

# BH Newsletter

Beier Howlett, P.C.

Elder Law and Special Needs Advocacy Group

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## A Home for Barbara

We want to introduce you to our friend and client Barbara. She is loyal, dedicated, and strong-willed. She is well-versed in world events. Seventy-three (73) years young, she continues to choose to work every day. She has a special person in her life, Rubin. They have dated for 17 years – a record in this day and age! As she will tell you, he is the light of her life. Barbara is active in the community and in her faith. She loves to play bingo, go to synagogue, and try new restaurants. Incidentally, Barbara is a person with a developmental disability.

Because of a lawsuit, and in an effort to provide protection for Barbara, her mother created a trust. Her intent was to supplement any benefits Barbara would receive from the state and federal government. At the time this trust was drafted, special needs planning was in its infancy and many of the rules governing special needs trust had yet to be tested.

It was important for Barbara to maintain her eligibility for these benefits, as her Medicaid benefits assisted in paying for the services she received from the mental health system. She receives support from Macomb Oakland Regional Center, Inc. (MORC, Inc.). A job was identified for her at Jewish Vocational Services (JVS). As the years passed, these agencies remained consistent, but Barbara began to voice her desire to have her own home that would provide stability and maintain the circle of supports that she had worked to develop.

However, a problem occurred when the Department of Mental Health (now the Department of Community Health) and the Family Independence Agency (FIA), the agencies that administer Medicaid in the State of Michigan, took a close look at Barbara's trust. The state took the position that the trust was an asset available to pay for Barbara's medical care, as well as the services she receives from the mental health system. They advocated that the money in the trust should be spent down to appropriate asset limits, and then Barbara should apply for benefits.

The Trustee hired attorney, Mary Schmitt Smith (Mary) of Beier Howlett, P.C., to represent the trust and to advocate the funds were to be protected from governmental claims. Barbara contacted an attorney, Patricia E. Kefalas Dudek (Patti), formerly a solo-practitioner and now a member of Beier Howlett, P.C., to protect her interests. The issues were complex, and appeals led to proceedings before the Michigan Supreme Court.

Last fall, after years of legal proceedings, Judge Elizabeth Weaver concluded that the trust was an available asset for purposes of determining Barbara's eligibility for benefits. Based on the ruling of the Michigan Supreme Court, Barbara's money had to be spent down to appropriate asset limits (\$2,000.00) before she would again be eligible for Medicaid.

An idea began to take shape. Marc Craig (Marc) of Community Housing Network, Inc. (CHN, Inc.) formerly with MORC, Inc. and Patti began to advocate that Barbara use the trust money for the down payment on a home. With agreement from the Trustee, a petition was presented to Oakland County Probate Court outlining the request. Judge Eugene Arthur Moore granted the petition to use the money to be spent down to purchase a home, with one condition. Following Barbara's passing, the home must be sold and the money generated from the sale of the house be paid to MORC, Inc. to be applied to the amount owed for Barbara's cost of care. The court required that MORC, Inc. be granted a first position lien on the property (similar to a private mortgage). By ordering the proceeds from the sale of the house back to MORC, Inc. after Barbara's passing, the money the court had determined was available to pay for Barbara's cost of care (plus any increase in value due to the investment in real estate) would be paid back to the system at her death.



continued

## Holding the System Accountable (Again!)

Fighting with the Social Security Administration over legitimate claims to Supplemental Security Income (SSI) continues to play a significant role in Beier Howlett's advocacy on behalf of persons with disabilities. Recently, however, Patricia E. Kefalas Dudek, together with a team of attorneys within Beier Howlett's Elder Law and Special Needs Advocacy Group, sought and obtained a significant victory with the Social Security Administration which resulted in the Administration's issuance of a Policy Memorandum reflecting a statewide policy change affecting certain claimants' eligibility for SSI.

In September 1998, Patricia E. Kefalas Dudek, on behalf of Nichole A. Blunden, filed an Application for SSI benefits with a local metropolitan Detroit Social Security Field office. That Application was denied. The basis for the denial was the existence of an OBRA '93 (d)(4)(A) special needs trust for the benefit of the claimant (Exception 'A' Trust). Consistent with the enabling federal legislation, the trust included a payback provision to the State of Michigan equal to the amount of any medical assistance payments rendered on behalf of Nichole during her life. After the appropriate payback, any funds remaining in the trust are to be paid-over to Nichole's "heirs at law."

The position of the local field office, the Administrative Law Judge who heard the initial appeal and the Appeals Council which reviewed the Administrative Law Judge's decision, was that the distribution to "heirs at law" rendered the trust "revocable" as opposed to "irrevocable", and therefore, a "countable resource" for purposes of determining eligibility for SSI. In formulating and defending this position, the various reviewing bodies relied on an *SSA Program Circular* issued by the Office of Regional Counsel in Chicago which interpreted Michigan law (along with the law of five other states in the Region) as it relates to the revocability of trusts. Nichole was not alone, incidentally, as field offices all over Michigan based decisions as to SSI eligibility on the same *Program Circular* relied upon in this case. In fact, Beier Howlett had no less than twelve similar cases pending at various levels in the administrative review process.

