Elder Law Estate Planning in a Nutshell

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by

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Preamble: Elder Law Estate Planning is All About "Control"

In our view, all of Elder Law Estate Planning comes down to one single word – and that word is "control". By planning for our disability (elder law) and for our demise (estate planning) we are taking back control – from the courts and the government – and giving it back to ourselves and our families. Let's look at how that's done.

Part One: Disability Planning

Starting with disability planning, there can be an enormous difference between having your own plan for disability versus the state's plan, known as "guardianship proceedings". One of the primary reasons people choose trusts over wills is that trusts tend to avoid guardianships while wills do not. Unlike wills, which only take effect on death and therefor offer no plan for disability, trusts take effect while you're living, hence the term "living trusts." The benefit of having a plan that starts now, instead of at death, is that it allows you to choose who will take over your trust assets should you become disabled. This is a significant issue. Due to advances in medical science and nutrition, we have reached a point where about half of all people will have a period in their lifetimes (usually later in life) where they can no longer handle their legal and financial affairs.

In a revocable living trust you put yourself or, for couples yourselves, in charge as trustees and then name who takes over as "successor trustee" should you become disabled – disability being proven by a letter from your treating physician stating that you are no longer able to handle your financial and legal affairs. You may choose any number

of successor trustees and may require them to act together or allow them to act independently on behalf of the trust.

Provided your assets are put into, or "re-titled", to the trust, there is no guardianship required for those assets since disability is already provided for in the trust. Indeed, the court has no jurisdiction over assets which you have placed in your trust. The effect of this is that should the client become disabled one day, then it is the people they chose who will be in charge and not the state-appointed legal guardian. The significance of this cannot be overstated.

What happens in the elder law practice when a client with a living trust becomes disabled? Generally, the successor trustee or trustees will contact the law firm to inquire as to their options and next steps. While the many options available in such a situation are outside the scope of this short treatise, there are some general principles that apply. First, at least half of the assets may be saved, even on the verge of requiring long-term care because your chosen representatives have the power to move assets out of your name. When it comes to Medicaid, it's "move it or lose it". The technique for saving assets on the nursing home doorstep is more fully described in the article entitled "Saving Half on the Nursing Home Doorstep: The 'Gift and Loan' Strategy" available on our website, trustlaw.com. Sometimes, all of the assets may be protected, depending on circumstances. The point is, your family member or whoever else you chose, are in control and they will

act, with the advice of your elder law attorney, in your best interests.

Contrast the foregoing with what happens should you become disabled without a plan, a not uncommon occurrence. We are confronted with the law of guardianship. Application must be made to the court via a petition to have a legal guardian named. The petition will outline the mental and physical state of the alleged incapacitated person (the "AIP") in some detail. The petition must be served by legal process on all interested parties. All this must be handled by a lawyer and the court will appoint a second lawyer to represent the AIP in the proceedings. The court will also appoint a "court evaluator" to meet with the AIP and prepare a report to the judge as to the extent of the AIP's disability. The court will also require that the AIP appear in the courtroom or, in the judge's discretion, the judge may go and question the AIP in the facility if they cannot appear in court. All expenses of these proceedings, many thousands of dollars, are borne by the AIP and their family.

One would think that the family member petitioning for the guardianship would be named the legal guardian. However, this is often not the case. The judge may feel that the guardian has a conflict of interest in that whatever they spend on the AIP will come out of their inheritance. The judge may determine that the petitioner lacks the requisite knowledge or expertise to be a guardian. The judge may be faced with sibling rivalry as to who should be appointed guardian and, finally, the judge may simply want to choose someone else more to the judge's liking, often a local attorney.

A Brookings Institute report found that two-thirds of these guardianship proceedings are commenced by nursing homes and hospitals looking

to take over control of an AIP's assets in order to ensure payment for their services.

Once the legal guardian is appointed, they may only spend the assets on the AIP. So you end up with the state's plan – spend it all on mom or dad's care until there's nothing left. Technically, the guardian may make an application for the judge's permission to protect assets. However, guardians often fail to do this and, even when they do apply, the judge may turn the application down.

