

# ELDER LAW BASICS

## ESTATE AND DISABILITY PLANNING

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*Elder Law issues involve financial and long-term care planning for senior citizens and overlap with issues relating to people with disabilities. With lifespans increasing and tax laws and governmental entitlements (including Medicaid) becoming more complex, parents and children are more concerned and confused than ever about these interrelated matters. Planning for the "expected unexpected" can save money and grief for you and your family. The goal of this article is to explain some basic facts, legal concepts, tax rules and techniques to provide for alternate decision-makers and preserve family assets for New York residents. It is critical to get competent professional advice because there are many exceptions to general rules, laws are changing (as well as their interpretation and implementation), and everyone's situation is different.*

*Topics beyond the scope of this article include Medicare, Social Security, SSI and SSD (see page 6 column 3), abuse of seniors by relatives or strangers, and how to select a nursing home or other care environment. Please refer to the RESOURCE DIRECTORY on the back cover.*

## WHAT EVERYONE NEEDS TO KNOW ABOUT ADVANCED DIRECTIVES, GUARDIANSHIP AND WILLS

### Why You Need a Health Care Proxy/Living Will

By signing a Health Care Proxy, you appoint someone (and an alternate) to make medical decisions if you can't make them yourself and also to access medical information. It requires two witnesses, and copies are valid. Because of new privacy laws, a Health Care Proxy is more important than ever.

A Living Will is not a will but an expression of your wishes about medical treatment. It usually states that you do not wish your body to be kept alive

if there is no reasonable hope of recovery from some terminal condition. Rather, you wish to be allowed to die with dignity and as little pain as possible. Some lawyers add Living Will language directly into the Health Care Proxy.

### Why You Need a Durable Power-of-Attorney ("POA")

If you suffer a severe accident or stroke or lose your memory due to Alzheimer's disease, it may be too late to appoint a trusted decisionmaker; then an expensive and time-consuming Guardianship proceeding in court may be required.

By signing a Power



of Attorney (POA), you give one or more people the authority to act on your behalf for most financial and legal matters, effective even after you become incapacitated because of a durability clause. However, your named agent(s) cannot make or take gifts unless you initial a gifting authority provision (important for Medicaid eligibility planning, see below). You can revoke the POA at any time, assuming you are competent, and it automatically ends upon your death.

Many hesitant people never sign a POA, worried that this important document might be misused. One solution is for your attorney to retain the originals in a safe (give the agents a copy for information only) to be released upon your future instruction or if your subsequent disability is confirmed. The law says NY banks must recognize a properly notarized standard POA and give your agent access to your accounts and safe deposit box while you are alive. Your loved ones should know where to locate your original POA and professional advisors in the event of accident or disability.

#### When a Guardianship is Required

When an individual is or becomes unable to make his or her own decisions, a petition for Guardianship can be submitted to the court by a family member, social service agency or other interested party.

In the case of an elderly Alleged Incapacitated Person (an "AIP"), a state Supreme Court judge will name an independent Court Evaluator to help determine if a Guardian should be appointed to manage the personal needs and property of the AIP. All interested parties and possible heirs must be notified of the hearing date, usually set about a month after a petition is submitted. The AIP may hire her or his own attorney or have one appointed by the court. The judge may determine the AIP to be an IP and appoint as Guardian one or more trusted family members or an independent person or agency in the event of a dispute or when appropriate. Appointees attend a training session to qualify and must obey the judge's order to take the IP's desires into account as much as possible.

In the case of a child, mentally retarded or developmentally disabled person, a petition to the Surrogate's Court requires a great deal of family and medical information, but a hearing is not necessarily required before an appointment is made.

All Guardians are subject to the rules of the court and must file periodic accountings.

The need for a Guardianship can often be avoided with a previously signed durable POA and Health Care Proxy.

#### Why You Need a Will

A *Last Will & Testament* can greatly simplify the process for your family of dealing with your death and distributing your assets. You can:

- Choose your beneficiaries, including grandchildren, friends or charities;
- Recommend a guardian for minor children;
- Create trusts to maximize governmental benefits and/or minimize taxes and other pitfalls for loved ones and disabled individuals;
- Avoid confusion about funeral, burial and/or cremation arrangements;
- Avoid disputes among your relatives and unintended inheritance of your property;
- Avoid the filing of an expensive bond with the court to ensure the job is done right; and
- Avoid the possibility of the court appointing a stranger who is paid substantial fees to administer your estate.