Faced with a decision by the Appeals Council affirming Nichole's ineligibility for SSI due to her interest as a beneficiary of an Exception 'A' Trust, the Trustees (on behalf of the claimant) authorized Beier Howlett to take the next available step in challenging the decision of the Administration — a Federal Court Appeal.

Beier Howlett filed a Complaint in the United States District Court for the Eastern District of Michigan seeking a judicial determination that the Social Security Administration's interpretation of Michigan law as it pertains to the revocability of trusts was incorrect, and that because of this incorrect interpretation of Michigan law, Nichole had been wrongly denied SSI.

Pursuant to an Order of the Federal Court, Beier Howlett prepared and filed a Motion for Summary Judgment and Brief in Support. Even before the U.S. Attorney filed a response, the Chicago office contacted Beier Howlett to negotiate a resolution. The result of the negotiation was a remand to the Appeals Council for the issuance of a fully favorable decision for Nichole. The basis for the favorable decision was the Administration's acquiescence to Beier Howlett's position as to the correct interpretation of Michigan law. The fully favorable decision was issued and Nichole will not only begin receiving current SSI benefits, but she is entitled to, and will receive, retroactive benefits dating back to the date of her original application — September 1998.

Ultimately, the Chicago Office memorialized the results of our fight with the Administration in Nichole Blunden's case and issued a *new SSA Program Circular* dated November 8, 2001. The *Circular* is reprinted in its entirety as an insert of this newsletter.

Although nearing completion, our efforts are not yet concluded in the battle to secure benefits to those claimants who are beneficiaries of Exception 'A' Trusts. Since the date of the Administration's change in its position, we continue to work with the Chicago Office and appropriate field offices to see that all of Beier Howlett's other clients whose applications for benefits were initially denied on the same basis as Nichole's are processed properly and finally approved.

*We would like to thank Nichole for giving us permission to tell her story.*

## Senior Prescription Savings Program

A new prescription savings program is available to permanent Oakland County residents age 60 and over regardless of income as long as they do not have other primary prescription coverage. The program allows for savings on generic and brand name medications at a national network of participating independent and chain pharmacies.

There are presently no enrollment fees or monthly fees associated with participation in the program. This program makes it possible for you to acquire your medications at a reduced rate.

This new program is being administered for the County of Oakland by National Prescription Administrators, Inc. (NPA) the nation's largest privately held third party prescription benefits manager. NPA has established a specific toll-free telephone number for you to speak to a representative should you have any questions about the medications covered under the program, the price charged, participating pharmacies in your area or to address any other issues or questions you may have. The toll-free number is 1-866-731-7213.

The information you provide on the enrollment form will be strictly confidential. Statistics on the usage of the program may be used to acquire additional savings or benefits for you. No personal identifying information will ever be released to any outside parties.

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The Elder Law and Special Needs Advocacy Group at Beier Howlett wish you and yours a safe and happy holiday season.

Mary T. Schmitt Smith .....	Attorney at Law
Thomas V. Trainer .....	Attorney at Law
Patricia E. Kefalas Dudek .....	Attorney at Law
Elizabeth L. Luckenbach .....	Attorney at Law
Mary Trayner .....	Legal Assistant
Diane Eller .....	Legal Assistant
Diann Geran .....	Legal Assistant
Barbara Bolton .....	Legal Assistant
Susan Lacayo .....	Legal Assistant

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## Adult Home Help Services

Many of our clients may not be aware of funds available to assist them hiring someone to help them with activities of daily living in their own home. Adult Home Help Services or AHHS, formerly known as Chore Services, provides money to people with disabilities, older adults and people who are blind to hire someone to help them care for themselves and their home. You must apply for AHHS through your local Family Independence Agency (FIA), formerly the Department of Social Services. You can call any FIA office to get the number to your local office. The phone number to the Central Office is 517-373-2035.

Once you have contacted your local office to request Adult Home Help Services, an FIA worker will contact you to evaluate your income, resources and eligibility. The worker will also conduct a client needs assessment to determine how much help you need completing the activities necessary for daily living, like bathing, dressing, eating, meal preparation, taking medication, housework, laundry and shopping or errands. After completing your needs assessment, you and your FIA worker also help you to locate a service provider to help you with your daily activities. The goal of AHHS is to maintain you in your own home and to keep you from being placed in an alternative residential care facility such as an adult foster care home or a nursing home. AHHS helps to strengthen your natural support system, for example you can choose your parents or spouse as your service provider. You are eligible for AHHS if you have Medicaid, require home help personal care and live in an unlicensed setting.

If you are eligible, you will receive money to hire a service provider to assist you with your daily living needs. The amount of money you receive each month is determined by your Family Independence Agency worker after they have completed your needs assessment. Currently, the maximum amount a worker can approve for you is \$333.00 a month. You can be approved for more than \$333.00 a month in many cases, by a Family Independence Agency supervisor or by the main office in Lansing. This is called Expanded Home Help Services. Your payment is made jointly to you and your service provider and will be mailed to you.