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ESTATE PLANNING, PROBATE & ELDER LAW

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Planning Today for Your Tomorrow

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IN THIS ISSUE:

Estate Planning and Medicaid Planning: Could be a Bad Mix

Much confusion abounds in the world of asset protection trusts, including the false belief by many elder law, estate planning, and asset protection attorneys that self-settled Offshore Asset Protection Trusts and/or Domestic Asset Protection Trusts are helpful in connection with Medicaid asset protection planning. In fact, these trusts are useless when it comes to the world of Medicaid asset protection planning.

"Self-Settled Trust" Defined

The term "self-settled asset protection trust" refers to a very specific type of "self-settled," i.e., an irrevocable asset protection trust where the settlor is allowed to receive distributions of both income and principal. Such trusts have historically been prohibited in the United States as a means to protect your assets from a creditor.

Offshore Asset Protection Trusts- Estate Planning Tool #1

The demand for self-settled asset protection trusts (i.e., irrevocable asset protection trusts where the settlor is allowed to receive distributions of both income and principal) and the refusal of any U.S. jurisdiction to recognize them led to the development of a prosperous Offshore Asset Protection Trust industry by the mid-1980s. Offshore Asset Protection Trusts make it nearly impossible for general U.S. creditors to reach the underlying assets because the trusts are not subject to the jurisdiction of the States. Thus, in order to enforce the judgment, the creditor must theoretically file suit in the offshore jurisdiction and then try the case in the foreign jurisdiction. Foreign law will apply and the creditor and witnesses must travel across the globe to try the case.

Domestic Asset Protection Trusts- Estate Planning Tool #2

The Domestic Asset Protection Trust (DAPT) is a spin-off of the Offshore Asset Protection Trust. DAPTs were first introduced in the United States in 1997 as an effort to retain in the U.S. some of the wealth that had been steadily moving into Offshore Asset Protection Trusts. Alaska and Delaware were the first to offer DAPTs. Since then, eleven other states have enacted DAPT legislation: Colorado, Hawaii, Missouri, Nevada, New Hampshire,

Oklahoma, Rhode Island, South Dakota, Tennessee, Utah and Wyoming. Most creditors cannot reach property in a DAPT unless that property was fraudulently transferred to the trustee. Most important, for elder law attorneys, however, is the fact that the term "most creditors" does not include Medicaid.

What Trust Works for Medicaid?

The biggest limitation of both Offshore and Domestic Asset Protection Trusts, which makes them essentially useless for a client who desires complete asset protection, is that these trusts allow the settlor to have access to principal and are therefore absolutely ineffective for Medicaid asset protection purposes because, under federal Medicaid law and under the Medicaid laws of every state, if the Medicaid applicant or the spouse of the Medicaid applicant has access to principal, the assets in the trust will be deemed "countable" for Medicaid purposes.

Only an irrevocable trust that puts 100 percent of the principal beyond the reach of the settlor is effective for both Medicaid asset protection and general asset protection. This can be a trust designed so that the settlor has no direct access to income or principal or, if the settlor wishes to retain use of at least the income from the trust, it can be designed an Income-Only Trust which allows the settlor to receive all ordinary income from the trust, but no direct access to principal.

For more information about what trust to use for estate planning or Medicaid planning, call us.

What Are Connecticut's Advance Directives Regarding Health Care?

Advance Directives consist of your written instructions regarding various facets of your health care. The most common are Health Care Representative and Living Will. Connecticut also allows you to designate in writing whether you wish to make anatomical gifts of your organs or body for transplant or research purposes when you die. You may authorize the cremation of your body upon your death, and you may also designate a custodian of your remains. Effective October 1, 2006, Connecticut replaced the health care power of attorney and health care agent with a "Health Care Representative." A Health Care Representative is a person you designate who can be responsible for all health decision matters, including your wishes regarding life support. Health care powers of attorney and health care agents signed before October 1, 2006 are grandfathered in and remain valid.

A Living Will is a document in which you can direct medical personnel to withhold or withdraw life support systems in the event of a terminal illness or a state of permanent unconsciousness (i.e., a coma). All life support systems can be withheld, including cardiopulmonary resuscitation (CPR), artificial respiration and artificial means of providing nutrition and hydration. Connecticut has a standard form for this directive and you should use this form with as little modification as possible.

