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PROBLEMS WITH TYPICAL REVOCABLE LIVING TRUSTS AND FINANCIAL DURABLE POWERS OF ATTORNEY – AND THE NEW 70

February 2008 Newsletter

Elder Law estate planning is different from regular estate planning. The typical revocable living trust and financial durable powers of attorney usually will not have the requisite language and powers required for asset protection and public benefits planning in the case of incapacity of one or both spouses. This is especially true of documents created by so called “trust mills”.

A typical case consists of an elderly couple who have a revocable living trust and financial durable powers of attorney. The home and some liquid assets have been transferred to the trust. Other assets are outside of the trust. One of the spouses has been diagnosed with Alzheimer’s disease, and has lost capacity. The “well” spouse is now the sole successor trustee under the trust, and is the acting attorney in fact under the durable power of attorney.

In order to preserve assets and qualify the ill spouse for Medi-Cal, one of the things we would like to do is transfer the ill spouse’s interest in the home to the well spouse and reserve a life estate in the home to the ill spouse. This is allowed under the Medi-Cal regulations, prevents Medi-Cal from placing a lien on the home, and keeps the ill spouse on title. However, the transfer of the interest in the home from the ill spouse to the well spouse constitutes a self serving gift. As a result, we look at the trust and the financial durable power of attorney for the requisite powers required for this transfer for public benefits planning. The typical trust and financial durable power of attorney will not provide this authority.

The documents will usually provide for the sale of the community assets of either party, but only for fair market value. But, we don’t want to sell the property. A sale would probably give the couple too much in the way of assets, and therefore make the ill spouse ineligible for Medi-Cal. And, as we know, the home is a protected asset and need not be sold for Medi-Cal qualification.

We then look to the language in the trust and in the financial durable power of attorney, for powers which would allow the attorney in fact, who is usually the ill spouse, to amend the trust to provide for the expanded gifting and transfer powers we need for Medi-Cal planning. Many times that language is not in the documents, and we must resort to court action to fix the documents, which is an expensive and time consuming process, and not always successful.

A funny story: The stories in the ELT newsletters are printed with permission of the clients, and sometimes poetic license is used. One of our clients, Mrs. Skiffins, who is 93 years old, came to see us, with her three sons. Mrs. Skiffins looked to me like she was no older than 70. She went on to explain to me that earlier that week she had gone to the DMV to renew her driver’s license. She passed both the written and driver’s portion of the test with ease. I think 90 is the new 70.

For additional information, such as upcoming seminars, past newsletters, and to listen to an interview with attorney Michael J. Young, visit www.YoungElderLaw.com.

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