# Ferriter Law Firm

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*Thank you for downloading our FREE information on Estate Law and Elder Planning…*

## Protecting You and Your Family Today and Tomorrow

Some firms provide estate planning services, such as wills and trusts. Some firms provide elder law services, including asset protection and Medicaid planning. Few firms provide both of these services.

At Ferriter Law we believe in addressing your need for both elder law planning on disability, and estate planning on death. What's the use of an estate plan if all the assets are lost to a nursing home because there is no elder law component to protect these assets? And what is the use of an elder law plan for disability that fails to keep the assets in the family?

Ferriter Law provides the complete range of estate planning and elder law services that families need. We have been protecting families for decades with superior results. Not only do we plan for the inevitability of death, but should you or a loved one become disabled, we have the experience to handle the Medicaid issues.

# ESTATE ADMINISTRATION AND PROBATE

Probate is the legal procedure in which the probate court assumes jurisdiction over the assets of someone who has died. The court supervises the payment of debts, taxes, and probate fees, then supervises the distribution of the remainder to the persons named in a will, or to the legal heirs if there is no will. Probate may not be necessary if a deceased person had a properly drafted and funded trust. However, trust administration is necessary.

Family members commonly believe that their deceased loved one properly planned because the decedent had a will, had created and funded a trust, or had designated certain individuals as beneficiaries. In fact, sometimes the decedent's plans may actually have a negative impact on the family with regard to estate taxes, and/or Medicaid planning strategies for the surviving spouse. If this occurs, experienced elder law estate planning attorneys can advise you about post-mortem planning techniques that may rectify the situation and create more favorable tax consequences for surviving family members. Assets that were "exempt" for Medicaid while the spouse was living may now be "available", such as the home. It is always a good idea to review the estate plan after the first spouse dies.

Unlike a will, a trust is a private document and need not be filed with the probate court on death. Nonetheless, the successor trustee must still take steps to administer the trust: Beneficiaries must be contacted and kept informed; the grantor's assets gathered and invested; any debts paid; potential creditors notified; taxes filed and paid; assets and/or income distributed in conformity with trust provisions to beneficiaries, etc.

Successor trustees often lack the time, resources or knowledge to personally administer the trust, and therefore may call upon legal, accounting and investment professionals for assistance. Ferriter Law has been helping families through the process of administering an estate for decades. Our experience will make the difference in how smoothly the process progresses. Call today for your free consultation.

## Successor Trustee's Obligations

Below is a summary of the basic obligations of a successor trustee of a trust.

- **Show loyalty of all trust beneficiaries.** Even if the successor trustee is himself a beneficiary, as trustee he has the duty of loyalty to all the other beneficiaries, including the contingent beneficiaries.

- **Deal impartially with beneficiaries.** The successor trustee may not favor the lifetime income beneficiary over the interests of the remainder beneficiaries who will take after the death of the lifetime beneficiary.

- **Make the trust property productive of income.** This duty is violated if the successor trustee keeps large amounts in a checking account that does not pay interest and does not grow in value. There may be other trust assets which do not produce income, such as a vacant home. These assets must be disposed of or made productive within a reasonable time, since they are considered "wasting" assets which deplete the estate. The trustee may be liable for failing to convert "wasting" assets into productive assets.

- **Invest only in prudent investments.** The prudent investor rule requires:

    1. Consideration by the trustee of the purposes, terms and other circumstances of the trust.

    2. Exercise reasonable care and caution as part of an overall investment strategy which incorporates risk and return objectives reasonably suitable to the trust.

    3. Diversity of investments, unless specific reasons are present not to diversify.

    4. Review at investment and implementation of a formal investment plan.

    5. An investments strategy that considers both the reasonable production of income and safety of principal, consistent with the fiduciary's duty of impartiality towards the beneficiaries and the purposes of the trust.

- **Account to beneficiaries and keep beneficiaries informed.** Upon commencement of the trust administration, the successor trustee must inform all income and remainder beneficiaries of his acceptance of the trust. If a beneficiary requests it, the successor trustee is required to provide that beneficiary with a complete copy of the trust document, including any amendments as well as relevant information about the assets of the trust and the particulars relating to administration. In addition, even without request, all beneficiaries must be provided with an annual statement of the accounts of the trust.