As you can readily see, having a plan for disability is essential to having "control". You're only as good as your back-up plan. And with long-term care now costing up to twenty thousand dollars a month, without a plan for disability there may be nothing left for your family. In our view, it's either you have a plan prepared by an experienced elder law estate planning firm, or it's fingers crossed and hoping for the best.

Part Two: Death Planning

Your author started his law career as a litigation attorney. In and out of the courtroom for eleven years. In late 1990, I first caught wind of a new concept – the living trust. I was astonished to learn that by establishing and "funding" a trust (transferring your assets into it) you control your assets the same as before but the assets transfer to your heirs at death without a probate court proceeding. As most people know, wills have to be "probated" at death – a court proceeding to prove the will valid – before the executor is authorized to distribute the assets to the heirs.

Having encountered numerous delays and obstacles in probating wills, I took to this concept

immediately and we have never looked back. Now, we would be able to put the client in control instead of having to prepare a court petition, serve it on the heirs and potential heirs, get proof of service along with the petition back to the court, go through whatever requirements the court imposed, and then wait for the judge to rule -- weeks, months and sometimes years later. In other words, a process over which we had no control. Meantime, houses could not be listed or sold, bills remained unpaid, and the family's assets were inaccessible.

Recently, a client of our firm whose father died in New York listed his father's home in Virginia for sale, found a buyer, signed a contract of sale and then contacted us to probate the will so that he could close. He was shocked to learn that the probate would take one to two years. He had to undo the sale, pay all the buyer's expenses and now has to carry an empty house in Virginia for an indeterminate time – a situation over which he has no control. Imagine this – if his father had a living trust he could have put the house up for sale immediately upon his father's passing.

Then there is what we like to call the "social cost" of probate. Imagine if we were to take all of your sons and daughters, and their spouses, and put them in business together for a year or two. Most people would shudder at the thought – yet this is exactly what happens in a probate proceeding. No wonder it is so common to find that, after the probate of a will is completed, brothers and sisters never talk to each other again. Settling a trust (i.e., closing it out at death) usually takes weeks or a few months at most. By settling the estate so much more quickly, having a trust goes a long way towards keeping your family together and avoiding the high "social cost" of probate.

Not only is considerable time saved in avoiding probate court proceedings, but tens of thousands of dollars are often saved as well. Trustee's fees in "settling" a trust – closing it out at death – are a fraction of what the executor's fees are under a will. Attorneys' fees are similarly much less when a court proceeding is no longer required and the estate is settled so much more quickly. Time is money and time saved is money saved.

Finally, court proceedings are public records. When someone dies with a will, anyone may go down to the courthouse and look up how much they had, who they left it to and where the heirs live. With a trust, since there is no court proceeding, no one knows how much you had or who you left it to except the people named in the trust – the only people whose business it is.

Again, by planning for death with a revocable living trust you are taking back control from the courts and government and giving it back to yourself and your loved ones.

Part Three: Inheritance Planning

One of the main drawbacks in will planning is that wills generally pay out at death. It's been that way for hundreds of years. However, circumstances in today's world have challenged that traditional mode of settling an estate. Today, the divorce rate hovers around fifty percent. Exposure to lawsuits and creditors is far greater now than it was fifty or a hundred years ago. As a result, the inheritance may be lost to these risks.

A second issue is that once an inheritance is paid out to your son or daughter they may die prematurely leaving all to their spouse, your son-in-law or daughter-in-law, who may get re-married and share your hard earned life savings with a complete stranger. In other words, traditional will planning does nothing to keep your assets in your family.

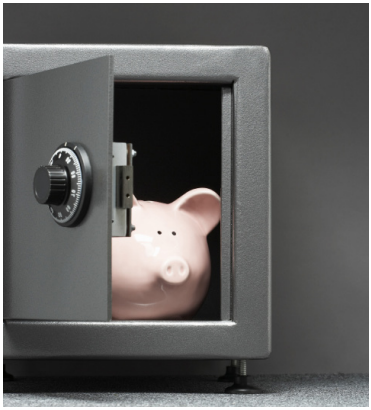
There is a better way. Through the use of the Inheritance Protection Trust, you may now protect the inheritance you leave from children's divorces, lawsuits and creditors while also keeping your assets in the bloodline so that it goes to your grandchildren, or others you choose, instead of potentially to in-laws and their families.

