UFT Welfare Fund Retiree Legal Plan
PREVENTIVE LAW GUIDE
A newsletter designed to help guide you through the legality of reality

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Selecting the Right Trust

By Ann Margaret Carrozza, Esq.

Life estates were historically my "go-to" vehicle to help clients avoid both probate and long-term care claims on their primary residence. However, this is no longer the case. Since the late 1990s, when New York state enacted "Transfer on Death" legislation for brokerage accounts, the majority of a decedent's assets can now avoid going through probate at death – except for the primary residence.

So why have I stopped using the life estate? Well, I have found that a properly drafted trust will accomplish one's planning goals more effectively.

What type of trust is right for you?

More than 100 years ago, Judge Learned Hand said to "put not your trust in money, but put your money in trust." This advice remains sound today, depending of course on whether you know how to select the right trust. Do you wish to reduce the estate tax bite for your children, protect assets in the event that long-term care is needed or merely wish to avoid probate? The three basic trust types for these goals are discussed below:

1. Revocable Trust – If you've ever attended a Living Trust seminar, you may wonder why everyone doesn't have one. The concept is very appealing, as the creator can serve as his or her own trustee and full control over the assets in the trust is retained. There is no need to go to a third party in order to access the trust. The primary purpose of this type of trust is to avoid probate at death. Assets in a revocable trust pass automatically (and privately) to one's beneficiaries.

The only downside to this type of trust is if someone mistakenly believes that a revocable trust can, in and of itself, protect a family's assets. Common sense (as well as federal law) tells us otherwise. If an individual has total access to and control over their assets in the revocable trust, how can he or she then turn around and expect a nursing home to consider the assets unavailable? This is true in regards to the Internal Revenue Service as well; any asset he or she has retained access to (even if it is only an income interest) will be included in their gross taxable estate at death. It is important to remember that assets do not avoid estate tax just because they may avoid probate.

2. Estate Tax Trust – This type of Irrevocable Trust is useful for an individual or family with assets greater than $2 million (the 2014 New York State tax threshold) or $5.3 million (the Federal tax threshold). One may not retain access to or control over the assets transferred into an estate tax trust. The Estate Tax Trust may be a good idea for an individual who wishes to shield some portion of his or her assets that are in excess of the current estate tax threshold.

3. Asset Protection Trust – This is my go-to trust for protecting one's primary residence. There is currently a five-year "look-back" period on transfers to any individual or entity other than a spouse. In order to commence the running of this clock (after which, the assets are exempt for Medicaid purposes), the trust must be irrevocable. It is not, however, as restrictive as the estate tax trust.

If, for example, this type of trust owns a home, the Grantor may retain lifetime ownership rights over the house or coop. An individual's property tax exemptions, step-up in tax basis at death and the $250,000 ($500,000 for a couple) capital gains exclusion for sales during the settlor's life will be all be preserved with a properly drafted asset protection trust.

Sale of House During Parent's Life – Both the trust and life estate allow for the sale of the property during the parent's life. The problem with selling the house in a life

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Estate re-planning after divorce or judicial separation

By Alison Leigh Epilone, Esq.

The divorce (or separation) process can often be a painstaking and heart-wrenching event in a person's life. Understandably, persons involved in divorce litigation are so emotionally entrenched in these proceedings that when the matter comes to a conclusion (either by settlement or the decision of a court), the newly divorced or separated individual shies away from any additional legal obligations or responsibilities.

Often, the newly divorced fail to "re-plan" their estate as a divorced or separated individual. And what many individuals may not know is that the Estates, Powers and Trusts Law § 5-1.4 was amended in 2008.

Prior to the 2008 amendment, the main effect that a divorce had on a person's estate was that the disposition(s) under the will to the former spouse was automatically revoked.

The divorce, however, did not affect the former spouse's survivor rights to items such as Totten Trusts, life insurance policies, pension/annuities, or joint tenancies. The 2008 amendment included these dispositions and has also applied this section to judicially separated individuals.

Accordingly, upon a divorce or judicial separation, the dispositions or beneficiary designations that will be automatically revoked include, but are not limited to: dispositions under a will, Totten Trusts, life insurance policies, lifetime revocable trusts, joint tenancies (a tenancy in common will then be created), powers of attorney, health care proxies, pension/retirement benefits, or bank accounts in trust form.

So what does this amendment mean for a newly divorced or separated individual? The easy answer is that estate "re-planning" is a necessity. As a newly divorced or separated person, you want to ensure that your assets will be distributed in accordance with your wishes upon your death.

Therefore, as soon as you receive notice from the Court or your attorney that your Judgment of Divorce or Judgment of Separation has been entered with your local county clerk, you should make an appointment with your estate planning attorney to update your will, health care proxy, living will, power of attorney, and other related documents.

However, when meeting with your estate planning attorney, you want to ensure that you are also complying with the terms of your Stipulation of Settlement, Separation Agreement, Judgment of Divorce, and/or Judgment of Separation.

What this means is that you must designate (or re-designate) your former spouse as the beneficiary on your life insurance policy if you are required to maintain a policy for the benefit of your former spouse or children with your former spouse as trustee. This requirement also rings true for your pension and/or retirement benefits.

The designation of your former spouse as a beneficiary on your pension and/or retirement benefits, however, is likely done pursuant to a Domestic Relations Order if same was agreed to in your final Agreement or required by the Court. Make sure to consult with your matrimonial attorney with regard to the survivor benefits required on your pension and/or retirement plans.

