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CLIENT NEWSLETTER
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This newsletter is intended solely for current clients of The Law Office of Michael J. Howell, P.A. and clients for whom we have previously provided estate planning or probate services. If you are neither a current nor a former client, please let us know so that we can remove you from our client mailing list. Also, if you have changed attorneys please let us know so we can take you off our mailing list.

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Where Are Your Original Documents?

It is important to make sure that your original documents are in a safe place and can be found. Although in some cases it is possible to probate a copy, there have been a number of reported cases where the original will could not be found and the courts held that only the original could be admitted to probate. It is also good to have a complete set of copies, but these should be in a separate location with a clear reference as to where the originals can be found.

So that our clients can easily identify original documents, for many years now, we have been using blue ink to sign original documents. If the signatures and initials on your documents are black, then it is likely only a photocopy unless the documents are very old in which case you need to come in for a review and possible update.

If You Have a Trust, Do Not Forget to Fund It

If you have a Revocable Living Trust, you need to fund it with all of your assets prior to your death or permanent disability in order to gain the maximum benefits from the trust. Funding refers to the process of transferring assets into the name of the trustee.

However, transferring assets into the name of the trustee does not normally apply to IRAs, pension benefits, annuities or other assets that generate ordinary income tax if you were to cash them in, sell them or take money out. These are sometimes referred to as tax-deferred assets. These types of tax-deferred assets are often subject to beneficiary designations.

You should consult with your CPA before changing the beneficiary of any tax-deferred assets to your Revocable Living Trust or to any beneficiary, for that matter. You should never change the ownership or title to the trustee without a letter from your CPA telling you to do so since it is rarely, if ever, done.

If proper steps are taken, changing the name on a mutual fund that is not a tax deferred fund should not be a problem. However, the mutual fund administrator needs to understand that you are not anticipating a taxable transaction.

For instance, if you divide the fund or change the name on the account, it may be construed as a sale and repurchase by the fund administrator. This can inadvertently trigger a gain or loss.

Once the fund issues its IRS tax statement for the year it is very difficult, if not impossible, to have the transaction reversed. If there is any indication that there might be a tax impact from changing the name

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on any particular fund, you should consult with your CPA before proceeding.

If your trust is not properly funded prior to your death or permanent disability, then your estate may needlessly go through probate or be subject to a probate court proceeding in order to transfer the assets to your trust and then to the ultimate beneficiaries. We suggest after your trust has been funded or simultaneously with funding your trust that you consult with us so that we can review your work.

If you have a durable general power of attorney, this can often be used to fund a trust in the event of your disability (but not death). However, it is best to take care of funding your trust prior to becoming disabled so that you do not have to rely upon your durable general power of attorney, which is considered a backup and only a "second best" solution.

Although most of our clients take care of funding their trusts, themselves, if you need our help in funding your trust, please let us know. We are here to help if and when needed.

Also, please keep in mind that you should never place real estate into your trust without the assistance of your real estate attorney.

Problems with Vulnerable Elderly Adults

We have noted an alarming increase over the past five years of instances where elderly individuals have been taken advantage of. While there is no one factor that we have noted, there are some common similarities in the cases and we have identified the following high risk factors:

1. Individuals in their 80s or older.

2. No children or the children are not close to their parents.

3. Dementia, Alzheimer's or short term memory loss.

4. Declining health. As people age, often their physical health as well as their mental health declines and they become dependent upon others.

5. Individuals needing companionship and being befriended by someone who either fills the gap of having no children or having no children who are close by or having children who are not close to their parents.

In cases where large amounts of funds change hands, the claim has usually been that a gift was intended. The amounts are normally unusually large and logic dictates that there is a problem.

There have been remarkably few prosecutions of such cases in our area. There are a number of reasons for this.

First, unless someone complains, the problem goes unnoticed. The more isolated the individual is, the less likely it is that someone will complain.

Second, the victim's health may make it difficult for him or her to effectively complain.

