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FORETHOUGHT

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Estate Planning for the Blended Family

We've all heard the stories. Husband and wife, married for the second time, finally got it right. Husband has children from a prior marriage. Wife has children from a prior marriage. But now, Husband and Wife are the perfect couple and their blended family is happier than the Brady bunch. Life is good. The children get along with both parents. Husband and Wife tell their estate attorney: "When the first of us passes away, we want to provide for the survivor and, at the surviving spouse's death for our collective children equally." I have no doubt that this blissfully happy couple means it when they tell me that they will provide for the other spouse's children as if they were their own.

Unfortunately, life happens. People grow, they change, they move away. Perhaps after Husband dies, Wife maintains a good relationship with Husband's children for a period of time but then Wife's daughter (the best, most devoted daughter in the world) moves to California and Wife goes with her. The relationship between Wife and Husband's surviving children may then become more tenuous. First, there are annual visits, holiday and birthday cards and calls. But, over time, that connection begins to fade. Wife doesn't mean to be disloyal to her deceased Husband when, years later, she changes her Will (which controls all of her assets along with the assets Wife inherited from Husband) to leave everything to her daughter alone. Just like that, Husband's children will not receive anything from their father and they have no recourse.

Or, consider the following. A young, happily married couple has two small children. Tragically, the wife falls ill and passes away prematurely. Husband is left to care for the small children. Husband ultimately remarries. Perhaps he and Wife #2 go on and have children of their own, or Wife #2 has children of her own. Now, what if Husband passes away and his Will leaves his assets all to Wife #2. Even if Wife #2 has the best of intentions, the assets which Husband left to her may not be available for his children, as Wife #2 may deplete them paying for her own living expenses. Or, if Wife #2 has her own children from a prior relationship, she could create a Will that excludes Husband's children from his first marriage.

More and more frequently, we are meeting with clients who are a part of a blended family in some capacity. Collectively, we need to be careful to create plans that both carry out the couple's wishes while protecting the interests of their heirs. These are not easy conversations to have between otherwise happy couples. However, in these situations, proper planning is critical.

Trusts are helpful tools that can be used to hold assets for the surviving spouse's lifetime benefit and then, at the spouse's death, allow assets to pass to the children. In such cases, careful attention must be paid to the selection of the Trustee. Appointing the surviving spouse as Trustee does not sufficiently protect the assets held in the Trust. Consideration should be given to appointing a third party as Trustee or as a Co-Trustee along with the surviving spouse.

Also, life insurance should be considered as a way to ensure that some assets pass to children at the time of their parent's

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Fendrick & Morgan Welcomes Colin Devlin, Esquire and Deborah Miller

A year ago at this time, we welcomed Rachel Shaffer, Esquire, to our team here at Fendrick & Morgan. Now, we could not be more pleased to welcome Colin Devlin, Esquire, to our legal team and Deborah Miller as an Administrative Assistant. Colin received his J.D. degree from Rutgers University School of Law in 2013. Prior to joining Fendrick & Morgan, Colin served a judicial clerkship for the Honorable Nan S. Famular, Presiding Judge of the Chancery Division in Camden County. Colin is currently pursuing his LL.M. degree in Taxation with a Certificate in Estate Planning from Temple University Beasley School of Law. When not in the office or classroom, Colin enjoys coaching the 8th grade boys basketball team in Haddonfield, NJ. Deborah came to us with excellent professional and personal skills. In her free time, she enjoys photography. Please join us in welcoming Colin and Deborah to Fendrick & Morgan!

Want to Provide for Your Grandchildren But Not Sure How?

We often listen to our clients struggle with how to provide for their family at large. Parents with adult children and grandchildren often want to provide for their grandchildren directly, rather than trusting their children to utilize their funds for the benefit of grandchildren. Many times, grandparents may not share their child's ideas regarding how assets should be used for the grandchild's benefit. Grandparents may also fear that by leaving or gifting assets directly to a grandchild, they are letting the grandchild's parents "off the hook" and enabling the parents to look first to the grandparents' funds for payment of certain expenses (such as college), which the grandparent believes the parent should be primarily responsible. Further, the grandparent may feel badly about bypassing their child to leave assets directly to grandchildren, and fear that their child may feel slighted. All of these considerations–and more–factor into a decision to leave assets to a grandchild.

