.) Oddly enough, "prenuptial" and "antenuptial" mean the same thing. They both mean an agreement prior to marriage. (For this article the term "nuptial" will be used.) Not too surprisingly, a postnuptial agreement is very similar, except it is entered into after marriage.

The purpose of a nuptial agreement is to reach an agreement on how matters should be resolved if there is a change in circumstances (e.g., death of a spouse or divorce). It is not unlike a partnership agreement. The theory behind nuptial agreements and partnership agreements is that the time to decide potential issues is when people are getting along not when people are in the middle of difficult decisions. It is difficult to decide what is fair when emotions are high in the event of an impending death or divorce. Individuals, and families too, have a much easier time dealing with the division of assets if they know decisions were made after a reasonable discussion considering all the factors.

Are nuptial agreements anti-marriage?

When I discuss the concept of prenuptial and postnuptial agreements with clients or friends, the response I generally get is, "Well, I don't need to do that, because I don't plan on getting divorced." First, of course, no one plans on getting divorced. Second, prenuptial agreements are as often used for purposes other than protecting assets in case of a divorce.

It is generally a good idea to consider a pre or postnuptial agreement in the event of

second marriages, particularly if children are involved. Why? A frank discussion between the parties as to their thoughts and feelings regarding the issues involved in a prenuptial agreement helps the survivor, in the event of a death, move forward with confidence knowing he or she is following the deceased spouse's intentions. It is particularly important in the case of blended families. Some of the most difficult estates to plan are those involving couples with three sets of children; his, hers, and theirs. Neither party wants his or her children to be cut out of any future inheritances, although most people want the surviving spouse to have a significant amount of control over the assets. What is "fair" varies with each family's situation. Pre and postnuptial agreements can also be very helpful if one or both of the parties have a significant ownership interest in a business. One of the last things a small business needs is an internal struggle or large attorney fees resulting from the need to sort out ownership and control issues.

Finally, while some people dislike nuptial agreements, they can form a basis of a smoother, more equitable divorce; in the

Continued on page 2

The Personal Touch

The attorneys at Smith Haughey Rice & Roegge (SHRR) frequently give *personalized* informational seminars and presentations. These seminars can be hosted at your facility or a neutral site that is convenient for the attendees. SHRR coordinates all the logistics necessary to deliver an informative half or full day of learning that can potentially save your organization hours of headaches, and most importantly, dollars.

Seminars we have presented included the following topics:

- Construction Contracts, Liens and Bonds
- Employee Termination
- Health Law - EMTALA
- Nursing and Medical Malpractice
- Professional Liability
- No Fault Law
- Wealth Pros... and Planning

SHRR has more than 75 attorneys who specialize in over 24 different areas of law. If you would like to take advantage of this service or attend one of our scheduled seminars, please contact ?? at (616)458-3636. *You can find a list of our scheduled seminars on our web site www.shrr.com.*

At Smith Haughey Rice & Roegge, we emphasize the importance, and advantage, of being proactive rather than reactive.

Prenup from page 1

event the marriage proves unsuccessful. While people do not necessarily feel comfortable entering into marriage where one or both parties feel as though they need a "safety net" before taking the leap; it can be a wise investment of time and money to consider what should happen in the event the marriage is dissolved. I usually compare it with a partnership. Partners entering into business do not want to think that the business will fail. However, partnerships, like marriages, sometimes do fail. Generally the best time to talk about what is fair in the event a marriage or partnership is dissolved is when the partners (whether marriage or business) are getting along, usually at the beginning or during planning stages. Once the point of dissolution is reached, there is usually so much emotion involved that clear thinking, as to dissolution issues, is often impossible.

Do these pre and postnuptial agreements hold up in court?

Increasingly, courts uphold pre and postnuptial agreements. After all, the agreements are usually the parties' idea of what is fair. However, judges still look at them with a critical eye. The court examines nuptial agreements much closer than it would a "normal" contract. (i.e., agreement to purchase real estate, employment agreement, etc.) Therefore, it is very important to proceed carefully in preparing a nuptial agreement. For example, there must be a full disclosure of assets and liabilities. Also, each party must be given an opportunity to fully review the agreement and, if he or she chooses to, consult with an attorney. These are two of the many factors that the court will use in determining whether or not the agreement is valid and should be enforced.

Is a Pre or Postnuptial right for everyone?

Of course not. A prenuptial or postnuptial agreement in a "traditional" family is probably not worth the time, effort, or expense to prepare. By "traditional" I mean the families we saw in the sitcoms of the fifties. (e.g., "Leave It to Beaver," "Father Knows Best," "Donna Reed," etc.). However, as more and more of us find ourselves in non-traditional families, the need for considering pre and postnuptial agreements increases. If people find themselves in blended families, having a large disparity of age or assets, having a business, or having some other non-traditional issues, it probably makes sense to discuss the matter with an attorney knowledgeable in the area.