#### Testamentary Substitutes:

##### A Will Does Not Cover Everything

A will directs how your solely-owned assets are distributed after you die and your debts are paid. Other assets (called "*Testamentary Substitutes*") upon your death belong to a named survivor(s) if owned:

- Jointly (which usually means the same as "joint tenancy with right of survivorship" or "JTWROS");
- In-Trust-For (ITF); pay on death (POD); or transfer on death (TOD); or
- Naming a beneficiary (such as IRAs, annuities and life insurance policies).

If you want someone to have access to your bank account only as a convenience but want the balance to pass upon death via your will, avoid joint accounts and use a POA instead.

#### What a Will Includes

A will includes residuary and sometimes specific bequests to named people or organizations called *legatees*.

Examples of specific bequests are: "I give and bequeath my diamond wedding ring to my niece and \$10,000 to Sunnyside Community Services, Inc."

Residuary bequests refer to the "rest and residue" of your property: everything solely in your name (whether or not you specify it) including bank accounts, stocks, bonds, real estate, jewelry, household effects and perhaps the proceeds of a lawsuit settled after your death in which you or your estate is the plaintiff. The residuary can go all to one party or by percentages to several legatees.

Your will names an *Executor* (or executors), usually a family member or close friend, to carry out the will's instructions. An attorney need not be named Executor unless there truly is no one else appropriate; a banking institution is usually named only for very large estates. The Executor is a *fiduciary*, who has legal responsibility to do the job properly. He, she, or it is entitled to a commission fixed by law, although a close family member will often waive it.

A will can include a trust, recommend a guardian for minor children, or recite burial or cremation instructions. It should be clearly understandable (after all, you can't go back and ask a dead person what they meant), and it must be signed under strict requirements to be valid. When a will is signed under an attorney's supervision, all legal requirements are presumed to have been met. Anyone using a printed form or computer generated will is taking the chance of a lifetime.

#### How is a Will Processed?

The processing of a will is called *probate* (from a Latin word meaning "to prove"). A petition is sworn to by the

Executor and submitted to the Surrogate's Court in the county of legal residence of the person who died (the *decedent*) together with the original will, a death certificate, other documents and a filing fee.



"Now that we're dead, it's just taxes."

Notices are delivered to all *distributees* who would inherit if there were no valid will, all legatees named in the will, and anyone else having an interest. Parties who may want to challenge the will by claiming fraud, coercion, or lack of mental capacity of the decedent waive their chance if they do not appear on or before a date set by the court. After all requirements are met, the judge issues *Letters Testamentary* granting the Executor legal authority over the decedent's assets.

Many people think that probate is to be avoided because of high costs and lengthy delays. This is simply untrue in most circumstances (see "Why Create a Revocable Living Trust" below). Wills that are properly written and duly signed are rarely challenged, even more rarely overturned, and often processed in as little as a few weeks. But special problems can delay the process. For example, the existence of a potential heir who is a minor, mentally incompetent, or whose identity or whereabouts is unknown often results in the court appointing a Guardian-Ad-Litem to protect their interests.

Some people think avoiding probate means avoiding estate taxes; they are plain wrong. The estate tax, if any, would be the same if all of your assets at the time of death are owned jointly with right of survivorship (or ITF, POD, TOD or "beneficiary of"), thereby avoiding the need to probate your will.

### What Happens If You Die Without a Will

If you die without a Last Will & Testament, called dying *intestate*, NY law provides that your net assets are divided among your next of kin, the distributee(s). Your spouse receives everything if you have no children. If you have surviving children or grandchildren (collectively called your *issue*, whether you were married or not), your spouse receives the first \$50,000 plus half the balance. Your children and issue of any pre-deceased child divide the other half. If you have neither spouse nor issue, your assets are divided among surviving parents or, if none, among brothers and sisters or more distant relatives. If no relatives can be found, your assets eventually pass to the state.

Someone must submit a sworn petition to become *Administrator* of your estate, similar to being an Executor. Normally this is your spouse, child or closest relative. If no one steps forward, or if the closest relatives are cousins, then the job is performed by the Public Administrator, a county official named by the judge. Like an Executor, an Administrator is paid a commission from your assets. When the judge is satisfied as to your family tree, that all distributees have been properly notified, and as to the qualifications of the petitioner, then *Letters of Administration* are issued appointing an Administrator.