- **Keep trust assets separate.** The successor trustee must keep the assets of each trust separate and keep his personal assets separate from the trust assets. This requires separate bank accounts, brokerage accounts, and safe deposit boxes for trust assets. It is particularly important that you keep the assets of the deceased spouse's Credit Shelter Trust (also known as the AB

Trust or Bypass Trust), if they had one, separate from all other assets, since these assets will pass tax-free at the death of the surviving spouse. If the surviving spouse, acting as trustee, comingles any other assets in with these assets (or even simply takes the assets out of the trust and mixes them with her personal assets), in addition to breaching fiduciary obligations, the successor trustee will have subjected these otherwise exempt assets to taxation when she dies.

- **Avoid conflicts of interest and self-dealing.** The successor trustee cannot buy assets from the trust or sell his personal assets to the trust. He cannot favor himself as a beneficiary at the expense of any other remainder or potential remainder beneficiary. He cannot make any distribution to anyone or any withdrawals from the trust unless specifically authorized by the trust to do so. Conflicts of interest and self-dealing are often vague and ill-defined. If you are a trustee and have any concern as to any specific action or situation, consult with an experienced attorney.

- **Preserve the trust assets and uphold the trust.** The successor trustee is liable if trust assets are lost, misplaced or destroyed because of inattention or negligence. The successor trustee should always be certain that all trust assets are appropriately protected and insured.

- **File tax returns and pay any tax due.** Each trust has a tax year, which like the personal tax year, ends annually on December 31. The trust must have a taxpayer identification number and file a tax return no later than April 15 of the year following. The income tax return for the trust is Form 1041, the Fiduciary Income Tax Return. If this is not filed annually and timely, penalties and interest may be assessed. There may be other tax returns and taxes, like the decedent's personal tax return, which the trust may be required to file, and the successor trustee is responsible for doing so.

- **We recommend that successor trustees consult with a qualified and experienced Certified Public Accountant.** You should not assume that your long-time CPA is necessarily experienced or qualified, since fiduciary taxation differs significantly from taxation of individuals and corporations, the types of accounting that CPA's are generally most familiar with. Before deciding on a CPA for the trust, determine whether that individual has experience and qualifications in this specialized area.

- **Distribute income.** Income generally includes interest earned on bank accounts, CD's, bonds or mortgages, and dividends on stocks and mutual funds. The current income beneficiaries are entitled to all of the income annually. Beneficiaries cannot choose to take less than all of the income, and the trustee is under an obligation to distribute it. What is income? Generally, it includes interest earned on bank accounts, CD's, bonds or mortgages, and dividends on stocks or mutual funds. Certain types of income may also consist of principal as well as income. If this is the case, the portion that is income is distributed and the portion that is principal is retained. If there is any question about what is principal and what is income, consult with the trust's CPA.

- **Handle trust expenses.** The administration of the trust necessarily requires certain expenditures. Example of expenses include CPA fees, legal services, the cost of insurance or real estate taxes on real estate owned by the trust. Every check written by the successor trustee (except to pay himself trust income) and each direct charge to a trust's bank or brokerage account, is considered a trust expense. Like receipts, expenses must also be appropriately apportioned between the income side and the principal side.

- **Delegate investment functions if necessary.** In many instances, individual trustees are not equipped to comply with their investment responsibilities. In these cases, investment professionals may be retained. The successor trustee is obligated to exercise reasonable care, judgment and caution in selecting an investment agent. Trust administration specialists may be found through brokerage houses, banks and some law firms. Note that "delegating" differs from merely obtaining investment advice. It contemplates turning over the investment functions to an advisor as opposed to simply seeking advice, and then acting or not acting on that advice. Even if investment functions are fully turned over to an agent, the successor trustee is still required to monitor the agent's investment performance. A successor trustee should not assume that he has satisfied his investment responsibilities just because he has consulted regularly or occasionally with a stockbroker. Further, stockbrokers are often unaware of the prudent investor rule and fiduciary duties of a successor trustee.

**Good record keeping.** Keeping accurate, up-to-date and comprehensive records is one of the most difficult jobs a successor trustee must perform. If the successor trustee becomes disabled or dies, another person must be able to seamlessly step into his shoes and understand the current status of trust matters. Trust records are also vital because the trustee must be able to explain any trust matter if the IRS or remainder beneficiary requests it. The CPA selected to handle the trust can be very helpful in setting up a sound accounting and record-keeping system. If keeping records is too burdensome for the successor trustee, he can retain the trust department of a bank, the CPA or the law firm to do the work on a fee basis.

## LIVING TRUSTS

Generally superior to a will for transferring assets to heirs at death. Trusts avoid probate court proceedings needed to settle a will and often save the family time and expense in closing the estate. Together with the power of attorney, the living trust also helps avoid a court taking over control of your assets if you become disabled.

