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Yearly Letter/Estate Plan Update – December 2022

Dear Clients:

Interesting times are ahead, to say the least. However, if we get back to the basics as far as my area is concerned, let's look at the legal documents you should have in place.

If I have done a Will package for you, then you should have a Last Will and Testament that says where your items go when you are gone. You would have named someone to be in charge of your estate when you are gone, this person is called the *personal representative*. If you have done a Will only, not a Trust, then there will most likely be a probate proceeding in court, in order for assets to pass to your intended beneficiaries. Other documents included in your Will package would have been a Durable Family Power of Attorney (for financial matters), a Healthcare Power of Attorney, an Agent to Control Remains, a Living Will, a Pre-need Guardian, and a HIPAA release. I explained each document to you at the time of signing but if you need further clarification, please give our office a call. Each of these documents should be signed, witnessed, and notarized. And you would have done so using blue ink. I use the special bond paper so you can identify the original document especially with the blue ink. When using a document such as a financial Power of Attorney, please make sure the original is always kept by you. Title companies are notorious for keeping the original Power of Attorney for some reason, or in some odd instances, giving back the first eight pages of the original Power of Attorney but keeping the last signed page. Please verify you have all original pages and the signed page in blue ink in your Will package.

If I have done a Living Revocable Trust package, the one with the big burgundy or blue binder, then you have all the above documents with the addition of a Living Revocable Trust, section 3, that is set up to direct where your assets go at death, but at the same time, avoiding probate. Please ensure all your documents are originals and in the proper sections in your book. Review the table of contents as well. Occasionally, I will have a client or a child of a client call asking me to prepare, for example, a financial Power of Attorney and my response generally is "what's wrong with the one in the book, section 12?" Please make sure you are familiar with your book, the table of contents, and your documents.

Also, please give a copy of your Will package documents or Trust package documents to your successor Trustee or Power of Attorney. We have received several calls lately from a client's adult child who is asking for a copy of the Power of Attorney or healthcare Power of Attorney. We do not keep copies of these original signed documents in our files. The original signed documents are in the Trust book or documents folder, our clients take home with them. We instruct our clients to make copies and give them to those who might need them later.

Those clients who have a Trust package should remember the primary reason for establishing a Trust is to avoid probate, avoid guardianship, and provide an organized manner to manage assets while living and distribute estate assets to your beneficiaries after death. The Living Revocable Trust you have is not an asset protection device, nor is it a tool to avoid the Medicaid spend down rules. Bentley Fisher from our office, spends the majority of his time dealing with Medicaid issues and qualifying clients for institutional care nursing home. Call him if you have any Medicaid related questions.

I probably will get some hate mail for this next topic, a true story. An elderly female client lives in Panama City, and she has an only son living in California. Mom is 88 years old and has fallen several times, broken her hip,

broken her arm, and has had other illnesses. Each time a traumatic injury, fall, or sickness occurs, son in California hops on a plane and flies to Panama City to assist his mother. He has asked her many times to move to California to be with him and her grandchildren, but she adamantly refuses to leave her home where she has lived for the past 60 years. He has expended significant money for airline tickets, lost time from work, and lost significant family time. She has now fallen a third time, fractured her hip, and the son is now calling me, the estate lawyer, asking about his options. I would explain to the son that his mother is my client and if she has her mental capacity, then he can't really force her to move. He would have to wait until she loses mental capacity before he can move her near him, or to a local assisted-living residence or nursing home. She would be at a local nursing home or assisted living facility pretty much on her own, with no family support. As you can see, this is a very difficult situation for both parties. I do advise my clients to consider moving near a child when they start having medical issues. I think it is best for the client to be with their family and certainly best for the children to have mom nearby, rather than racing across the country every time mom has a medical issue.

Before I go into a list of considerations for this year's newsletter, I will tell you a story about how life does go on after the death of a spouse. In this instance, a gentleman lost his wife of 50+ years. She was buried at a small-town cemetery and the headstone was prepared with her date of birth and death along with his date of birth. They were to be side-by-side with a common head stone. Apparently, after her death, he met someone new and decided he did not want to be buried with his first wife. So, he made his way back to the small-town cemetery and went to the gravesite with a hammer and chisel and started chipping and chiseling his name off the common headstone. We gather he was able to do this because he had paid for the gravesite and headstone. I think it was a tacky move. We deal routinely with clients who lose a spouse and then remarry. When this happens, I should be the second person to know about the intended marriage because we can protect the estate, the family, and the assets, by doing a prenuptial agreement. This agreement generally keeps the estate assets separate and makes sure that upon death, the assets will be distributed to the intended beneficiaries.

For your consideration:

1. The yearly gift tax exemption was $16,000 last year and it is now increased to $17,000 per person this year. That means you can give a gift of any asset with a value of $17,000 or less, and not have to file any paperwork with the IRS.