Third, the defrauded individual is embarrassed and would rather suffer the loss than admit that they have been taken advantage of. Unfortunately, this allows the guilty party to move on to the next victim.

Fourth, even in those cases that are reported and investigated, Beaufort County does not have enough law enforcement personnel who are adequately trained and qualified to investigate such "white collar crimes." Even in those cases that are prosecuted, often the guilty party negotiates a deal for a lesser sentence.

Fifth, our local Courts are hesitant and slow to react.

We have written similar articles in newsletters to our clients over the years cautioning you about related problems. Unfortunately, we have seen an increase and not a decrease in the number of problem cases.

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You should be aware of the potential abuse and protect yourself and your loved ones accordingly. One of the best defenses is to have not only a team of experienced financial and legal advisors, but also trusted and financially experienced friends and family members who can help, if needed. The more people who are involved, the harder it should be for someone to defraud you, assuming you have the proper checks and balances in place.

If someone who is not currently a beneficiary of your will or trust agreement either directly or indirectly suggests either a gift or that you pay for something for them, this should serve as a first alert to potential problems. It is often merely a suggestion to you that something be done. Sometimes this takes the form of the individual sharing their problems with you that can easily be handled by money.

Often the victim may think it is even their own idea, especially when there is no direct request for funds. Similar considerations apply if someone, who is currently one of your beneficiaries, suggests that you leave them significantly more than you are currently leaving to them.

We have also had some problems with elderly clients being sold somewhat sophisticated and high commissioned financial products. If anyone tries to sell you a financial product that sounds too good to be true, then it probably is and you should only purchase the product after receiving *independent* legal and financial advice.

If there is a commission earned on any financial product that you are going to buy, always make sure that you know how much the total costs and commissions will be and seek independent non-commission based advice. The higher the commission, the more likely it is that self-interest or conflicting interests taint the advice or recommendations given by the person who is recommending the financial product.

Always ask questions in writing. Also, if the response is not in writing, then follow up in writing, acknowledging the response.

We have also seen problems with people soliciting funds from our clients via the mail and telephone asking for somewhat small amounts in exchange for hundreds of thousands or millions of dollars in return. Many of these requests are also internet frauds received by email. If you are offered something that sounds too good to be true, it probably is and you should consult with us or some other trusted advisor or friend.

Unfortunately, we have also experienced problems with children taking advantage of their own parents. We suspect that many older children have not properly saved and are relying upon their parents for their own comfortable retirement. The longer their parents live, the more funds they consume and the less their children will have for their own retirement.

If you believe that you have been taken advantage of, or if you believe that someone is trying to take advantage of you, please do not hesitate to contact our office. We are here to help and to advise you.

New Uniform Trust Code May Create Some Problems for Residents of the Hilton Head Island Area

On January 1, 2006, the new Uniform Trust Code became effective in South Carolina. This new law is also known in South Carolina as the South Carolina Trust Code. Although, much of it is either not new or is a codification of existing case law, there are some significant changes.

On balance, the new legislation is a positive step in the right direction. However, there are some potential issues that may have a disproportionate financial impact on consumers as opposed to creditors and, in particular, the residents of the Hilton Head Island area where the use of revocable living trusts is much more prevalent than in other areas of South Carolina.

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First, there are additional reporting and notice requirements under the new Trust Code, which can increase the cost of postmortem administration. However, for documents drafted after January 1, 2006, we have taken steps to mitigate much of the additional inconvenience and cost.

The new trust law also reverses the presumption as to when a trust is revocable and when it is irrevocable. Since the beginning of United States history most if not all states have held that a trust is considered to be irrevocable unless it specifically states otherwise. On January 1, 2006, the new presumption in South Carolina is that the trust is revocable unless it specifically states otherwise. It applies to trusts created on or after January 1, 2006. In certain situations it can also apply to amendments.

Traditionally almost all lawyers specifically state in their trust agreements whether or not the trust is revocable or irrevocable. I am sure that this practice will continue regardless of the new law.

