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Yearly Letter/Estate Plan Update

Dear Clients:

I hope this year finds you happy, healthy and prosperous. I have been thinking about age lately primarily because I am getting older and I now have a son, Bentley, who is an attorney practicing alongside me in my business. I remember years ago when a very sweet elderly lady said to me "do you know why I picked you as my estate lawyer?" I responded, "Well, is it because I'm a good lawyer?" She said, "No, it's because you're young. You'll be alive when I die and you can take care of my estate and help my children." That was about 25 years ago and when she died I assisted her family with the estate paperwork. My son, Bentley, is an integral part of my legal practice and can carry that torch forward and be there for those families I have been helping for the past 28 years. I also recently hired another attorney, Miranda Simpson Yancey. She is licensed to practice in Florida, as well as Alabama. Miranda is currently handling our complicated Probate and Trust Administration cases.

My 82 year old father-in-law, a retired Air Force pilot, has had his ups and downs with medical issues over the last 20 years. We frequently discuss issues related to aging and one of his favorite sayings is, "growing old is not for sissies." I am now 55 and have suffered a cracked tooth and had my first skin cancer removed from my leg. I agree, getting older hurts and it's not for sissies. This makes me think about one of my favorite historical figures, Ben Franklin. He said, "wish not so much to live long as to live well." What good is living to age 90 or 100 if you don't have your physical and mental abilities? I have suspected my clients are living longer and the life expectancy tables prove this to be correct. In 1932, the average male life expectancy was 61 years and a female was 63.5 years. In 1975, the male life expectancy was 68.8 and the female was 76.6. The latest table I have, published in 2009, shows the male is expected to live to 76 years and the female will live to 80.9 years. My personal office experience is that most of my clients live much longer than the published life expectancy tables. I have many clients in their mid 80's and 90's. So we are back to Ben Franklin's quote about the living longer part is not as important as living well. This is all the more reason to have your estate documents updated on a regular basis (every 5 to 10 years) so you and your family can concentrate on the living well part and not be burdened with the many problems created by not having the proper legal documents.

If you have not been to my office for a review in more than 10 years, you should be aware of the many important changes which have occurred in Trust and Will documents. The following is a list:

- 2002 - statutory change to the Living Will
- 2005 - HIPAA language inserted into the Designation of Health Care Surrogate
- 2005 - HIPAA language inserted into the General Durable Family Power of Attorney
- 2005 - creation and addition of a HIPAA Release form to the Trust package
- 2007 - creation and addition of the Agent to Control Disposition of Remains form to the Trust package
- 2011 - statutory change to the General Durable Family Power of Attorney
- 2013 - digital asset language inserted into the Trust, Will and General Durable Family Power of Attorney documents
- 2013 - genetic issue (children/grandchildren) language inserted into the Trust document

The following are this year's observations and comments for your consideration:

1. The inheritance tax rate exemption has been raised to $5,340,000 per person. This exemption is portable so any unused portion can be used by the surviving spouse. This effectively gives each married couple an exemption of

$10,680,000 from estate/death taxes. However, the surviving spouse must file a 706 Estate and Gift Tax return after the first death to preserve both exemption amounts.

2. Our office does not keep copies of all original signed documents, only computer generated unsigned copies. Please make a copy of your Trust documents, give them to your Successor Trustee and advise the Successor Trustee where the original Trust book is located.

3. Pen and ink changes made on your Trust, Will and other documents are not valid. All changes must be done with witnesses and a notary.

4. Review property deeds to determine your property(s) are titled to the Trust and the legal description(s) are accurate.

5. Review title to all other assets to determine they are owned by the Trust or payable to the Trust. Remember, any asset not in or payable to the Trust may require probate.

6. Many elderly clients are electing to appoint their Successor Trustee (usually, the son or daughter) to serve as a Co-Trustee with them now. This enables the client to turn over as much or as little of the day to day management of the Trust as they choose. It is a seamless way for a child to step into the management of a parent's estate. If you want to make it easier for a child to settle the estate when you are gone, the Co-Trustee selection is a great option.

7. Review the assets in your estate, the assets you have sold or distributed, and discuss it with your children. Recently, a client died and the children were frantic to find several assets owned by their father. After much wasted time and expense, they discovered he had sold the items or had already given them away.

8. Review and save any and all digital assets. Your login/usernames, passwords and personal identification numbers are important to ensure family members can access important online and electronic records after your death.

9. The following information concerns clients who have an A/B Trust:

A. Certain clients have an A/B Trust and now may not need to have the A/B Trust language because of recent changes in the law. In last year's newsletter, I addressed this concern. With an A/B Trust, the death of one spouse creates a duty on the surviving spouse to add up the assets of the Trust estate and separate them into Trust A and Trust B. This is done in order to preserve the decedent's tax credit ($5,340,000). If you have an A/B Trust and have questions on this issue, please contact my office.

