Berwitz & DiTata LLP

A STEP AHEAD

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Lawrence N. Berwitz, Esq. and Maureen Rothschild DiTata, Esq.

Berwitz & DiTata LLP Gets Favorable Decision in Court

A Step Ahead is intended to provide our clients, friends and family with information that we believe is of interest to them concerning estate planning, retirement planning, Medicaid, guardianships, probate and estate administration and the practical considerations of caring for those who are aging, blind or disabled. However, Berwitz & DiTata LLP also represents many clients in litigated matters relating to estates and trusts. We are proud to report that we recently obtained a favorable decision from the Nassau County Surrogate's Court, in *Matter of Schreiber,* 2012-369907 (Sept. 30), the first decision to interpret New York's "decanting statute," EPTL 10-6.6, which was liberalized by the state legislature in 2011.

"Decanting" is the ability of a trustee of an existing irrevocable trust to distribute all or part of the trust assets to another irrevocable trust - much the way one would pour wine from its original bottle to another. Decanting is desirable when there is a problematic provision in the existing trust. The goal is to eliminate the problem in the new trust. The Court in our case permitted the trustee of the existing trust, a trust which had been created in 1992 to benefit the infant grandchild of the creator, to "decant" or pour the trust assets to a new trust which contains special provisions to protect the assets for the grandchild who was later diagnosed as disabled.

In 1992, when the beneficiary/grandchild was 19 months old, his grandfather created and funded a trust

which would have permitted the beneficiary to withdraw all of the trust assets when he reached 21years of age, in May 2012. Years after the trust was created, the beneficiary was diagnosed with a variety of cognitive and learning disabilities. Prior to turning 21, the beneficiary qualified for Medicaid and SSI benefits. However, because the trust afforded him the right to withdraw trust assets at 21, irrespective of whether he took them, he would no longer have qualified for those benefits and the assets would have been at risk.

The problem was that the original irrevocable trust did not contain a "supplemental needs trust" for the benefit of the beneficiary. Such a provision would have permitted the

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Gifting in 2013

As we approach the end of another year, we have been asked by clients whether 2013 should be a year in which they make gifts. Gifting is usually thought of as a tax saving strategy, but whether it should be implemented to reduce future estate tax liability or for some other purpose, gifting and the manner in which gifts are made requires careful consideration.

Currently, there are two separate gift and estate tax schemes - federal and state. For federal gift tax purposes, this year an individual can gift up to $14,000 to an unlimited number of persons. Spouses can each make these gifts. Gifts to any one person in excess of $14,000 ($28,000 for married couples) require the filing, by the gift-giver, of a federal gift tax return. However, each individual can gift up to $5.25 million in excess of the $14,000 limit without any gift *tax* consequence. At the individual's death, the balance of the $5.25 million can be used to avoid federal estate tax, applied against the value of his or her estate. New York does not impose a gift tax on the value of any gift. However, only $1 million avoids estate taxes at death.

An example demonstrates the interplay between the federal and

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trustee to maintain the assets in the trust so that they could be utilized to enhance - or supplement - the beneficiary's quality of life without interfering with his governmental benefits. There are 2 types of supplemental needs trusts, *first-party* and *third-party* trusts. The difference lies in whose assets are used to fund the trust. A *first-party* trust is funded with the assets of the beneficiary and it is a condition of this type of trust that, at the death of the beneficiary, governmental benefits received during the life of the beneficiary must be paid back from remaining trust assets. A *third-party* trust is funded with assets belonging to another, here the grandfather, thus remaining trust assets at the death of the beneficiary can be distributed to whomever the trust creator specifies.

What our trustee had hoped was to find some way to "fix" the trust, keep the assets in the trust for the life of the beneficiary rather than distributing them, and protect them in a supplemental needs trust. In short, decanting to a new trust was the anticipated solution.

But the solution was not without its problems. The decanting statute requires the trustee to give notice to the beneficiary and others of the intended transfer to the new trust, and the transfer only becomes effective 30 days after that notice is given, although the parties can agree to a shorter time period. By the time the trustee retained Berwitz & DiTata LLP, there were less than 30 days remaining before the beneficiary was to turn 21. Our concern was that, once the beneficiary turned 21, the assets in the trust would be his and unprotected. While a *first-party* supplemental needs trust might then have been created with the beneficiary's money, that would have negated his grandfather's intent that at the beneficiary's death remaining trust assets pass to future generations.

However, the existing trust allowed a parent, who is not also a trustee, to act on behalf of the beneficiary. On May 1, 2012, 6 days before his 21st birthday, notice was given to the beneficiary that the trustee intended to decant, pour, the trust assets to the new trust. On May 2, 2012, the beneficiary's father signed an agreement on behalf of the beneficiary to eliminate the 30 day waiting period and make the transfer effective immediately.