One interesting aspect is the apparent reason for the change. Over the last 50 years or so, trusts have become more and more popular as an estate planning tool and not just for the wealthy. Most modern trusts are revocable until the death of the settlor or creator of the trust. Many of these have been called “living trusts,” “revocable living trusts,” or “revocable trusts.” Due to the widespread use of such trusts, the drafters of the Uniform Trust Code decided to change the presumption to match the modern trend and the probable intent of most people who set up trusts.

Another significant aspect of the new Uniform Trust Code has to do with spendthrift trusts. A spendthrift trust is one normally created by a person for his or her child or other loved one as the beneficiary. It is designed to protect the beneficiary by providing support while preventing the beneficiary’s creditors from being paid from the trust assets.

A spendthrift trust prevents most creditors from being paid by the trust for money owed by the beneficiary. This prevention can be from a simple debt owed by the beneficiary to a creditor who obtained a judgment against the beneficiary arising out of litigation or bankruptcy.

There was some question, but not significant, about the validity of such spendthrift trusts in South Carolina and what language was required to create one. Effective January 1, 2006 it is clear that such trusts can be used and the language that it takes to create the trust has been greatly simplified.

However, for those trusts created by a beneficiary to allow him or her to enjoy the benefits of his or her own assets while protecting them from his or her own creditors, the new Uniform Trust Code makes it clear that such trusts can not be used. It has been somewhat popular in recent years to go off-shore or to certain select states that allow “self-settled asset protection trusts” to be created in such a manner as to escape potential liability, while enjoying the benefits of the property. Note however, that even these trusts can not be used in most if not all of the United States, if there are present or pending creditors or judgment problems as opposed to future or potential problems at the time the trust is created.

Some high net worth individuals in high-risk occupations have used this technique to shield their assets from lawsuits that may occur in the future. Many states have rejected this concept and South Carolina has made it clear that it is one of those states.

So far so good and the new trust law seems quite reasonable and logical. However, one significant problem with the new Uniform Trust Code is that although it purports to go with the modern trend of avoiding probate when an individual dies, it potentially creates a probate problem. In the past, there was no specific statutory or case law requirement in South Carolina that held a trustee liable for the trust creator’s probate debts absent a specific instruction in the trust agreement to pay the debts.

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There were those who argued contrary to this result, but without statutory or case law in South Carolina to support the position. This meant that if someone died with all of their assets in trust, the trustee did not have to wait until the period for the expiration of creditor claims against the decedent's probate assets to expire before the assets were distributed to the ultimate beneficiaries.

In most revocable trust agreements the trustee is allowed to pay the debts, but not necessarily required to. In most cases legitimate debts are voluntarily paid in a much more efficient manner than if they had been paid through probate; although, there can be some estate tax issues associated with a "voluntary" payment. However, payment while in probate requires that certain documentation be filed with the probate court, which can take substantial additional time and consequently costs.

Under the new Uniform Trust Code, non-probate trust assets can now be subject to probate creditor claims and the resulting time consuming procedures. This may delay the final distribution of trust assets for a longer period of time than under the old law.

From a creditor protection standpoint, typical revocable living trusts offer the creditor the same or very similar protection as property owned as joint tenants with right of survivorship. While the debtor is living, the creditor can collect against the debtor's interest in property that is owned as joint tenants with right of survivorship.

However, except for limited circumstances dealing with certain joint financial accounts, upon the death of the debtor, the interest in property owned as joint tenants with right of survivorship no longer exists as it dies with the debtor. This is due simply to how the debtor chose to own the asset.

Often married couples, who do not use trusts, own their residence as joint tenants with right of survivorship. Upon the death of the first spouse, the residence is not subject to the unsecured creditor claims of the first spouse to die unless the surviving spouse was also liable on the debt. If on the other hand, the house had been subject to a mortgage or a perfected judgment had been obtained by a creditor of the deceased spouse prior to death, then the creditor would be a secured creditor and could foreclose on the property, if the debt is not paid.