### What an Executor/Administrator Does

An Executor/Administrator may retain the lawyer of his or her choice to do most of the work. Often this is the lawyer who drafted your will because he or she would have obtained appropriate family-tree and other important information and can best defend the will if it is challenged. Once appointed, your Executor/Administrator has the authority and responsibility to collect all assets solely in your name (as opposed to Testamentary Substitutes), and to file your final income tax return. These assets are used to pay funeral expenses, estate taxes if any, legal and court costs, and all valid claims by the decedent's creditors. To avoid interest and penalties, NY and Federal estate taxes must be paid within nine months of the date of death.

Unless a will provides that estate taxes should be an estate expense, any taxes must be apportioned among the beneficiaries.

Partial preliminary distributions of net probate assets can be made to the legatees (or to distributees if there is no will),

who should eventually review and approve an informal accounting of all the assets, expenses and proposed distributions. Only after they all sign a Release can the commission be paid and final distributions made. In special circumstances, including if there is an objection, a time-consuming judicial accounting must be carried out in Surrogate's Court. An Executor/Administrator is no longer responsible to creditors after seven months



following appointment by the court if he or she was unaware of the claim, has performed properly, and then has distributed the net assets. For this reason, final distributions (or a reserve) are held until at least seven months have passed.

## Trusts are Not For The Wealthy Only

A Trust is a separate legal entity that can own assets such as stock, bank accounts or real estate (but not IRAs). It is created by a written agreement between a Grantor (who establishes and usually funds the Trust) and one or more named Trustees (people or financial institutions). The Trustee accepts a fiduciary responsibility to properly manage the assets for the benefit of ("f/b/o") lifetime or residuary beneficiaries according to the instructions or discretion set forth in the Trust. A Trust usually has its own tax ID# and pays its own income taxes.

A *Revocable Trust* can be changed at any time because the Grantor generally maintains complete control as initial Trustee (consequently, his or her SS# can often be used).

An *Irrevocable Trust* for the most part cannot be changed, and a Grantor can't retrieve assets transferred to the Trust. Although usually not a Trustee, a Grantor can retain certain powers such as the right to change the ultimate beneficiaries via a "*Special Power of Appointment*" (SPA). Irrevocable trusts are an important part of tax and Medicaid eligibility planning (described later).

A *Living Trust* (also known as "*inter vivos*"), created during Grantor's lifetime, can be either revocable or irrevocable. A *Testamentary Trust*, created via a Last Will & Testament, is by definition irrevocable because it only comes into existence upon death of the Grantor. Until then, it is really only a plan that can be changed.

Trust provisions can vary widely, and Living Trusts often include directions as to distribution following the death of the Grantor. In that sense, they can accomplish many of the same goals as a will (and avoid the probate process in court). Trustees can be given broad discretion as to use of Trust funds f/b/o beneficiaries, or their role can be more limited. For example, you can require the Trustee to periodically disburse a fixed sum of money or all income generated by Trust assets. You can also set a specific date or age when the beneficiary receives the balance. The possibilities are endless.

### Why Create a Revocable Living Trust

For most New Yorkers, a Revocable Trust is more trouble than its worth, although the benefit of avoiding probate may be greater to residents of other states. Here, once the Surrogate Court issues Letters Testamentary to an executor, the process of administering the estate is usually smooth. People who believe that avoiding probate means avoiding estate taxes are plain wrong.

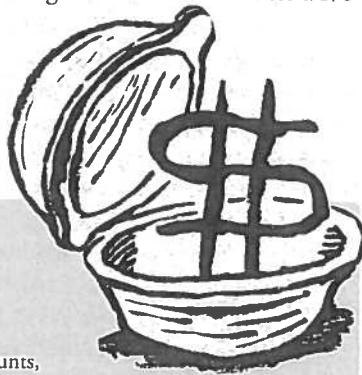
A Revocable Trust is very helpful in avoiding problems such as a possible will challenge or the expense and delay involved with the due diligence search for missing distributees that is required when probating a will. By naming yourself as Trustee and then retitling or conveying all of your assets into the Trust name, you can often avoid the probate process and still control your assets. Generally, the Trust even uses your own Social Security #. If you become disabled, or when you pass away, your named Successor Trustee can carry out your instructions quickly and without public exposure. This may be especially important if you need to provide for a handicapped child or relative.