However, once the grandparent has decided that he/she wants to provide for grandchildren, a number of questions still remain. How do you provide for a grandchild (in trust, outright, in a 529 Plan)? How much do you gift/leave to the grandchild? And, which asset(s) should you give/leave to the grandchild? These are all important questions that must be considered.

First, depending on the grandchild's age, it is often not appropriate to give the grandchild an outright gift. Instead, the more prudent approach may be to leave assets to a trust for the grandchild's benefit. Such a trust could run until the grandchild reaches a certain age, or even for the grandchild's lifetime. While the assets are in the trust, the Trustee (selected by the grandparent) would make investment decisions regarding trust assets and would control distributions from the trust to the grandchild, or for his/her benefit. Thus, with a carefully selected Trustee, the grandparent can have some confidence that the assets will be used for the grandchild in accordance with the grandparent's wishes.

Further, by leaving assets to a grandchild in trust, the grandparent can protect the assets from the grandchild's creditors and can even protect the assets in the event of the grandchild's divorce. Also, the grandparent can protect the grandchild from himself or herself by leaving assets to a grandchild's trust so that the grandchild cannot squander, gamble or otherwise waste the funds. In short, by giving assets to a grandchild's trust, the grandparent can control the terms (i.e., how long will the trust run, who's in charge of it, and what can the trust assets be used for). For example, a grandparent may want the trust assets to be used primarily for the grandchild's education. In such case, we can expressly state that intent in the trust document. In other cases, the grandparent may only want the trust assets available to pay education expenses as a means of last resort in the event the parent cannot finance the grandchild's education. Similarly, we can state that intent in the trust document. Trusts allow us to make your wishes clear.

If, rather than giving or leaving assets to a trust for the grandchild's benefit, a grandparent gives assets (either during life or at death) to a minor grandchild outright, those assets will be held in a custodial account for such grandchild until he or she reaches the age of twenty-one (21). Once the grandchild reaches such age, they become legally vested in the funds and they can withdraw the funds from the account and spend the monies as they see fit. The grandparent has no control over the assets once the grandchild has attained the age of twenty-one (21). The grandparent may be thinking "college tuition," but the grandchild may be thinking "car." Furthermore, the assets are not protected from the grandchild's creditors, nor are they protected in the event of the grandchild's divorce. This doesn't instill a great amount of confidence in the grandparent that the funds will be used wisely.

Grandparents may also consider leaving grandchildren assets in a Section 529 Plan.

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Use of Annuities In Medicaid Planning

Generally, when applying for Medicaid benefits, the assets of the Medicaid applicant must be spent down to below $2,000 or $4,000 (depending on the applicant's fixed monthly income). The spouse of a Medicaid applicant (often referred to as the "Community Spouse") is allowed to keep the lessor of fifty percent (50%) of the couple's assets or a maximum of $117,240 (adjusted annually for inflation). In addition, the Community Spouse may treat the marital home and one vehicle as non-countable resources, provided they are owned by the Community Spouse. But, for many people, that still leaves a significant amount of assets at risk to long term care costs.

Can an annuity help to protect your assets from long term care costs? Maybe.

In order for an annuity to help protect assets from long term care costs, it must be: (1) irrevocable, (2) actuarially sound, (3) non-assignable and (4) designate the state as remainder beneficiary. The Community Spouse cannot access the underlying assets in the annuity, all they possess is an income stream. The Deficit Reduction Act of 2006 severely curtailed our ability to use annuities in connection with Medicaid planning. However, a recent string of New Jersey cases suggests that annuities may again be useful tools in protecting assets from long term care costs.