Credit Shelter Trusts: Used by couples whose estates are over one million dollars (including your life insurance) to save tens of thousands of dollars in estate taxes by creating an estate for each spouse, allowing a couple to pass up to two million dollars estate tax free instead of only one million.

### What a Living Trust Can Do for You

- It Eliminates Guardianship Proceedings.
- If you become disabled or are unable to manage your estate, your living trust avoids the need for a court mandated guardianship for the trust assets. The successor trustee you've named will step in and manage your affairs without government interference and expense.
- It Avoids Probate.
- With a living trust your assets will go directly to your beneficiaries after your death. There will be no probate attorney's fees or court costs. There will be no court delay in distributing your assets, and all your estate planning wishes will be completely private.
- It Can Reduce or Eliminate State Estate Taxes.
- With living trusts, a married couple can pass $2,000,000 absolutely state and federal estate tax free to their heirs. A single person can pass $1,000,000 State estate tax free.
- It Can Protect Children from Earlier Marriages.
- Both the surviving spouse and the children from a previous marriage can receive fair treatment and protection under the terms of your living trust.
- It Can Insure That Your Wishes Are Carried Out and Are Not Subject to Attack.
- It is generally accepted that living trusts are more difficult to contest than wills. This prevents disgruntled heirs from successfully attacking your estate

plan.

- It Allows You to Restrict How Your Estate is Managed and Spent Even After Your Death.

- It can provide for the care, support and education of your children or grandchildren by turning over assets to them at an age chosen by you.  Even insurance proceeds can be paid to the trust so your successor trustee can manage them for the benefit of your family.

- It Gives You Peace of Mind.

- When your living trust is completed, you and your family will relax knowing that your estate will be managed and distributed by someone you have selected and trust.

Living trusts are just one component of an Elder Law Estate Plan.

## SPECIAL NEEDS TRUSTS

Parents or grandparents of a disabled child should leave assets to them in a special needs trust, to avoid the child being disqualified from receiving government benefits, such as SSI and Medicaid. The reasoning behind these special needs trusts is simple — prior to the protection now afforded by these trusts, parents would simply disinherit their disabled children rather than see them lose their benefits. Since the state wasn't getting the inheritance monies anyway, why not allow it to go to the disabled child for his or her extra needs, above and beyond what the state supplies, such as:

- Clothing
- Essential dietary needs
- Education
- Hobbies, sports, exercise
- Tickets for events
- Health care costs and medical procedures
- Vocational rehabilitation
- Household goods (appliances, furniture, computer, television)
- Personal care products
- Personal services (lawn mowing, housecleaning, babysitting, etc.)
- Music
- Real property
- Automobile (including gas and insurance)
- Transportation (buses, cabs, trains, domestic airfare)
- Vacations

These trusts, however, offer traps for the unwary. Since payments to the child will generally reduce their SSI payments dollar for dollar, trustees of such trusts should be advised to make payments directly to the providers of goods and services. Preserving SSI benefits is crucial since eligibility for SSI determines eligibility for Medicaid.

In other words, if SSI is lost the recipient also loses their Medicaid benefits. In addition, any benefits previously paid by Medicaid may be recovered. As such, one also has to be mindful of bequests from well-meaning grandparents.

Distributions from the trust to the beneficiary should be "in kind" rather than in cash. For example, the trust may own items such as furniture and allow the beneficiary child the use of them. In addition, the special needs trust must be carefully drafted so that it only allows payments for any benefits over and above what the government provides, not only now but also in the future. The child may not control or have direct access to any portion of the trust.

There are two types of special needs trusts. First party and third party. The first party trust is set up by a parent, grandparent or legal guardian using the child's own money, either through earnings, an inheritance that was left directly to them or, perhaps, a personal injury award. These trusts require a "payback" provision, meaning that on the death of the child beneficiary, the trust must pay back the state for a government benefits received. In other words, the state is saying that, we will let you use this money for your special needs, but whatever was not needed should go back towards your basic care. These trusts require annual reporting and accounting requirements to the state.

A third party trust is set up by a third party, usually a parent or grandparent, using their own money. Here, no "payback" provision is required because it was not the child's own money that funded the trust and the parent or grandparent had no obligation to leave any assets to the child. Indeed, requiring a payback provision would discourage many parents from setting up a special needs trust at all. Generally, on the death of the child beneficiary, the balance of the trust is paid out to the disabled child's children first, if any, otherwise to the surviving siblings, then nieces and nephews, etc.

