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Does Your Trust Include Medicaid Planning?

I regularly provide consultations on estate planning issues, guardianships, conservatorships, and Medicaid planning. During these consultations, I am often asked to review an existing trust. I am shocked that most trusts that I review do not consider that one spouse may enter a long-term care facility or that some form of public assistance may be available or may be required.

Unfortunately, most attorneys who prepare trust documents are not Elder Law Attorneys. In contrast to the old-line estate attorneys, these new breed of Elder Law Attorneys regularly consider issues of incapacity, long-term care, Medicaid and other public assistance possibilities. This month's article will identify some common defects, or at the very least some shortcomings, in trust documents.

From time to time, I have discussed issues relating to trusts and to Medicaid. (See issues of October 1999, February and July 2000, and March and July 2001). Although I have pointed out that the fear and costs of Probate are unfounded, I have not linked Medicaid with poorly written trust documents.

First, revocable trusts often become irrevocable upon the death or incapacity of one spouse or grantor of the trust. The effect of this provision could hamper or prohibit eligibility for public benefits.

For instance, property tax benefits are statutorily allowed to seniors (age 65 years of age) under a "Circuit Breaker" provision. However, those property tax benefits may be denied if the property is within a trust and the surviving spouse or the spouse who is not incapacitated cannot "revoke, terminate, alter, amend, or appoint the property." For those wishing to refer to the specific statute, please read Title 59, Chapter 2, and Sections 1107 through 1109 and Section 1208.

Second, trust documents are often unclear in defining how and under what conditions Successor Trustees are to be appointed. For instance, a trust document that I recently reviewed included language as follows:

"In the event both Grantors die, resign or become incapacitated, Successor Trustees are hereby appointed . . ."

The foregoing language does not appear to allow Successor Trustees to be appointed if only one Grantor becomes incapacitated. Further, the trust document expressly states:

"Upon the death or incapacity of either Grantor, this Trust shall be irrevocable and unamendable . . ."

This trust severely limits the ability to transfer assets, particularly the home of the Grantors to their children or to just one of them. This becomes significant when one spouse enters a long-term care facility.

Assume that a couple created a trust with the foregoing language. At age 70, the husband is diagnosed with severe dementia of the Alzheimer's type. It appears that he will soon be transferred to a long-term care facility suitable for Alzheimer's patients.

With the trust they created, it would be best if their home could be transferred out of the trust and to the wife. She could then transfer the home to their children, reserving a life estate for herself. Since the transfer of the home is an exempt transfer for Medicaid purposes, the husband would be eligible for Medicaid, assuming that the couple meets the other financial criteria.

The trust appears to prohibit a transfer to the wife or their children. Therefore, if the wife were to predecease her husband, the home would be solely owned by the trustee husband and would be subject to a Medicaid lien upon the death of the husband.

In the foregoing example, the trust document, with its existing language, severely limits the couple's options. Had the attorney who drafted the trust document considered the potential for property tax relief or Medicaid, the language of the trust document could have been different.

A similar limitation is imposed when the trust document prohibits a conservator for the husband or wife to revoke or amend the trust, even though such revocation or amendment may be in the best interest of the grantors of the trust. This is a common mistake made by attorneys in drafting trust documents.