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For example, in *M.W. v. Division of Medical Assistance and Health Services* (N.J. OAL Docket No. 2998-2013, Jan. 28, 2014), New Jersey's Medicaid agency held that a Medicaid applicant who made a substantial gift and purchased an annuity to help pay for the resulting Medicaid ineligibility period was eligible for benefits. In that case, a nursing home resident ("M.W.") gifted monies to her son, knowing that the gift would result in a penalty being assessed by Medicaid and she would not receive Medicaid benefits for a period of time. Accordingly, M.W. purchased an irrevocable, actuarially sound, non-assignable annuity and named the state as remainder beneficiary. She applied for Medicaid, and the Board of Social Services denied her application because of the gift to her son. The state reasoned that because she made her resources unavailable by purchasing the annuity, the annuity was an available resource. M.W. appealed and an administrative law judge ("ALJ") reversed the denial of Medicaid benefits, finding that the annuity was not an available resource because it could not be converted into cash. The Director of the Division of Medical Assistance and Health Services then affirmed the ALJ's decision. After stating that M.W. was "engaging in legal and financial gamesmanship in order to make herself Medicaid eligible, by having someone else hold funds that could be used for her care and arguing they are excluded from the resource eligibility determination," the Director reluctantly found that, under state law, the annuity was not an available resource. Thus, with a properly structured annuity, a nursing home resident might consider gifting assets and purchasing an annuity. The annuity payments could then be used to pay the resident's nursing home expenses during the penalty period which would be imposed as a result of the gift.

In another case, a New Jersey federal district court held that a provision in an annuity that required the owner or beneficiary of the annuity to agree to the amount paid to the state as remainder beneficiary was merely a verification provision, not an authority to consent, so the annuity was not a transfer for less than fair market value for purposes of Medicaid eligibility. *Carlini v. Velez* (U.S. Dist. Ct. D.N.J., No. 12-7290 (June 4, 2013). In that case, the nursing home resident's wife purchased an annuity and named the state as remainder beneficiary. The annuity contract included language that the annuity company reserved the right to require that a representative from both the state and the estate of the owner or contingent beneficiary agree to the amount to be paid to the state. When the husband applied for benefits, Medicaid denied the application, stating that the annuity was an improper transfer of assets because of the language in the annuity contract that required the owner or beneficiary of the annuity to consent to the amount paid to the state. Medicaid reasoned that the contract did not properly name the state as remainder beneficiary. The U.S. District Court of New Jersey found that the disputed language in the annuity contract was merely for verification purposes and not an authority to consent to the distribution to the state. The court further noted that exempting an annuity purchased by a Community Spouse from the couple's pool of available assets "creates a potentially large loophole in the Medicaid laws by allowing a Medicaid applicant to turn a countable asset into income for the community spouse, which is not deemed available to the institutional spouse."

If you or a loved one may need long term care assistance in the near future and you would like to discuss the possibility of using an annuity in your planning, please call our office to schedule a consultation.

BLENDED FAMILIES continued from page 1

death, while still providing for the spouse with the remainder of the estate. For example, in the first example above, if Husband had taken out an insurance policy on his life and designated his child(ren) as beneficiaries of that insurance, even if the balance of assets all passed to the Wife at Husband's death (and she later changed her Will to not provide for Husband's children), at least Husband could rest easy knowing that his child(ren) will have received the insurance at his passing.

If you are a part of a blended family, it is critically important that you consider the changes that life brings with it and try to protect your loved ones by implementing proper planning. We can help you navigate through these treacherous waters. If you would like to discuss this planning for you and your family, please call our office and schedule a consultation.

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529 Plans allow persons to gift assets to such accounts and allow the gifted assets to grow income tax free provided that they ultimately be used for qualified education expenses. Such expenses include: room and board (provided that the beneficiary is at least enrolled on a half-time basis), "tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution." Such 529 Plans are excellent planning vehicles. However, families must be careful to not over fund them. If funds come out of a 529 Plan for a non-qualified education expense, the income tax on the distributed amount plus a 10% excise tax will then be due. While 529 Plans are useful planning tools, they are limiting and only beneficial for education expenses; they afford little benefit beyond the higher education arena.

Considering the above, establishing a trust for the benefit of a grandchild may be the most sensible way to leave assets to such grandchild. In addition to the benefits described above (namely, control and asset management), if you wish to leave qualified retirement account assets (i.e., IRA, 401(k), 403(b), etc.) to a grandchild, you can designate the grandchild's trust as beneficiary of the retirement account asset and allow the income from the retirement account to be deferred over the grandchild's lifetime.

There are a number of important considerations in deciding to leave assets to a grandchild. If you would like our help in navigating your way through them, please call our office to schedule a consultation.

Does your group need a guest speaker?

We are available to speak to your professional, civic, religious or special interest group on various topics (Estate Planning, Elder Law, IRA Planning, Special Needs Trusts, Disability Planning.) Give our office a call at **(856) 489-8388** to arrange a date and time or visit our website at www.fendrickmorganlaw.com.

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