Berwitz & DiTata LLP

A STEP AHEAD

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Changes to Community Medicaid

In our last issue we reviewed certain changes to community based Medicaid eligibility (home care) which had been incorporated in the 2020 budget but had not yet been implemented because of the pandemic emergency. We noted that, previously, eligibility required an applicant to be incapable of performing *two* of six activities of daily living: eating, bathing, dressing, transferring, toileting, and ambulating whereas, under the new rules, unless the applicant suffers from dementia, eligibility is based on the inability to perform *three* of the six activities of daily living.

The 2020 budget also addressed changes to the way in which enrollment in a Managed Long Term Care Plan (MLTCP) will occur. Effective May 16, 2022, after new applicants have been approved financially,

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Estate Planning: Now or Later

When we ask our clients why they want to implement estate plans, they usually give one of three reasons: they want to ensure that their assets will be distributed according to their wishes; they want to avoid probate; and they wish to reduce estate tax liability. These are all very good and valid reasons but, depending on your circumstances, you may have better reasons for undertaking this task.

If you are the parent of a minor child or children, the establishment of a last will and testament is the only way to nominate a guardian if you die before your child reaches the age of 18. While the Surrogate's Court is always going to have the last word as to the appointment of a guardian for minor children, your nomination will carry great weight. Moreover, if you die without a will, your child will inherit at the age of 18, and what parent today believes that 18 is an appropriate age for a child to manage their inheritance?

Estate planning is critical when a child or family member has special needs. Proper planning can ensure that the assets which they will inherit are protected for them and will not interfere with governmental benefits to which they are or may become entitled.

If your estate will be taxable, payment of the estate tax liability must be made within nine (9) months from your date of death. Depending on how your estate is invested, the liquidation of assets to meet the tax deadline may result in loss in value and/or liability for capital gains tax

that may be avoidable with proper planning.

Estate planning should also incorporate "lifetime planning:" planning that will protect you during your life and ensure that decisions concerning your health, medical, business and financial matters are timely addressed, by the person or persons whom you select for that responsibility, if you become incapacitated, either temporarily or permanently.

Seniors are frequently reluctant to do estate planning. Whether they are superstitious, are convinced that they are at no immediate risk or are just uncomfortable with the prospect of discussing these issues, they often defer planning until it has become too late. An accident or incapacitating illness may rob them of the ability to plan. The costs of long term

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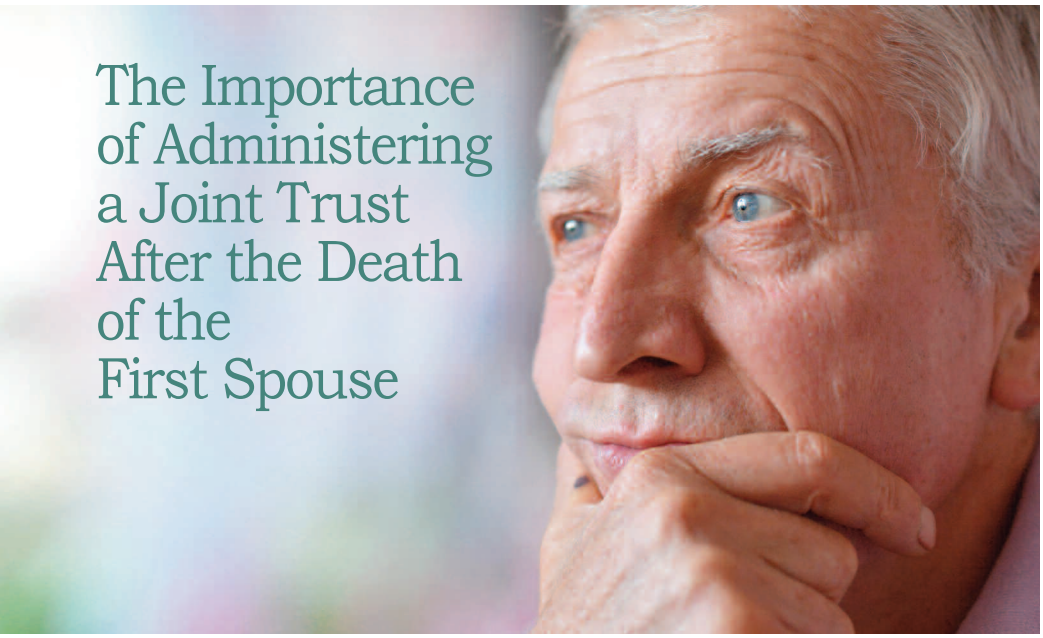
IN THIS ISSUE:

The Importance of Administering a Joint Trust After the Death of the First Spouse



A trust, whether revocable or irrevocable, is an efficient way to transfer your assets to your loved ones after your death. Trusts avoid probate which can be a time-consuming and expensive endeavor. Very often, married couples create a single, joint trust under which both spouses are the grantors and trustees. But what happens when the first spouse dies? What are the steps a trustee should take to administer a trust? All too often, the surviving spouse/trustee fails to administer the trust after the first spouse dies. This can cause future problems.

Joint trusts should be uniquely tailored to the estate planning objectives of the particular couple. Each trust should contain instructions for the surviving spouse/trustee after the death of the first spouse. He or she has a fiduciary obligation to carry out those instructions. If the trustee fails to do so, the trustee could face significant consequences.