Bankruptcy & Your IRA: SO MUCH FOR

By Heather Blanton-Dykstra, Attorney

Most of us assume that money we stash away for retirement bears a flashing "do not touch" neon sign for everyone to see. We assume that once this money is placed into an IRA, stock bonus, pension, profit sharing, or annuity it cannot be touched by our potential creditors, even in the unlikely event we file for bankruptcy. According to a recent Bankruptcy Court Decision, our comfort is misplaced!

On August 25, 2000, the Bankruptcy Court for the Western District of Michigan was presented with the federal exemption of an IRA. Nary an eyebrow was raised because the Court had almost always interpreted the Bankruptcy Code to exempt such retirement benefits from the

Changes Ahead For

By Dale Ann Iverson, Attorney

Many Smith Haughey Rice & Roegge clients have worked with us to use innovative forms of dispute resolution to reach successful outcomes in litigation and pre-suit disputes. Now, thanks to new court rules adopted by the Michigan Supreme Court, Michigan's state courts will offer court-connected alternative dispute resolution ("ADR"). The most prominent of the ADR services offered will be facilitative mediation.

In Florida, where a similar rule has been in effect for at least ten years, ADR program administrators estimate that 100,000 cases or more go through facilitative mediation annually. The popularity of this process, as in Michigan, is due in part to its proven success in resolving cases.

ADR programs in Michigan courts are likely to be implemented between February and August 2001.

R THAT “SAFE HARBOUR” IN THE STORM

bankruptcy estate. While noting that his decision ran contrary to what had been previously decided, Judge Hughes held that retirement benefits, specifically IRA's, may only be exempt from the estate if the debtor meets strict criteria.

According to Judge Hughes, the federal exemption is available for retirement benefits only if the individual is eligible at the time of the bankruptcy petition to draw benefits from the IRA because of illness, disability, death, age or length of service. Furthermore, even if receiving payments, the bankrupt debtor must also prove that the payments are “reasonably necessary for his support and the support of his dependents.” Therefore, the exempt amount is

only the present value of the benefits required under the “need” portion of this two-prong test.

Judge Hughes justified this decision by noting that “if Congress had intended a ‘pension exemption,’ it could have done so by clearly stating that all interests in a ‘stock bonus, pension, profit sharing, annuity or similar plan or contract’ are exempt.” Instead, Congress’ intent was to ensure that deserving individuals who receive non-wage benefits at the time they file for bankruptcy receive the same treatment as debtors who are employed when they file for bankruptcy.

If you file for bankruptcy at age 59 1/2 you are not eligible to exempt some or all of your retirement benefits, but if you file bankruptcy at 59 1/2 plus one day, you are safe as long as you need the benefits to support you and your loved ones.

To add to this confusion, IRA's are still completely exempt, under Michigan law, from creditor claims. So what cannot be lost fending off a judgment creditor in Michigan, can be lost if the debtor seeks bankruptcy relief.

Remember...although you may not be able to touch your retirement benefits for years to come, there is now a flashing neon sign to some creditors. It reads “first come, first serve.”

or Litigants Under Michigan’s New “ADR” Court Rules

If you are litigating in these courts, you can expect:

- Your case will probably be referred by the judge to facilitative mediation if you do not agree with your opponent to do so voluntarily, although you may seek leave to forego the process in appropriate cases;
- Parties and counsel will be permitted to select a mediator of their choice, but if they fail to do so a mediator from the court’s list of approved mediators will be appointed by the judge;
- You will be required to attend a mediation session in person, but the court will not inquire further whether your participation was “in good faith”;
- Your case will not resolve at or as a result of mediation unless you agree;
- The process utilizing a 3-lawyer panel to render a “mediation evaluation” and formerly known as “mediation” in Michigan courts is now called “case evaluation”, and may be used in addition to facilitative mediation in appropriate cases.

Dale Ann Iverson is a Smith Haughey shareholder. In addition to her litigation practice, she works as an approved mediator for government and non-profit agencies and in federal and state courts. She served by appointment to the Michigan Supreme Court Dispute Resolution Task Force, which drafted the new court rules She is also chair-elect of the Alternative Dispute Resolution Section of the State Bar of Michigan. She can be reached at (616) 458-3232.

Introductions are in Order

We are pleased to announce that several attorneys have joined the SHRR team allowing us to continue to meet the growing needs of our clients.



Eric W. Phelps specializes in business and property law, business and corporate litigation, and construction law. He is also a Major in the United States Marine Corps Reserve. Eric can be reached in our Traverse City office at (231) 486-4542.