A Revocable Trust is certainly more expensive than a will, and it will not avoid the probate process if any assets remain solely in your name.

### How a Supplemental Needs Trust ("SNT") Can Avoid Ineligibility for Governmental Benefits

A *Supplemental Needs Trust* (SNT, sometimes called a "Special Needs Trust") provides funds for the benefit of ("f/b/o") a chronically disabled individual. It is controlled by a separate Trustee who is instructed to supplement, and not to replace, expenses that would otherwise be paid for via governmental entitlements such as Medicaid. Under NY law, a properly drafted SNT avoids ineligibility because the Trust fund is not deemed to be owned by the disabled beneficiary.

When created f/b/o someone under 65 from their own (or their spouse's) money or a personal injury verdict or settlement, a "Self-Settled" SNT must provide for notice to the social service agency and *payback* of costs advanced by Medicaid upon death from any remaining balance. SNTs can also be used by Medicaid recipients to shelter income. A person of any age may fund a "Pooled" SNT that is managed by a not-for-profit organization f/b/o that person during lifetime and thereafter f/b/o others.



When created from funds provided by a parent or other relative f/b/o a disabled person, a "3rd Party" SNT does not have to include payback provisions, and can specify ultimate distribution of any remainder to anyone.

### Using Trusts to Protect Minor or Adult Children

Without appropriate trust provisions in a will, a minor child's inheritance is managed by the legal guardian (usually the surviving parent) until the age of majority is reached. To avoid having your child skip college and buy a sportscar instead, you can establish a testamentary trust naming suitable relatives or friends as Trustees to use their discretion f/b/o your child until a more mature age is reached, say 25. *Spendthrift Trust* provisions can also be helpful for beneficiaries with gambling problems, shaky marriages, or the tendency to squander money.

## ESTATE PLANNING AND SAVING TAXES

*Everyone wants to have enough assets to live comfortably and be able to pay for health and care costs throughout old age, but investment strategies to accomplish this are beyond the scope of this article. Most people also want to minimize taxes on their estates, thereby passing to their heirs as much as possible, but some jump through unnecessary hoops attempting to protect assets from the government's clutches.*

### Gifting Strategies to Reduce Estate Tax

For New Yorkers with estates over \$1,000,000, limited lifetime gifts reducing the size of your estate is a simple way to reduce estate taxes (and see the money enjoyed!). Gifts up to \$11,000/calendar year can be made to an unlimited number of people without reducing the estate tax exemption or having to file a gift tax return. In addition, you can pay for someone else's educational or medical expenses as long as payment goes directly to the provider. Lifetime gifts up to \$1,000,000 and gifts or bequests to charitable or religious organizations are exempt from tax.

People of high net worth can transfer business interests or real estate during their lifetime at a discounted value for estate tax purposes, while still maintaining considerable control. Sophisticated concepts, such as a *Family Limited Partnership* (FLP) or *Qualified Personal Residence Trust* (QPRT-

### Estate Tax Summary: Only Millionaires Need be Concerned

Here is the estate tax story in a nutshell:

Your *gross estate* for estate tax purposes includes all bank accounts, stocks, real estate and other assets owned solely, jointly, ITF, POD, TOD, or otherwise as well as proceeds of annuity and insurance policies on your life or trust assets over which you have control. Only joint assets proven to originally have been owned solely by the survivor(s) are excluded.

1. **No NY or Federal Estate Tax applies for any inheritance received by a husband or wife if the survivor is a US citizen.**
2. **NY estates under \$1,000,000 are not subject to any estate tax.**
3. **The Federal Estate Tax exemption is \$1,500,000 as of 1/1/04 (\$2 million as of 1/1/06 and \$3-1/2 million as of 1/1/09). Non-exempt assets are taxed at rates from 37% to 48% (45% top rate as of 2007). The law is scheduled to "sunset" if Congress does not amend it by 2010 (we expect it will), and dramatic consequences could result requiring expert estate planning.**
4. **NY Estate Tax applies to assets over \$1,000,000 at rates from about 4% to 16% under current law, which may be amended. However, the interface with federal law can reduce the top rate.**
5. **Decedent's debts, funeral costs and probate/administration expenses are deductible from the gross estate.**
6. **Bequests to charities and religious organizations are exempt.**
7. **Heirs need not report inheritances on their income tax returns (except sometimes for deferred income on inherited IRAs, annuities, Keoghs and US Savings Bonds). Tax may be due, however, on net income earned by the estate between the dates of decedent's death and distribution of the inheritance. Heirs receive a stepped-up tax basis on appreciated assets (such as stock or real estate) to the date-of-death value.**

different from conveying a house to a trust with a retained life estate, described later), can achieve big estate tax savings. A Charitable Remainder Trust can generate lifetime income and/or current tax savings and reduce estate tax.