Some states give substantial additional protection from creditors for a primary residence and for property owned by a husband and wife as tenants by the entirety, even while both are alive. However, this protection is not available in South Carolina.

Living trusts have operated in a manner somewhat similar to property owned as joint tenants with right of survivorship. While the debtor is alive, a creditor can force payment of their debt from the trust assets, if the creditor is not otherwise paid. Creditors know and understand how property owned as joint tenants with right of survivorship or property held in trust works and can easily avoid any issues by requiring security for a loan and/or having the trust liable for the debt, if the assets are in trust.

Creditors also know that there is an additional risk when giving unsecured credit such as credit cards. This is why the interest rate is so high.

In many cases, if there are no issues or taxes, the assets of a revocable living trust can be distributed within a relatively short period of time after the death of the decedent. We have had numerous cases where there were no significant issues and trust assets were distributed within a few months after the death of the creator of the trust.

Although, it is not clear how the procedure will work under the Uniform Trust Code, the trustee may be liable for the debts of the decedent for up to one year or more after the decedent's date of death. There is also a provision in the new Uniform Trust Code that gives someone with an interest in a trust up to one year after the death of the settlor to challenge the trust's validity.

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The intent is to make the process similar to challenging a will since the legislation deems revocable trusts to be will substitutes. The Uniform Trust Code also uses a lower standard of competency for entering into trust agreements. It is the same standard, which was traditionally reserved only for wills. However, by changing the time limit for challenging a trust, it opens up a revocable living trust that has been in existence for many years to being challenged for up to one year after the death of the creator of the trust.

One of the traditional reasons for using trusts is that to execute one requires a higher standard of competency and the longer the trust is in existence, the less likely it is that anyone can reasonably challenge its validity based upon the competency of the creator of the trust. Now a trustee may not know for a year or so after the death of the creator of the trust whether or not it is valid and whether they can distribute according to the terms. Although the new law gives some protection to a trustee who makes distributions without knowing of a potential contest of the trust agreement, these new procedures may create uncertainty and delay.

Although, I can see some benefit to this lower standard of competency, the combination of this provision with the above postmortem creditor issue will likely serve to increase the time required to terminate the trust and distribute the assets. Consequently, this will increase the expense of postmortem administration of a fully funded trust. This will reduce some, but certainly not all, of the positive postmortem benefits of the revocable living trust when compared to traditional probate. Much depends upon how these new laws are interpreted and implemented.

Consider the following. First the new legislation protects unsecured creditors such as credit card companies, many of whom are banks. Also, many banks serve as corporate trustees and will now be able to keep the assets for up to a year or more after a revocable trust terminates. They may be charging additional trustee fees to protect themselves from claims of unsecured creditors, while possibly protecting the banks that extended unsecured credit.

I don’t think that this was the intent of our legislators and there may need to be legislative corrections. I am also somewhat concerned that the banking and financial industry may have had a disproportionate impact on the legislation.

Also, since the new legislation will have a tendency to increase my revenues and other attorneys in similar situations, I have to ask a question. Is the increased time and costs to the average consumer of legal services worth the potential benefit to the banking, financial and legal industry because of a few people who do not pay their bills? I don’t think so.

Is shifting more costs to the consumer worth the increase in profits to the legal, banking and financial industries? I don’t think so. Keep in mind that it is the banking and financial industry that is aggressively marketing and encouraging the use of unsecured consumer debt.

Although, I have some problems with the new law, it is a step in the right direction. The good news is that the South Carolina Bar Association has a committee looking into many of the issues. Hopefully, the committee will be able to help by recommending further improvements to the new Uniform Trust Code.

The above are just a few of the changes to our law concerning trusts, and estate planning. If you have specific questions as to how the new legislation will affect your particular trust, please call to set up a time to meet. As always, we suggest that you have your estate planning reviewed and updated every 2-3 years or sooner if you hear of major legislation affecting wills, trusts or taxes or if you have a substantial change in your family or financial circumstances.

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