2. The estate tax exclusion amount, the amount you can give away at death with no additional federal estate tax (currently 40%) has been increased to $12,920,000. This amount will drop to 5 million+ on January 1, 2026, unless Congress acts to keep it at the current level or increase it. If your estate is 10+ million, then you might want to see me about additional tax planning tools using Irrevocable Trusts. As the term implies, this Trust will be non-changeable. The benefit is the potential tax savings for a married couple, up to 5.6 million dollars in taxes, no longer owed to the IRS.

3. Review the deeds to property(s) you own. They should be found in section 15 of your Trust binder. All Florida deeds we prepare for a client are mailed off to the county, recorded, and the originals, (prepared on bond paper and signed in blue ink), are sent back to our clients to be added to section 15 of their binder. If you or a family member have prepared a deed transferring title of your property to the Trust, please look this over carefully. Our office has found more than half, (I'm thinking like 70% of all these deeds) are defective. Either the name is wrong, the date is wrong, or the legal description is wrong or not complete. You cannot use the property appraiser's website short, abbreviated legal description. It has to be the actual legal description found on the deed.

4. At my initial meeting, I usually ask each client about their children and grandchildren. I want to know if there is a special need, or need or concern, regarding any child or grandchild. For instance, if your child is an alcoholic, drug addict, has a tax lien, a sizable judgment against them, receiving SSI, or involved in a nasty divorce, I should know that information. I can protect a child's inheritance if I know about the problems ahead of time. In one instance, a child had a tax lien of over $300,000 but I was able to set up my client's Trust so the money was available for the son, but not attachable by the IRS.

If you have a Trust, the separate writing is in section 9 of the binder, and if I did a Will package for you, I included the separate writing instructions and asset list in the blue folder I gave you. Please remember this is a great document to use when you wish to give away particular items such as rings, watches, tables, lamps, chairs, cars, shotguns, etc. Remember, you may NOT give any land or cash with this separate writing. ***J. Mark Fisher***

Medicaid

It's all about the spouse. When we talk Nursing Home Medicaid Planning, the single best planning option is having a spouse. There are many planning techniques which can be utilized. In 2019, I wrote about several of them in that year's letter, and I am sure I will write about them again, but this year I want to focus on the spouse. First, the low hanging fruit: A community spouse (spouse not needing Medicaid) is allowed a resource allowance of $137,400. This means the community spouse can have a bank account (or whatever other resource) in their individual name with a balance or value of $137,400. Also, the "5-year lookback" rule we all know about (the applicant cannot make a gift or uncompensated transfer) <u>does not</u> apply to inter-spousal transfers.

We can have a married couple, who has a homestead (exempt asset up to $636,000 in equity value), a car (exempt), a retirement account (principal balance exempt), and $137,400 in cash, and the spouse who needs a nursing home can apply and get approved with very little action. BUT WAIT, THERE'S MORE… in Florida it's all about the spouse. A couple could present with liquid/countable assets of <u>any</u> amount and the applicant could STILL qualify. In Florida, to accomplish this, the community spouse would exercise their "right of spousal refusal." Spousal Refusal is based on a US Supreme Court case holding: one spouse is not liable for the other spouse's medical expenses. So, in Florida, we could transfer/consolidate all the assets to the community spouse and the community spouse would literally refuse to make their resources available, even IF over the allowed resource allowance, and the applicant could still be approved. ***Bentley M. Fisher***

Litigation

Sometimes even with the best planning, things do not turn out the way we hope. Unfortunately, there are unscrupulous people who take advantage of others when they are in declining health and vulnerable. It is all too common for undeserving people to end up with a Will, Trust, deed, or beneficiary designation in their favor, unbeknownst to those the decedent truly cared for most. When that happens, it can be devastating emotionally and financially. The silver lining is that because this has been happening as long as people have been passing assets at death, the law has evolved to provide remedies to those aggrieved in these situations.

When a Will, Trust, deed, or beneficiary designation is obtained through undue influence, it is invalid and can be set aside by a court. Undue influence is manipulating someone into doing something they really do not want to do. It is most often exercised on people who are aging and in decline. It could be an end-of life caregiver convincing the person that if they do not sign a Will, the caretaker will leave them and there will be no one else to care for them. That is not likely true, but vulnerable people can be more easily convinced than someone of good mental and physical health. It could involve the caretaker creating a conflict between the elderly person and those close to him or her. It is most often done in secret, behind closed doors, where nobody can witness it.

Because undue influence is difficult to prove, the courts started to apply a presumption that certain transactions were void. Where someone has a confidential relationship with the person, is a substantial beneficiary of any change, and actively procures the change, the courts hold there is a presumption that the transaction is invalid. Initially, if the person benefitting could provide a reasonable explanation, the presumption would go away. The Florida legislature, however, found that because the presumption was implementing the public policy of protecting fiduciary and confidential relationships, that the presumption should shift the burden of proof to the party receiving the benefit.

The presumption is helpful because the facts giving rise to it can often be proven even where the undue influence was never directly witnessed by anybody but the decedent. If you or someone you know may have been wrongfully disinherited, we can help. ***James R. Green, Jr.***

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