Despite opposition by the Attorney General, who argued on behalf of the Department of Social Services which administers the Medicaid program, the Surrogate's Court permitted the decanting of the existing trust to a new and improved trust which contains the *third-party* supplemental needs trust and protects all the assets from recovery by the government. A complete copy of the text of the decision is available on our website at *www.berwitz-ditata.com.*

Preventing Financial Abuse of the Elderly

Alarmingly, instances of financial abuse perpetrated against the elderly and disabled are on the rise. According to the National Council on Aging [NCOA], 1 in 5 individuals in the United States is aged 60+ and 1 in 13 of these individuals will experience some instance of abuse, neglect and/or financial exploitation. Perhaps the most alarming statistic is that only 1 in 44 elder financial abuse cases is ever reported. Many elderly individuals are private about their affairs and are too embarrassed to report it. Others may be confused or may not even realize that they are being victimized. It is for this reason that seniors and their families must be particularly vigilant and recognize that financial abuse is a serious problem that must be addressed and is certainly not something to be embarrassed about. In fact, even sophisticated celebrities and entertainers have been victimized. A recent film called *Last Will and Embezzlement* features entertainer Mickey Rooney and his story as a victim of financial abuse. To prevent financial abuse from happening to you or your loved ones, it is important to know about some of the scams that are out there.

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state schemes. John has an estate of $2,200,000. In 2013 he gifts $14,000 to each of his 4 grandchildren ($56,000). If he makes no other gifts in 2013, he will not have to file a federal gift tax return. However, John also makes gifts of $514,000 to each of his 2 children. Because the gifts to his children exceed $14,000, John has to *file* a gift tax return. However, rather than paying any federal estate tax, John allocates $1 million of his $5.25 million unified credit to the gifts exceeding $14,000 - $500,000 per child. As a result, John has no gift tax to pay in 2013 and, at his death, there is $4.25 million remaining of his federal estate tax credit, well in excess of the value of his remaining estate, $1,116,000.

Now let's consider the effect John's gifts have on his New York State estate tax liability. There is no NYS gift tax and, by reducing the size of his estate, from $2,200,000 to $1,116,000, John has significantly reduced his estate tax liability.

Gifting can provide benefits besides tax savings. It is a strategy that can be used to financially qualify a person for Medicaid benefits. Aside from the benefit to the gift-giver, the recipient derives benefits from the gift permitting, for instance, payment for goods, services or education, which might not otherwise be affordable, and allowing the recipient to improve his or her quality of life.

Gifting can also have unintended consequences. Thus, for instance, assets like stock or real property that would qualify for a step-up in basis if inherited at the giver's death do not qualify for that tax treatment if gifted during the giver's lifetime. In the

earlier example, John's gift to his children would disqualify him from receiving Medicaid nursing home benefits for 5 years.

If a gifting strategy is something you wish to implement, it is important to consider the manner in which the gift(s) will be made. Is the recipient a minor child, financially irresponsible or otherwise unable to manage the gift? Is there a possibility that the recipient will have marital issues that place the assets at risk? If the intended beneficiary ultimately predeceases you, who will benefit from your gift? In any of these cases, the implementation of a trust as the repository for the gift(s) may enable the gift to be effectively managed and utilized for the benefit of your intended beneficiary.

Gifting is an excellent strategy. It can accomplish very different goals but it can also create complications. It is best to consult with an attorney experienced in this area of the law to help you evaluate the most effective gifting strategy for your circumstances. To avoid the pressure that end-of-year gift planning can cause, we recommend that you contact us as soon as possible for a consultation to discuss the merits of this estate planning strategy.

Would You Like To Read About It Here?

We at Berwitz & DiTata LLP are proud of our newsletter and hope that each issue brings our clients and friends insightful and timely information. We endeavor to write articles geared to your interests and concerns. We would be happy to receive your feedback. More importantly, if you have a question or would like us to address a particular topic, please call and let us know. We will try to include it in one of our next issues. Just call or drop us a line.

310 Old Country Road, Suite 101
Garden City, New York 11530

TELEPHONE: (516) 747-3200
FACSIMILE: (516) 747-3727
WEBSITE: www.berwitz-ditata.com

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Some of the more common types of financial abuse include Medicare scams, investment fraud, fake charities, telemarketing and sweepstakes scams, forgery, identity theft, and home repair and contractor scams.

Medicare Scams: One of the most widespread scams perpetrated against seniors is the misuse of Medicare. Common schemes include billing for services that were never rendered and selling unneeded medical devices.To avoid this type of scam, carefully protect your Medicare number and do not allow anyone else to use it. It is important to review all Medicare statements to confirm that you have received the services and equipment that appear on your bills. Suspicious activities can be reported to 1-800-MEDICARE.

Telemarketer Scams: The U.S. Department of Justice estimates that dishonest telemarketers take in an estimated $40 billion each year. The AARP claims that about 80% of these scams involve victims who are 50 or older. Scammers use the phone to conduct investment and credit card fraud, lottery scams, charity scams and identity theft. They also try to convince seniors to purchase products that never arrive or are completely useless. To avoid this kind of scam, always ask for and wait until you receive written material about the particular charity or the products or services being offered. Do not be pressured into making a purchase and always take your time in making a decision.

Home Repair & Contractor Scams: Typically working in teams, these scammers will scour neighborhoods with a high concentration of older residents and then appear on their doorsteps claiming to spot something in need of fixing. They will often ask for money up front and then disappear without completing the work. To avoid this kind of scam only hire contractors and repairmen that are licensed and insured. Ask a trusted friend or relative for a referral and do not be afraid to ask the contractor for references.

These are just a few examples of financial abuse perpetrated by strangers against the elderly. It is important to remember that financial abuse can also be perpetrated by those closest to us. Never be afraid or embarrassed to reach out for help.