A major issue for parents today is the increased life expectancy of their disabled child. With major advances in medical care, many disabled children, who would have in earlier days predeceased their parents, are now surviving them. In order to solve this problem, parents often leave a disproportionate share of the estate to the disabled child. This can engender hard feelings in siblings who, although agreeable to such an arrangement initially, may find themselves in need of funds later on and resentful of the uneven distribution in favor of the disabled child. The surviving siblings are often the only support network available for the special needs child so it is all the more important to keep peace and harmony in the family.

Often, an analysis with the elder law estate planning attorney will reveal that the income from an equal division of the estate will, in fact, be sufficient to provide for the disabled child's needs. If such is not the case, "second-to-die" insurance may be purchased to provide for any additional funds needed. These policies are written over both parent's lives. Since the insurance company only has to pay when the second parent dies, the premiums are significantly lower than on a single life policy. Consideration should also be given to having the policy owned by an Irrevocable Life Insurance Trust, for tax purposes.

## WILLS

A Will, also known as a Last Will and Testament, is used to state formally who you want to receive your estate and to name an Executor to settle your affairs. Wills are especially important if you have children, to state at what ages they should receive an inheritance and who will manage it for them in the meantime. You may also name a legal guardian for a minor child (under eighteen years of age).

Without a Will, your assets will be distributed according to state law. In many cases, clients are surprised to learn how different state law is from what they would have wished. For example, if you have a spouse and children, assets would be divided between them, instead of to your spouse first, as most people would expect and want.

Some reasons to review your Will are a divorce, remarriage, additional children, a significant change in assets or if it is more than ten years old.

In order for a Will to be valid, there are strict requirements surrounding its execution. It is preferable to use an attorney to ensure that all of the requirements are met and that your wishes will be honored. You may have estate tax issues that need to be addressed (generally for estates valued at more than one million dollars). You may also want to set up trusts for your children so that you may delay the statutory distribution at age eighteen to twenty-five or thirty years old.

So many clients are advised that they need a will. In fact, will planning is becoming obsolete for persons over sixty for many reasons.

Instead of actually solving problems, wills often create them. First, they must be proven to be valid in a court proceeding, the infamous probate. Court proceedings may be expensive, time-consuming and things often go wrong. Also, when the client dies, that is usually out-of-date, having been created decades before. The executors may be the wrong persons, the beneficiaries or their percentages may be wrong or other changes in the family have not been taken into account.

Notice of the court proceeding must be given to certain relatives who may be difficult or impossible to locate. Complications arise with relatives in foreign countries who may need to go to the American Consulate for notarization or "consularization" of legal documents. If there is a disabled child, the court will appoint a lawyer to represent that heir's interests, including preparing a report to the court, and your estate must pay that attorney's fees.

Proof problems with the will may lead to delays preventing needed funds from getting to surviving spouses or children. It is fairly common for real estate to be tied up, while the probate process drags on, causing potential buyers to be lost. In some cases, stock cannot be sold even though it may be falling in value rapidly. Law firms routinely find they must commence probate proceedings as a courtesy for families who cannot afford the legal fees to get the matter started. The cost of court proceedings today may be expected to be in the five figure range.

Two other pitfalls of will planning bear mentioning. First, since the will is filed in court, it becomes a public record. Anyone may go to the courthouse and order a copy of your will to see what you had and who you left it to. Secondly, since notice must be given to the heirs you may have left out, or left less than they may feel they are entitled to, you run the risk of a will contest if your estate is distributed in anything but equal shares.

When you are in probate court, who is in charge? The judge, not you or your lawyer. Don't suppose that the judge will always act in your best interests, as the court may have other interests to consider.

Always better to stay out of court, in our opinion. By using a living trust, instead of a will, you avoid probate court proceedings and keep control, or at least control rests with those you have chosen, if you die or become disabled. The expenses are sufficiently less without court proceedings that you may save tens of thousands of dollars.

The other problem with a will? It only takes effect when you die. Today, about half of all people eventually become disabled. Since the will does not provide for disability, you risk guardianship proceedings. These proceedings occur later in life when someone becomes unable to handle their affairs and does not have an adequate plan set up for disability. In a guardianship, the court will appoint someone to handle your affairs. Not only may it not be the person you would have chosen, it may not even be someone you know. Trusts, which take effect while you are living, are considered a highly effective tool to avoid guardianship proceedings so that the person or persons you choose will be in charge. This way, you may be certain that your best interests will be looked after.

In short, when someone tells you that you need a will, think again. It may be a trust that you need instead. Call us today for your free consultation.