Here's how the Inheritance Protection Trust works. Instead of leaving the inheritance to son Bobby directly, we set up a trust in Bobby's name called "The Bobby Trust" and name Bobby as the "trustee" or person in charge of the trust. The terms of the trust provide that Bobby may buy, sell, trade or spend the assets as he pleases, including spending the whole thing – so you're not "ruling from the grave".

These Inheritance Protection Trusts offer significant benefits. First, the assets in the trust are protected from Bobby's divorces, lawsuits and creditors.

Secondly, the parent may provide in the trust for what happens to those trust assets when Bobby dies. Generally, the trust will state that whatever trust assets Bobby did not use goes to his children instead of to in-laws and, potentially, strangers. The trust does not govern Bobby's own assets – these pass according to Bobby's own plan. The trust only governs whatever assets you left to Bobby.

These Inheritance Protection Trusts now allow you to "control" – there's that word again – what happens to your assets after you're gone. Now, the inheritance you leave may be protected from your children's divorces, lawsuits and creditors and then pass by blood instead of by marriage – and who wouldn't want that.



Before we leave this topic some clients wish to provide for their son-in-law or daughter-in-law. In the event you wish to provide for them, and still keep your assets in the bloodline, you have the option to state in the Inheritance Protection Trust something to the following effect "In the event Bobby is still married to his wife Mary at the time of his death, keep the inheritance moneys (or a percentage of them, such as one-half) in trust for Mary, giving her the income for life and, upon her death, pay out the trust funds to her children. This way, you may provide for the in-law if you wish to, while still guaranteeing the assets will ultimately go to your grandchildren.

Part Four: Asset Protection Planning

The two main vehicles for asset protection planning -- in the event you may need long-term care services – are long-term care insurance and the Medicaid Asset Protection Trust (MAPT). Long-term care insurance should be your first choice, but the vast majority find that it is either too expensive or they cannot qualify for medical reasons.

Many people opt for "Plan B", the Irrevocable Medicaid Asset Protection Trust. This is the trust with the five year "look back" period for nursing home care. Any assets you put into the MAPT today are protected from long-term care after five years have passed.

While both the revocable and irrevocable trusts avoid probate at death and prevent guardianship proceedings if you become disabled, only the MAPT protects your assets from long-term care costs. In the revocable trust, you are in charge and may take your assets out at any time – so if you ever need long-term care you will be required to use your own assets to pay the costs. If you can get it, they can get it.

The MAPT sets up two roadblocks that Medicaid and nursing homes cannot break through. First, you must choose someone else as Trustee. Since the Trustee is in charge they can take it out, so if its you then you have access and they will make you take it. Most people choose one or more of their children as Trustees. The assets in this trust may still only be used for your benefit but they act as a "manager" for you.

The second roadblock is that in the MAPT you may only take income from the trust – in fact, they are called "income only" trusts. For example, if you transfer stocks to the trust you may only take the dividends, if CD's you may only take the interest, etc. However, if you put your house into the trust it does not earn income so you get the equivalent – "life rights" or the exclusive right to use and enjoy the premises for your lifetime. On your death, the assets go to your children's Inheritance Protection Trusts free of the expense and delay of probate.

Who sets up these trusts and why do they do it? Middle class people, generally around seventy, give or take a few years, have a lot of assets they are not going to spend, especially the house. What happens if you own a home and end up needing care in a nursing facility? The county puts a lien on your home for the cost of care and, before you know it, the lien exceeds the value of the house and the county takes it. This is totally unnecessary. For more than thirty years, you have been allowed to put that home into the MAPT and if you need care anytime after five years it is protected.

