Berwitz & DiTata LLP

# A STEP AHEAD

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## Guardianship ABCs

A guardianship proceeding seeks a court determination as to whether an individual is incapable of handling their own financial and/or personal needs and, if not, to appoint a guardian to act on behalf of the individual. Such a proceeding is both costly and time-consuming.

You can expect a guardianship proceeding to cost thousands of dollars. The costs include court filing fees, attorney fees, the fee for the Court Evaluator, a person appointed by the court to investigate the facts and circumstances, render an opinion as to the need for a guardian and recommend who should serve in that capacity, and even the fees for an attorney appointed by the court to represent the alleged incapacitated person.

It is not unusual for the proceeding to take months to complete. During this time, without a valid and enforceable power of attorney and health care proxy, no financial or health care decisions can be made on behalf of the alleged incapacitated person. Moreover, no

CONTINUED ON PAGE 3

## Title Matters

Do you know what type of account you opened when you and your spouse opened an account jointly? What about the account you own with your child? When was the last time you looked at your deed? Did you and your spouse buy your home before you were married? When was the last time you reviewed your statements and how the names appear on each of your accounts?

How property is owned, real property and personal property such as bank and investment accounts, whether individually or jointly with another person, dictates each person's right to the property. It also determines how property will pass after the death of an owner. There are three main ways to own property: tenants-in-common, joint tenants and tenants by the entirety.

Tenants-in-common hold separate but undivided interests in the prop-

CONTINUED ON PAGE 3

IN THIS ISSUE:

Title Matters

Guardianship ABCs

The Importance of Documenting Loans to Family Members for Estate and Medicaid Planning

# The Importance of Documenting Loans to Family Members for Estate and Medicaid Planning

With today's rising cost of living and uncertain economy, circumstances arise in which family members might need to rely on each other for financial assistance. Parents may decide to lend children money to help them buy a home, car or other large purchase, to get out of debt or to start a business or financial venture. Conversely, parents may need help from children in the event of a medical or other emergency. When providing a lending hand to a family member, it is important to document the loan. This can be done with promissory notes and other written agreements, mortgages, repayment schedules and records of repayments.

We frequently hear that people feel uncomfortable asking family members to document a loan. However, documenting the loan can be critical for estate planning and can provide protection for both the lender and borrower — if a financial crisis arises or if, for instance, one of the parties to the transaction requires Medicaid benefits.

When preparing an estate plan, a parent who has loaned a child money may wish to forgive the loan, or the unpaid balance of the loan, at death. They may, instead, wish to make their other children "equal" by making a bequest to each of them of a sum equal to the loan or the unpaid balance of the loan that had been given to their sibling. Without evidence of the loan, and/or the remaining balance, it may be difficult or even impossible to comply with the Will's directions when administering the estate.

If a parent has borrowed money from a child with the expectation that it be repaid from their estate, documentation establishing the loan is required. The child is a "creditor" of the estate. Depending on the circumstances, it may be important to differentiate between the parent's estate assets and those assets that were loaned when valuing the estate.

If one of the parties to the loan requires Medicaid benefits, documentation supporting the existence of a loan is crucial. If the lender is applying for benefits, proof of the loan will avoid Medicaid's treating the transfer of money or other assets as a gift, resulting in a penalty to the applicant. On the other hand, if the applicant is the borrower, for instance, in circumstances where a child is paying parent's expenses, proof of the loan establishes that the child did not make a gift and pay those expenses out of "love and affection." Also, if the proceeds of the loan were deposited to the applicant's account, it will be important to demonstrate that the money is a loan and not part of the applicant's resources.

If you are planning to make or receive a loan from a family member, give us a call. We, at Berwitz & DiTata, will guide you regarding the documentation that will properly reflect the transaction.