Case of a Child Misusing a Power of Attorney for His Own Benefit

This just out of Tennessee (January 20, 2012). A mother and father opened a checking account for their farm with a child, as an authorized signatory. They later executed a POA naming the child as their agent. The mother's Will left real estate to the child and monetary assets to her other children. Over the years, the child used money from the account for his benefit, used the POA to sell some of the property, and established other accounts with rights of survivorship to him, with the result being that at the time of the mother's death, her monetary assets had reduced amounts in them. The child was the personal representative of the mother's estate and his siblings sought to have him removed.

The trial court entered a judgment in favor of the siblings for over $2 million, plus attorney fees totaling in excess of $100,000, upon finding that the child failed to meet his burden to rebut, by clear and convincing evidence, the presumption of undue influence and the appellate court agreed with the trial court. There was no evidence that the mother ever intended the farm account to become a survivorship account that would deprive the siblings of their inheritance under her Will. Though the other accounts were marked as survivorship accounts, the trial court correctly found that they belonged to the mother's estate because the child obtained the survivorship right through undue influence. As the attorney-in-fact for the mother, the child was obligated to handle her property honestly and loyally with the utmost good faith, which he did not do.

Editor's Note: Only give a Power of Attorney to someone in whom you have total and complete trust and be very clear in the Power of Attorney what gifts the agent is authorized to make of your assets—to whom and in what amounts.

Florida's New Power of Attorney Law Makes Significant Changes

Florida has a new power of attorney law that makes major changes to the way powers of attorney work in the state. The law affects any powers of attorney signed after September 30, 2011.

One of the biggest changes is that springing powers of attorney will no longer be valid in Florida. A springing power of attorney does not become effective until the principal becomes incapacitated, but springing powers of attorney signed before October 1, 2011, will still be valid as long as the principal's primary physician is licensed in Florida and enters an affidavit testifying to the principal's incapacity. It is not clear whether an out-of-state springing power of attorney, such as Connecticut allows, would still be valid in Florida.

Another important change to Florida's new power of attorney law is that every single power the agent might exercise must be specified. An agent will not be able to perform any tasks that are not specifically enumerated in the power of attorney document. In addition, certain powers will not be effective unless they are specifically set forth in the document and the principal has signed to accept the provision. The following are the powers that the principal must specifically agree to:

- The power to create a trust.
- The power to amend, revoke or terminate a trust.
- The power to make a gift.
- The power to create or change a beneficiary designation.
- The power to waive the principal's rights to be a beneficiary of a joint and survivor annuity.
- The power to disclaim property or powers of appointment.

The new law sets out new rules regarding an agent's compensation. An agent can be reimbursed for any reasonable expenses that occurred, but only certain agents can receive compensation. The agent must be the principal's spouse or heir, a financial institution with trust powers and a place of business in Florida, an attorney or accountant licensed in Florida, or a Florida resident who has never been an agent for more than three principals at a time.

Financial institutions often reject powers of attorney and the new law addresses this issue. It requires that third parties either accept or reject the power of attorney within a reasonable period of time (four business days is presumed to be a reasonable period for financial institutions) and provide a written explanation for the rejection.

Editor's Note: Powers of Attorney are extremely useful, but also extremely powerful documents and should only be given to someone in whom you have full, total and complete trust. Connecticut is currently re-examining its own power of attorney laws to address some of the concerns that Florida most recently addressed, so stay tuned. For those of you who spend time between Connecticut and Florida, I suggest that you upgrade your Florida Power of Attorney to meet the new requirements Florida just enacted.

What Not To Do

As the world gets more complicated, so too does the need to plan, and the need to plan is especially important for estate planning and asset protection. As a lawyer for over 29 years, I have seen many estate and asset protection plans prepared by other professionals and here is a list of what I believe to be the 10 most common, and preventable, mistakes made by these professionals. This is not a comprehensive checklist, but if you feel that your estate or asset protection plan is lacking in one of these areas or may suffer from a flaw mentioned below, I suggest you call right away so that we can prevent a problem down the road.

• Failure to have an adequate and recently dated Power of Attorney

• Failure to fund a Living Trust

• Failure to understand and accommodate change/repeal or reimposition of state and federal inheritance and gift taxes

• Failure to make gifts of unneeded funds

• Failure to title assets appropriately

• Failure to have the correct beneficiary designations on Life Insurance and IRAs

• Failure to start planning early

• Failure to plan for Nursing Home Care

• Failure to have appropriate types and amounts of insurance

• Failure to have current and correct health care directives – Appointment of Health Care Agent and Living Will