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Consumer Alert: Beware of phone scammers

By Anita Y. Aginian, Esq.

All too frequently, we hear about scam artists calling individuals at home trying to swindle money and/or personal information. Often in these situations, a caller will state to the target that a debt is owed to a collection agency.

The person taking the call is told that unless money is sent immediately, the police will be on their way to make an arrest. The victim – who is under duress in these cases most of the time – will provide bank information to make a settlement payment on a debt not really owed.

The target in this situation is normally unaware of the fact that it is generally NOT a crime to owe money. Therefore, the police would not come to the home of the target to make an arrest.

Under other circumstances, the target is called and told by someone identifying himself as an agent of the Internal Revenue Service that money is owed. Fearing some tax consequences, the target will again supply financial information. Too often, the target/victim will be told to send money through a wire transfer. Keep in mind that the IRS does not call a taxpayer out of the blue.

There seems to be a rise of calls from these scammers to seniors recently. Seniors are often targeted for a variety of scams because these low-risk crimes are usually not reported. These crimes become an embarrassment to the victim, especially for those who feel some cognitive loss and do not want to appear vulnerable.

Retirees are prime targets for these types of crimes because they have retirement savings and equity in their homes. They are also more likely to use landline phones, making it easier to find them through phone lists that are sold.

Another frequent scam that targets all ages is phone lottery scams. In these situations, the caller informs the target he has won an international lottery and that an administrative fee must be sent prior to receiving winnings.

In other circumstances, a check is sent to a target that is tied to a foreign lottery with a phone number provided to verify the claim. The victim deposits the check and must send funds to the scammer to administer the winnings. The checks turn out to be fraudulent, and the target must then deal with the bank that took the deposit in the first place by replenishing the funds.

Another type of fraud that has become prevalent recently is imposter fraud. In these instances, a criminal will pose as a law enforcement official – threatening arrests if funds are not paid.

At other times, scammers will pose as relatives to scam targets out of money. The criminal may say he is being arrested and needs money for attorney fees and/or bail; he may also say he's out of the country and lost his identification and wallet. There is usually a bad connection on the call so the target cannot be sure of the voice of the relative.

Don't fall victim to these scams! The best strategy is to simply hang up the phone if a call like this comes through. And make sure to look out for loved ones that could be more vulnerable to these types of crimes. ⚖

Estate re-planning...
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Some newly divorced or separated individuals want their former spouses to remain as their designated beneficiaries, executors of their estate, health care proxy, etc. This is permitted as long as you "re-designate" your former spouse in newly executed legal documents with the bank, life insurance companies, etc. Accordingly, if this is your desire, estate "re-planning" is still required.

In summary, it's important to contact your estate attorney immediately upon your divorce or separation for estate "re-planning" to ensure that your assets are protected and distributed pursuant to your wishes. If you have any questions about this topic, please contact me at 631-231-1450, ext. 205 or *aepilone@fkmlaw.com*. ⚖

Sources:

1. New York Estates, Powers and Trusts Law § 5-1.4
2. McKinney's Practice Commentaries to EPTL § 5-1.4
3. McKinney's Legislative History to EPTL § 5-1.4

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estate is two-fold. The parent will receive a percentage of the sale proceeds outright. The acturarial value of the life estate (determined by reference to the "life insurance tables") is payable directly to the parent. This leaves them with totally unprotected assets and the need to "start over" in terms of protecting this money.

Moreover, if the parent is on Medicaid and in a nursing home at that point, the parent's "life estate" portion of the sale proceeds must be turned over to Medicaid. As if this wasn't bad enough, selling a home in a life estate will also deprive the family of the parent's full $250,000 capital gains exclusion. This is due to the fact that he or she only owned a percentage of the house ("the now") and therefore isn't entitled to the full exclusion.

By contrast, selling the house from within the trust results in all of the sale proceeds being paid directly to the trust. These monies can then remain protected within the trust and invested in any asset class, including a replacement residence for the parent's use. The trust (if properly drawn) will also entitle the family to the full $250,000 capital gains exclusion.

Second Marriage Planning – The life estate is often employed to help clients balance the competing goals of protecting a surviving spouse against the desire to leave the primary residence to one's adult children of the first marriage.

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This life estate can be created in the will and reads as follows: "I leave my house to Jane, for her life, and then to Mary, Susie and Johnny, as tenants in common." This arrangement has intuitive appeal, but is flawed in several respects.

Giving the surviving spouse lifetime ownership means just that. During all of the days of Jane's life, the children cannot sell the house -- even if Jane has moved away or is in a nursing home. A better result can be achieved by using a trust that gives Jane occupancy rights "until the earlier of her death, voluntary vacatur, stay in a nursing home, remarriage, or cohabitation with an unrelated person."

Other Assets – A life estate can only operate on real estate. A trust, on the other hand, can own every type of asset (including cooperative apartment shares). One typical elder law planning scenario is to transfer the home to a trust and leave the liquid assets in the parent's name. In the event of a long-term care need, the liquid assets can then be transferred into the trust, which already owns the house.

The bottom line is that a properly drafted trust can offer all of the advantages (and more) of a life estate without the negative aspects that can come with it.

Ann Margaret Carrozza, Esq. is a practicing attorney who also served as a New York State Assemblywoman. She is a member of the UFT Welfare Fund Legal Plan Elder Law Supplement and a regular legal contributor to television & print media outlets. Ms. Carrozza can be reached at 212-606-6811 or by visiting myelderlawattorney.com.