So first we move to protect the house. Let's say your name is Mary Jones and your daughter is Cindy Jones. The property would be deeded to: "Cindy Jones, as Trustee of The Mary Jones Irrevocable Trust". The trust provides that Mary has the exclusive use and enjoyment of the home for her lifetime. She keeps her property exemptions, STAR, Veterans, etc. The trust may sell the house at any time. In that case, the money is paid to the MAPT and the trust may go out and buy a condo for example and it is still protected – you don't start the five years over again. Since there is no downside, it makes sense to protect the house.

Now let's look at your other assets. Certain assets are exempt from Medicaid. They cannot get any of your retirement accounts, IRA's, 401(k)'s, 403(b)'s, etc. However, since you have to take the RMD (required minimum distribution) after age 72, that income must be used toward your care. This might be the two or three thousand a month you have to take out. The money inside the retirement plan cannot be touched by Medicaid.

We are concerned, however, for those who have a nest egg that is non-IRA money that they don't need to live on. Many clients tell us they have money in the bank or investments that they are not spending since they have enough income. Other clients advise they are only taking the earnings from their investments. Remember, the trust gives you the earnings. Our view is that if you have assets that you don't need to live on, then you're much better off protecting them than leaving them exposed. When you put those assets into the MAPT they're still there when you need them but no one can come and take them away from you.

A few words about the operation of these MAPT's. First, even though you named a son or daughter, or both, as trustees, you reserve the right to change the trustee at any time. That means you keep control – they are in charge of the trust but you are in charge of them. Secondly, although you cannot take out principal there is a workaround should you need to get money out. You are allowed to make gifts from the trust to your children without violating the Medicaid look-back rules. These gifts can be for virtually any amount tax-free.

Any money needed for repairs, improvements or insurance on the house may be paid for by the trust. Since the house is in the trust and the money is in the trust this is not considered as taking money out of the trust. Further, assets in the trust may still be used for your benefit. So let's say you want to buy a condo in Florida. The trust buys the condo and, assuming the five years has passed since you opened the trust, it is already protected by the trust from long-term care expenses.

Finally, many people are understandably afraid of the word "irrevocable". However, in New York you may revoke an irrevocable trust provided all the parties named in the trust agree in

writing. Since it is only you and your immediate family this is generally easy to accomplish. This means the MAPT allows you to have the protection so long as you want it and, if you change your mind for any reason, you can undo it – so you always have control over your affairs.

Conclusion: An Elder Law Estate Plan Covers All Your Bases

With one comprehensive plan you can keep control of your affairs by (1) ensuring the people you choose will take over later on should you become disabled (2) avoiding the expense, delay and publicity of a probate court proceeding (3) keeping the inheritance you leave in the bloodline and protecting it from children's divorces, lawsuits and creditors, and (4) protecting your assets from being lost to long-term care expenses.

About the Author and Ettinger Law Firm

Principal attorney Michael Ettinger has been a member of the New York State Bar since 1980. He is an honors graduate of McGill Law School in Montreal, Canada and obtained his Master of Laws from the London School of Economics in 1978. Ettinger Law Firm, dedicated exclusively to elder law estate planning, was formed in 1991. Mr. Ettinger was a founding member of both The American Academy of Estate Planning Attorneys and The American Association of Trust, Estate and Elder Law Attorneys.

Ettinger Law Firm has prepared tens of thousands of estate plans and has filed thousands of Medicaid applications. Our staff of ten attorneys plus many experienced paralegals and support staff provide you with over one hundred years of combined elder law estate planning experience.

The law firm offers a free consultation to help you determine whether our services may be of benefit to you and your family. Please call us at 800-500-2525, ext. 117 to schedule your free consultation at one of our offices.

Please also visit our website, trustlaw.com, for directions to our offices and for more information about elder law estate planning.

Thank you for considering Ettinger Law Firm for your elder law estate planning needs.

Testimonials

"This is the best choice for elder care and estate planning! Well established and transparent in services and quality of staff is superb. Has built in updates for consumer, this is a firm that you stay with for life. Highly rated. Go now for your peace of mind." — K.D.

"Mr. Ettinger has worked with my family for over a decade and has provided excellent advice on numerous issues relating to trust and elder law. He is extremely knowledgeable and responsive. I highly recommend him." — B.A.

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