B. Under the 2001 Tax Act, the tax credit is currently $5,340,000 per person. A couple with a $900,000 estate may not need an A/B Trust because one credit ($5,340,000) shields the entire estate from inheritance taxes. The children of the surviving spouse would not benefit from the preservation of two inheritance tax credits, and therefore, the surviving spouse may not wish to maintain two separate Trusts. If you find yourself in this situation, it is very easy to convert your A/B Trust to a joint Trust (A/A), allowing the surviving spouse to receive the entire estate. The cost to do this conversion is $1,050.00 and includes an Amended and Restated Trust and all new updated supporting documents.

C. If your estate is larger than $5 million, then maintaining these two separate accounts is a small inconvenience in relation to the thousands of tax dollars that can be saved; if there is no tax due, then why bother? One reason to maintain the A/B Trust, even if there is no tax advantage, is to insure the decedent's beneficiary designations are honored. In a joint A/A Trust, when the first spouse dies, all the assets immediately belong to the surviving spouse. If he or she remarries, there are no restrictions preventing him or her from re-titling all the assets jointly with his or her new spouse or leaving them all to his or her new spouse and nothing to the original children. The A/B Trust preserves the beneficiary selection for the first spouse.

As always, I am here to answer questions and provide you with some sense of security in knowing that if there is a need, my office will be there to help.

Sincerely,

J. Mark Fisher

Bentley's Corner

The year 2013 brought many different cases to our firm; from representing children who were unduly disinherited in Will Contest cases to proceedings calling for the removal of a Personal Representative/Trustee. While these are fairly common estate litigation issues, I came across one issue in particular I consider to be of great public importance and I refer to it as the **"Payor Agreement"** case. Get ready for this: a Nursing Home sued the daughter of a nursing home patient based on the patient's inability to pay the nursing home. This lawsuit was against the daughter personally and against her as the Power of Attorney or representative of her mother's estate.

During the intake of the patient, the Nursing Home made the daughter sign this **"Payor Agreement"** which allows the daughter to: **Agree** or **Disagree** to:

> "Voluntarily guarantee payment to the above named facility for services provided to the resident/patient. I understand that I am not required by law or by the facility…to personally guarantee payment; however, I choose to do this on a voluntary basis: I agree voluntarily to be liable along with and in addition to the resident for all charges incurred by the resident for items and services provided by the facility as specified in the Admission Agreement and attachments."

The obvious choice here is to disagree; but I do find it worrisome this is even present in a document that is signed at the intake of the patient. As those who have gone through this process would know, this is a time of high stress and generally a person would just make quick decisions to get their parent the immediate help they need.

The second component of the "Payor Agreement" **does not** allow you to **Disagree.** So, unless you are not going to allow your mom to be admitted to the Nursing Home, **you will Agree** to:

> "pay resident/patient's funds to the facility for goods and services provided to the resident/patient under the Admission Agreement. I understand that I am not assuming personal liability for any payment except up to the amount of the income or assets belonging to the resident/patient over which I had, have or will have authorized control."

In my case, the nursing home sued the daughter for $9,835.94 based on a breach of contract theory, citing the "Payor Agreement." The $9,835.94 represented 34 days in the nursing home. The Patient was applying for Medicaid benefits during this time (meaning she was at or near the qualification limits: less than $2,000 in assets; and less than $2,130 in income). There was NO MONEY! The daughter only had access to the patient's monthly social security, and every month it would come in and it would go out just as fast, to pay medical bills and expenses. While the law does hold the signor of the **"Payor Agreement"** liable if a child misuses the patient's funds; you can only be held liable to what funds you had legal authority over. In the present case, the daughter only had legal authority over the monthly social security, therefore, she could only be held liable for one month's social security of about $1,600 NOT $9,835.94. Yet she was sued individually and paid for our law firm to represent her, using her own funds, about $6,000. The nursing home did not collect the $9,835.94 they demanded.

If you, or someone you know, are in the process of transferring your parent to a nursing home, please read the documents carefully and be very cautious if the nursing home is making you sign a **"Payor Agreement."** This is an untested area of the law and we are not sure if standard Medicaid planning would run afoul of this Payor Agreement. Feel free to call our office and discuss Nursing Home Medicaid planning and the **"Payor Agreement"** issue with me, before you sign.

Bentley M. Fisher

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The hiring of a Lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask me to send you free written information about my qualifications and experience.

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Attorney J. Mark Fisher's yearly client letter

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