Paul T. Jarboe has practiced for 17 years in the areas of business & property law, commercial litigation, employment law, health law, criminal law, and domestic relations. Paul can be contacted in the Traverse City office at (231) 486-4538.



Randall L. Velzen has practiced family, probate, and real estate law for 21 years. He received his bachelor's degree from Calvin College and graduated from the University of Notre Dame Law School in 1978. Randy can be reached in our Grand Rapids office at (616) 458-3644.



Heather Blanton-Dykstra is a recent graduate of Rutgers University School of Law where she was a Lead Articles Editor for the Rutgers Law Review. She specializes in

business and property law in the firm's Traverse City office. Heather can be contacted at (231) 486-4543.



Michelle D. Johnson was previously an attorney/policy analyst for the Michigan Senate. She currently handles general civil litigation, with an emphasis on health law in the firm's Lansing office. Michelle can be reached at (517) 332-3030.



Annie M. Schaefer was previously an assistant prosecuting attorney for Calhoun County. She handles general civil litigation in the firm's Traverse City office. Annie can be contacted at (231) 486-4539.



Brian A. Nettleingham previously worked as a judicial clerk for Judge Joel Hoekstra of the Michigan Court of Appeals. He graduated from the University of Notre Dame Law School. Brian can be reached in our Grand Rapids office at (616) 458-5388.



John R. Oostema joined the firm as a shareholder and specializes in professional liability litigation and appellate law. He has been practicing law for 23 years. He can be reached in the firm's Grand Rapids office at (616) 458-0495.



Thomas R. Ter Maat specializes in transportation and no-fault insurance law. He received his law degree from the Indiana University School of Law and his Bachelor degree from Hope College. He can be reached in our Grand Rapids office at (616) 458-6295.



Kirk W. Morgan previously worked as a judicial clerk for the 26th Circuit Court. Kirk is a graduate of Wayne State University Law School and handles family, probate and real estate law. He can be reached in our Grand Rapids office at (616) 458-3319.



Wendy Passineau has been named Client Services Director for the firm. Wendy was formerly with our Lansing office as well as another Lansing area law firm where she was the client services coordinator. Wendy can be reached in our administrative offices in Grand Rapids at (616) 458-3636.

Have You Heard the News?



Dale Ann Iverson has been named president elect of the Grand Rapids Bar Association and Chair-elect of the Alternative Dispute Resolution Section of the State Bar of Michigan. Ms. Iverson also received The John Hensel Award from the Arts, Community, Entertainment, and Sports Section of the State Bar of Michigan, which is given to a Michigan attorney who has made a significant contribution to the arts, communications, entertainment or sports. Ms. Iverson is a partner in the Grand Rapids office and practices in the areas of civil litigation, facilitative mediation, and legal consulting for non-profit corporations.



J. Joseph Rossi has been promoted to the rank of Major in the United States Marine Corps Reserves. He serves as Peacetime/Wartime support and training officer and is the coordinator of public affairs in West Michigan. Mr. Rossi is an attorney in the Grand Rapids office and specializes in governmental law and employment law.



Patrick F. Geary has been elected President of the Michigan Defense Trial Counsel. Mr. Geary is a shareholder in the Grand Rapids office and is chairperson of the product liability practice group. He also handles business and commercial litigation.



Craig S. Neckers, partner and CEO of the firm, has been appointed to a three year term on the Board of Pensions for the Reformed Church in America. The Board has responsibility for oversight of the retirement program for all ordained ministers, their families and certain lay workers in the RCA. Mr. Neckers specializes in product liability and commercial litigation in the firm's Grand Rapids office.



Karl W. Butterer and Angela T. Ross have been elected to the Michigan Bar Association's Representative Assembly.



Mr. Butterer is an attorney in the Grand Rapids office and specializes in criminal law and civil rights litigation. Ms. Ross is also an attorney in the Grand Rapids office and specializes in criminal law, business and property law and family law.



Charles F. Behler has been reappointed to the State Board of Law Examiners by the Michigan Supreme Court. He will serve another 5-year term. Mr. Behler is a partner in the Grand Rapids office and specializes in governmental and construction law and commercial litigation.



Aileen M. Leipprandt and Charles B. Judson have been appointed to the Firm's Management Committee.



Douglas G. Powe has been named Managing Partner of the Firm's Lansing office and **Robert W. Parker** has been named Managing Partner of the Firm's Traverse City office.



P. Laurence (Larry) Mulvihill was elected to the City Council of Ferrysburg for a four-year term. Mr. Mulvihill is a senior shareholder in the Grand Rapids office and specializes in worker's compensation and employment law.



William W. Jack won this year's Grand Rapids Association of Legal Support Professionals' Boss of the Year Award. Mr. Jack is a shareholder in the Grand Rapids office and handles professional liability litigation, health law, and commercial litigation.