Multi-millionaires should seek specialized guidance beyond the scope of this article involving *Generation-Skipping Taxes* and other complex issues.

### Life Insurance Policies Put in Trust Can Save Money

Life insurance policies contributed to an *Irrevocable Life Insurance Trust* (ILIT) are valuable tools that can be used to create value and to provide future liquidity without increasing your taxable estate. The basic requirement is that the person whose life is insured must not own or control the policy and must survive the transfer of any existing policy by three years. Proceeds can be used to pay estate tax and avoid the need to sell stocks, real estate or other non-liquid assets. This complex topic requires professional guidance.

### Estate Planning for Married Couples and Credit Shelter Trusts

Most spouses prepare separate wills that leave all their property to each other or, if the spouse does not survive them, alternatively to their children. These are often called "I Love You" or "A-B" wills (See cartoon). This is fine, but if your combined estate exceeds \$1,500,000 it can result in whopping estate taxes upon the death of the second spouse.

If a surviving U.S. citizen spouse inherits more than the \$1,500,000 Federal Estate Tax exemption as of 2004, there is no immediate significance since the entire amount is completely exempt for both NYS and Federal Estate Tax purposes. However, the surviving spouse's estate will be taxable on the amounts in excess of the exemption at aggregate rates from 43% to 56%!

A *Credit Shelter Trust* can use the exemption for both spouses, thereby eliminating Federal Estate Tax on \$3,000,000 as of 2004. Also called a Bypass Trust, its terms are set forth in a will or revocable trust and can be changed during lifetime. Instead of leaving everything to a spouse, a will can provide that a portion of solely-owned assets goes to a Trust instead, usually with the surviving spouse and children as Co-Trustees. Generally, the goal is to reduce the estate of a surviving spouse by

excluding the Trust principal (eligible for exemption under the estate of the first to die [\$1,500,000 as of 2004]), while still providing the survivor with the benefit of lifetime income and limited rights to invade the principal, with ultimate distribution of the remainder to children.

Since a will only covers assets solely in the decedent's name, it is important that property be titled to ensure a sufficient portion is solely-owned by each spouse. Otherwise the trust may not be funded.

A Credit Shelter Trust can also be funded on a "disclaimer" basis, whereby the surviving spouse inherits everything except what is renounced within 9 months after the first spouse dies, and those assets fund the trust.

### A Spouse Can Waive Part of The Inheritance to Save Taxes

A surviving spouse who would own more than the exemption amounts can accomplish significant future estate tax savings by waiving part or all of what he or she would otherwise inherit. This can even include half of the marital residence. A written renunciation must be submitted to the court within 9 months of the spouse's death. The waived sum passes instead according to alternate provisions in the will (or, if none, to successor distributees). Obviously, unless the disclaimer results in funding a Credit Shelter Trust,

the surviving spouse loses all control over or benefit from disclaimed assets. Special IRS rules about disclaimers require professional guidance.

### What Your Surviving Spouse Gets if You Die Without a Will

Everything, unless you have children (even if by another mate or out of wedlock), in which case the law provides that your spouse receives the first \$50,000 plus half the balance, and your children divide the other half.

### Second Marriages Require Special Planning

People contemplating remarriage, especially if they already have children, should review the impact of Social Security rules and other matters.

One tool often used in wealthier second marriage situations is a *Qualified Terminable Interest Property Trust*. A properly drawn QTIP can maintain the marital exemption from estate taxes while providing income for your spouse during his or her lifetime and still pass on the principal to your children.

### You Cannot Be Disinherited by Your Spouse Unless You Agree

The *Marital Right of Election* is the provision of law stating that a surviving spouse can "elect to take against the will" and collect 1/3 of her or his spouse's





**Home Care and Medicaid**

If you are single and need help paying for home care services, Medicaid eligibility can be based only on your income because there is no penalty for transferring all your assets to your spouse or anyone else one month or more before applying. You are responsible for paying "surplus" income in excess of \$679/month in 2004 on account of your care. Eligibility for home care if you are married is complicated by an arbitrarily low combined resource limit of \$5,600, effectively requiring a spousal refusal (see below).