## Guardianship ABCs

CONTINUED FROM PAGE 1

Medicaid planning can be implemented until the court has issued a Commission authorizing the guardian to act on his or her behalf. This may result in the expenditure of *significantly* higher long term care costs. Instead of being able to implement Medicaid planning and secure benefits at the earliest date, nothing can be accomplished during the pendency of the guardianship proceeding.

These are just some of the reasons that Berwitz & DiTata LLP strongly encourages clients and friends to implement powers of attorney, health care proxies and living wills at the earliest time. This not only ensures your retention of control over this important decision-making and permits your trusted agents to engage in asset-protection planning if you lose the capacity to do so, but it also eliminates some of the family stress and dissension that may occur when a loved one is ill.

## Title Matters

CONTINUED FROM PAGE 1

erty. They have an equal right to possession and each has a right to use *all* of the property. For example, if a brother and sister both inherited their parents' home and now own the property as tenants-in-common, the brother could occupy the entire house and may not have to pay rent. This is true even though the brother and sister each hold an equal 50% interest. Tenants-in-common are not required to give their co-owners notice if they wish to sell or transfer their interest in the jointly owned property. If the sister decided to sell her 50% interest to a stranger, she could do so without informing her brother. Upon the death of a tenant-in-common, that co-owner's share passes to his or her estate and then in accordance with his or her estate plan. Creditors of any one tenant-in-common can reach that tenant's portion of the property. In New York, other than for married couples, unless otherwise specified, property owned by more than one person is presumed to be owned as tenants-in-common.

Joint tenants also own an undivided interest in property. The main difference between joint tenants and tenants-in-common is that, upon the death of a joint tenant, that co-owner's interests are extinguished and the surviving co-owner(s) receive the property. Financial institutions often refer to this ownership as "joint with right of survivorship." The property interest cannot pass by a Will or a trust, it automatically passes to the surviving owner(s). For real property, the only way to terminate a joint tenancy is by mutual agreement or by a petition in court. A joint tenant can transfer his or her interest, but the new owner and the remaining joint tenant(s) will own by tenancy-in-common. Generally, if you open a "joint" account with another individual at a bank, it is considered to be held as joint tenants. In New York, each joint tenant has a right to the entire account and can withdraw all funds from the account - so can the creditors of one co-owner!

Tenancy by the entirety can only exist between spouses and they must be married at the outset of the ownership of the property. As with joint tenants, immediately upon the death of one spouse, the surviving spouse inherits the entire property. No action is needed in court or otherwise. If spouses own property in this way, one of them cannot pass the property to children or other beneficiaries during the life of the other by a Will or trust. Creditors of one spouse cannot reach the property. This type of ownership cannot be terminated without the knowledge and consent of both owners. If the parties divorce, they no longer own property as tenants by the entirety.

We have learned that many people do not know how their assets are titled or what affect title will have on how their assets will pass to loved ones after death. Married people often assume that everything they own with their spouse is owned jointly. It comes as a surprise when they discover an account, a safe deposit box or a stock held in only one name. Employees at banks and other financial institutions unwittingly encourage account holders, especially seniors, to name benefici-

CONTINUED ON PAGE 4

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## Title Matters

CONTINUED FROM PAGE 3

aries on all accounts. But this can adversely affect the administration of the estate of the account holder. For example, if a parent has designated beneficiaries on all of the financial accounts but dies owning a house, the estate will have no money to pay the expenses of the house, taxes, insurance, utilities, etc., until the house is sold. This is often how fights among siblings begin. One child winds up bearing the burden and resenting that the others are not contributing. Sometimes a parent adds the name of a child on accounts merely for convenience. They believe this will ensure that "bills will be paid regardless of what happens." The legal effect is that that child owns the account at the parent's death. He or she may or may not understand that sharing the account had been what the parent expected. Worse, if that child has creditors, it may not matter that the account should have been shared with siblings.

A thorough review of title is an import component of comprehensive estate planning. Only if these issues are explored should you feel confident that your goals will be accomplished. We take the time to review all of our client's assets and how they are titled. We counsel our clients on the effects of how they hold title to property.

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