## MEDICAID STRATEGIES

Having to place a loved one in a nursing home is an emotionally wrenching experience. To make matters worse, confusion often reigns supreme when navigating the Medicaid application process. Well-meaning family, friends and even professional advisers may give conflicting or incomplete advice causing families to needlessly lose their property and assets.

By planning ahead, you can easily protect all of your assets from the high costs of long-term care, either through the use of long-term care insurance (LTCI) or, where you do not qualify for LTCI, by setting up a Medicaid Asset Protection Trust (MAPT).

Long-term care insurance is the preferred option for protecting assets from nursing home costs, since it helps keep clients out of the nursing home – by paying for home care. Many clients over the years who were forced to spend their final days in a facility simply because they ran out of money to pay for home health aides. Additionally, for married couples, the home care option may protect the spouse from compromising their own health and finances with the heavy burden of caregiving in their later years.

When the client is turned down for long-term care insurance, or is unable to afford the premium, the next best option is the Medicaid Asset Protection Trust (MAPT). Making assets joint with adult children offers no protection since Medicaid considers all of the jointly held assets to be available for the care of the ill parent, except to the extent the child can prove the amount of their actual contribution. Additionally, outright transfers to children are generally inadvisable since those assets then become exposed to the children's debts and liabilities, divorces, etc. In addition, some children spend the money, refuse to give it back when needed or die before the parent and pass those assets on to their heirs. One exception to the inadvisability of outright transfers to children is when nursing facility care is imminent or at least foreseeable. In such a case, the assistance of an elder law attorney is essential since the amounts to be transferred, the order of assets transferred and where to transfer the assets all require the advice of counsel. The object here would be to protect as much of the assets as possible and to qualify for Medicaid benefits at the earliest possible moment. If someone is just getting older, can't or won't get long-term care insurance and wants to plan ahead to protect their assets, the best option is to set up a Medicaid Asset Protection Trust.

Known as an "income only" trust, the MAPT names someone other than you or your spouse as the trustee, usually one or more adult children, and limits you to the income. The principal must be unavailable in order for it to be protected. These trusts are ideal for the family home as well as for assets the client is only taking the income from or is simply reinvesting. The client's lifestyle is not generally affected since they continue to receive their pension and Social Security checks directly, they keep the exclusive right to use and occupy the home and they preserve all the tax exemptions on the home. The trust may sell and trade assets through the trustee. Nevertheless, the parent retains some measure of control by reserving the right to change the trustee in the event of dissatisfaction for any reason.

The MAPT is currently subject to a look-back period of five years. This means that if assets are transferred and the client needs nursing home care any time after five years have passed, the assets in the trust are protected. Nevertheless, it always pays to get started, since you get credit for the time you accumulate, even if you don't make the five years. For example, if the client needs nursing home care, say, after only four years, then they would only have to pay for the one year that's left.

The Medicaid Asset Protection Trust is also flexible. You may sell the home, the money is paid to the trust, and the trust may buy a condominium, for example, in the name of the trust so it is still protected. The trust may buy and sell and trade stocks and other assets. IRA's and other qualified plans stay out of the trust since the principal of all such retirement plans are exempt from Medicaid. These types of assets avoid probate as they go directly to the designated beneficiaries at death.

MAPT v. Life Estate Deed

Clients often ask whether the home should be deeded to the client's adult children while retaining a life estate in the parent or whether the Medicaid Asset Protection Trust should be used to protect the asset.

While the deed with a life estate will be less costly to the client, in most cases it offers significant disadvantages when compared to the trust. First, if the home is sold prior to the death of the Medicaid recipient, the life estate value of the home will be required to be paid towards their care. If the house is rented, the net rents are payable to the nursing facility since they belong to the life tenant. Finally, the client loses a significant portion of their capital gains tax exclusion for the sale of their primary residence as they will only be entitled to a pro rata share based on the value of the life estate to the home as a whole. All of the foregoing may lead to a situation where the family finds they must maintain a vacant home for many years. Conversely, a properly drafted MAPT preserves the full capital gains tax exclusion on the primary residence and the home may be sold by the trust without obligation to make payment of any of the principal towards the client's care, assuming we have passed the look-back period. It should be noted here that both the life estate and the irrevocable Medicaid trust will preserve the stepped-up basis in the property provided it is only sold after the death of the parent who was the owner or grantor. Upon the death of the parent, the basis for calculating the capital gains tax is stepped up from what the parent paid, plus any improvements, to what it was worth on the parent's date of death. This effectively eliminates payment of capital gains taxes on the sale of appreciated property, such as the home, after the parent dies. Both the revocable and irrevocable trusts also preserve any tax exemptions that the client may have on their home, such as senior and veteran's exemptions.