A joint trust does not necessarily require the distribution of the entire share of the first spouse to die to the survivor. The trust can require the decedent's share to fund a tax savings trust, for the benefit of the surviving spouse or to benefit other beneficiaries. The failure of the surviving spouse/trustee to administer the trust following the death of their spouse can have adverse tax consequences. For example, couples often fund their trusts with stocks that were purchased years ago and have appreciated in value. At the first death, the decedent's share of the stock, typically half, receives a "step-up" in basis to the fair market value of the stock as of the date of the first death. The step-up resets the value of that stock so that any capital gain will be calculated based upon the stepped-up basis, not the original purchase price. A well drafted trust should address how the portion belonging to the first spouse to die is to be administered in order that the stock shares subject to the step-up can be readily distinguished from the shares that are allocated to the surviving spouse which do not receive the stepped-up basis at the first death.

The joint trust may require that gifts or bequests be made to certain individuals after the first death. It may also require that the decedent's share be paid to the Executor of his or her will. None of these dispositions will be accomplished if the trust is not reviewed and then properly administered after the death of the first spouse.

Every trust is different. In order to understand the obligations of the trustee, it is necessary to review the trust and understand the obligations it imposes on the survivor. If you or a loved one has suffered the loss of a spouse and you know that assets are held in a joint trust, or if the decedent had his or her own individual trust, seek help and guidance so that this process can be explained, the mystery unraveled and the spirit and intent of the decedent can be carried out.

Would You Like To Read About It Here?

We at Berwitz & DiTata LLP are proud of our newsletter and hope that each issue brings our clients and friends insightful and timely information. We endeavor to write articles geared to your interests and concerns. We would be happy to receive your feedback. More importantly, if you have a question or would like us to address a particular topic, please call and let us know. We will try to include it in one of our next issues. Just call or drop us a line.

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they will no longer go through the conflict-free assessment process. Instead, the Department of Social Services will refer these eligible applicants to the New York Independent Assessor ["NYIA"] which will schedule two assessments to determine eligibility in an MLTCP.

The first assessment: the Community Health Assessment ["CHA"] is conducted by a NYIA nurse, in the applicant's home, to determine whether the applicant meets the appropriate need for community long term services. This assessment may be done in person or via telehealth and can be scheduled any weekday: Monday through Friday 8:30am-5pm or Saturday and Sunday 10am-6pm.

The second assessment: the Clinical Appointment ["CA"] is performed by an Independent Practitioner Panel (IPP) of medical doctors, osteopathists, nurse prac-

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Estate Planning: Now or Later

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care can be devastating. When meeting with clients, we present alternative planning strategies that will help to qualify a client for Medicaid in the event that they later require long term care at home or in a nursing home. Our planning helps seniors maintain control and maximize the resources that may be available for their care.

And what about those who have already done their planning? Do not believe that this is a once-in-a-lifetime event. When we meet with our clients to sign their estate planning documents we make a point of advising them that their plans should be reviewed whenever there is a significant change in their life or circumstances: marriage, divorce, illness, birth, death. Changes in the law can also affect estate planning. For this reason, we offer our clients a **complimentary review every 3 to 5 years** and send reminder letters to encourage this review. Many clients take advantage of this invitation to review the viability of an existing estate plan or to ascertain what, if anything, should be done when new circumstances arise. Unfortunately, some clients do not. This may result in lost opportunities. Beneficial planning techniques which could have been incorporated to take advantage of a change in circumstances are lost. Laws may have changed, rendering obsolete strategies that were important when the documents were first prepared.

For instance, the value of your estate plays a critical role in the way an estate plan is crafted. It is customary for attorneys to take into account the value and anticipated growth of their clients' assets when evaluating whether to incorporate tax planning. In 2011, the maximum amount that could be protected from federal estate tax, per person, was $5,000,000. In 2018, the threshold for federal estate tax increased to $11,000,000. Estates that previously required tax planning no longer require that protection and, in many circumstances, the tax saving structure is *counter-productive*. However, this is not something that most clients would identify without an attorney's review. If we do not see a client again until the first of the couple has passed away, we cannot effectuate a change after the fact.

Clients and their loved ones do not always remember the instructions that we give them during our meetings. They often make mistakes that could have been avoided. Some forget that certain Medicaid planning can be augmented before the death of a well spouse. Waiting to reach out to us can cost a family many thousands of dollars in costs for care that could have been paid by Medicaid.

Estate plans should be fluid. They should address our current needs and reflect our current intentions, but as our lives change and our families age, the plans require tweaking. Like a mobile, the smallest change can significantly alter the plan's effectiveness.

In short, there is no time like the present! For those of you who are without estate plans, make an appointment today. To those who have not recently had their plans reviewed, why wait?

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titioners and physician assistants who will review the CHA and perform a thorough medical exam of the applicant, in person or via telehealth, to determine if the applicant is medically stable enough to remain in the community. The CA assessor will make personal care service recommendations and complete the physician order form but will not award services or determine hours of care.

After both assessments, NYIA will inform the applicant of the results in writing and, if approved, refer the applicant to an MLTCP which will develop a plan of care and award hours using the CHA assessment and the physician order form. If the MLTCP concludes that the applicant requires 12 or more hours of care per day, the applicant will go through a high-need review by NYIA's independent review panel which will determine if the proposed plan is reasonable and appropriate for the applicant to remain safely at home. The MLTCP will make the final decision and issue the notice.

Under this new system, assessments are done by medical professionals who are not familiar with the applicant. You may wonder whether your primary care physician can provide input in this process. We recommend the following:

- Have your physician write a letter of medical necessity to the CHA and CA assessor;
- Share your medical records: NYIA allows you to share your medical records with the assessors by going to https://www.nyia.com/en/for-authorized-representatives;
- Prepare for the assessments in advance and present to both the CHA and CA assessors a list of all diagnoses and medications;
- Retain an advocate who can assist you in preparing for the assesments and will be present throughout the process to ensure that your specific needs are properly catalogued.

Some good news: under the new system, reassessment occurs once annually not every six months.