Your doctor's order must specify the needed care, and if Medicaid does not cover sufficient hours or type of care you can appeal. Or you can pay privately.

**Spousal Refusal of Support**

Currently in New York, couples can freely transfer all assets to the "well" spouse who can then sign a *spousal refusal of support* as part of the Medicaid application.

This practice has allowed the well spouse to continue living in the community while Medicaid pays for all or most of the applicant spouse's care. However, the Medicaid agency may subsequently sue the well spouse to require support and recoup funds actually spent on behalf of the institutionalized Medicaid applicant spouse to the extent that the funds retained exceed the CSRA of \$92,760 or the MMNA of \$2,319 in 2004.

Certain planning actions and/or negotiations can be effective in preserving assets within the family. But the possibility must be considered that the well spouse, in whose name all assets become titled, may die first.

**An Income-Only Irrevocable Trust Can Preserve Family Assets**

The goal of preserving assets within the family can be partially achieved via an *Income-Only Irrevocable Trust*, whereby income is distributed to you (and/or your spouse) during your lifetime(s) while the principal balance is distributed to your children or others, usually at your death. Since a trust is a separate legal entity, the trust property technically does not belong to the Medicaid applicant, so only the

**Income must be used on account of care**

costs. However, transfers into and out of a trust will result in a period of ineligibility, and the *Look-Back Period for Trusts* is 5 years, not 3. Various court decisions about these trusts affect eligibility, but currently a grantor may retain a *limited power of appointment* allowing a change in designation of the ultimate beneficiary.

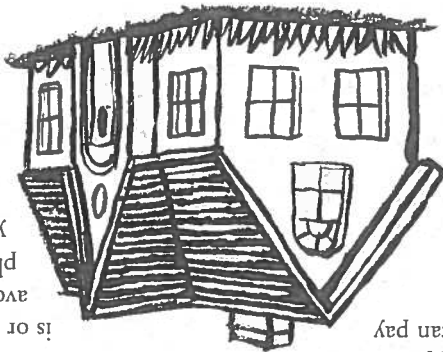
**When The Family Home Should be Transferred**

Although a house (or co-op) is an exempt asset as long as the Medicaid applicant or his/her spouse resides there, a lien can sometimes be placed on the residence of a Medicaid recipient who is or becomes single. To avoid this, if you are not planning on selling, you as grantor might deed your home to your children with a *retained life estate*. This means you (and your spouse) have the legal right to live there indefinitely. Another option is transferring the home to an irrevocable trust. In either case, a transfer results in a period of ineligibility based on the market value less the value of the retained life estate (about 50% for a transferor who is 75 years old). There is no penalty for exempt transfers to a spouse or to:

- a blind or disabled child;
- a child who has lived with and cared for his/her ailing parent for over 2 years;
- a brother or sister with a previous financial stake in the homestead; or
- certain trusts for a disabled individual under 65.

Complicating the decision as to the best strategy are capital gains tax implications if the residence might be sold during the grantor's lifetime, because non-residents are ineligible for the primary residence exemption (\$250,000 for single people and \$500,000 for married couples). A sale after grantor's death can avoid a taxable gain because of the step-up in basis to the date-of-death value.

This complex question requires expert advice.



**A Reverse Mortgage Can Help Families that are "House-Rich and Cash-Poor"**

A Reverse Mortgage on a home doesn't have to be repaid until after the death of the senior, unless the house is sold during lifetime. A new bank mortgage can be federally insured if the borrower or spouse is over 62 and has attended a counseling session to explain this creative financing tool. Loan funds can be advanced in three ways: a) at the closing, b) on a monthly basis thereafter, and c) on a credit-line basis. The maximum sum of these amounts is based on the house value and the borrower's age. As time passes, interest accrues on funds the borrower receives at an adjustable rate (about 4.5% in 2004), and the mortgage balance increases, hence the term "reverse" mortgage. The loan generally does not affect Medicaid eligibility and can usually be made even after transfer of a house subject to a life estate. A reverse mortgage is ultimately paid off upon sale of the house and can never exceed the house value.

**Long Term Care (LTC) Insurance Policies**

Statistics show that an increasing number of people will eventually require long-term care. Generally, LTC insurance policies can be a cost-effective way of financing it for individuals with a net worth exceeding about \$300,000 who have a sufficient income to easily pay the premiums.

Policies vary as to coverage, features and term. Proceeds can pay part or all of the cost of custodial care at home, in an assisted living facility, or in a nursing home (from \$50 to \$250/day). Many policies will not reimburse for home care unless provided by a licensed agency or certified home-health aide, but some policies include a cash benefit. Benefits commence when you become either seriously:

- cognitively impaired from dementia, Alzheimer's disease or a stroke, or
- incapacitated or unable to perform several basic activities of daily living (ADLs) such as bathing, dressing, toileting, feeding, transferring from a bed and maintaining continence.

Annual premiums range from about \$2,000 at age 60 to about \$8,000 at age 75, depending on factors such as your health at application and whether benefits start after a 20 or 90 day deductible period. It is important to have an inflation rider and to purchase from a

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September, 2013

Dear Friend:

This letter updates our 2004 ELDER LAW BASICS brochure pending a new printing later this year incorporating changes in the Estate Tax laws, Medicaid eligibility, and the Supreme Court overturning DOMA.

Now in our 31st year, our firm is pleased to continue provide a broad array of legal representation:

- > Personal injury cases
- > Civil and criminal litigation including employment termination matters
- > Real estate transactions
- > Wills & Estate Planning, Estate Administration, Guardianship... and more.

We are proud to be on the attorney referral list for the Alzheimer's Association, the AHRC and other organizations helping seniors, the disabled, and families.

## MEDICAID ELIGIBILITY and ESTATE TAX UPDATE

### Estate Tax Summary: Only Millionaires Need Be Concerned (page 4)

- The New York State Estate Tax Exemption remains \$1 million and tax rates range from 6% to 16%.
- Federal Estate Tax Law establishing a \$5.25 million federal exemption per person with a rate of 35% for taxable estates has been adopted. Creative strategies remain available for well-to-do individuals & married couples, such as wills providing for Credit Shelter Trusts on a disclaimer basis.
- The Federal lifetime cumulative Gift Tax exemption remains \$1,000,000. There is no NYS Gift Tax.
- Gifts up to \$14,000 per person per calendar year do not reduce the Federal Estate Tax exemption.

### Medicaid Eligibility Issues (pages 6-7)

- The LOOK-BACK PERIOD is now 5 YEARS for gifts or transfers to non-spouses for all purposes, and ...
- ...the START DATE for the ineligibility period caused by a transfer is when an applicant needs institutional long-term care services and "is otherwise eligible".
- The EXEMPTION for a HOME is limited to equity of \$786,000 in New York.

**Deficit Reduction Act provisions limit elder law planning options and make the field more complicated** as to issues including home transfers & life estates, annuities/promissory notes, Income-Only Irrevocable trusts, care agreements, etc.

- Nursing home costs in NYC can be \$13,000 per month or more; Medicaid eligibility currently requires that an applicant first spend down to under \$14,400 of assets or transfer assets to her or his spouse.
- The maximum *Community Spouse Resource Allowance (CSRA)* for 2013 is \$115,920 and the *Minimum Monthly Maintenance Needs Allowance (MMMNA)* is \$2,898 of monthly income.
- The Medicaid ineligibility calculation for nursing homes in NYC for 2013 is based on \$11,350 per month.
- Home Care Medicaid income eligibility maximums are about \$812 for single people and \$1,179 for 2-person households and \$14,400 of resources for a single person and \$21,150 for 2-person households. A "Community Pooled Trust" with a not-for-profit organization may be helpful for "surplus" income.
- "Spousal refusal" remains available for the present in NY in conjunction with Medicaid applications.

### Long-Term Care (LTC) Insurance Policies (page 7)

Policies that can cover part of the cost of home care, assisted living, and/or nursing home care are available. LTC insurance policies are recommended for healthy middle-class seniors and "boomers". Premiums are eligible for a 20% NYS income tax credit and partial federal tax exemptions. "Partnership Plan" policies that meet certain governmental standards and provide in excess 12 months of benefits can allow you to eventually be eligible for Medicaid and still retain assets.

Naturally, everyone's situation is different and requires special attention. We look forward to hearing from you.

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