Law Office of Eileen R. Fitzgerald Newsletter

Fall 2004
Volume 5, Issue 2
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News From Eileen

It's fall! This is my favorite season. I love the crisp weather, the color of the leaves and apple picking in Wisconsin with my family.

My sister, Rita Peckhart, has been working part-time with me in a marketing and legal assistant capacity since I opened my law practice six and a half years ago. Rita has decided to pursue a full-time sales/marketing opportunity with Brighton Gardens by Sunrise in Wheaton. Brighton Gardens is an assisted living community located on Butterfield near Naperville Road. If you or your loved one needs assisted living, give Rita a call at (630) 681-1234.

I took my first real vacation since opening my law office! I went to Ireland with my husband. It was a busy week of sightseeing and visiting with relatives I had never met before. It was an adventure I hope to repeat someday.

Care Giving Agreements

When a caregiver family member is providing care giving services for another family member and is being paid for those services, it is important that a care giving agreement is put in writing. An estimated one in three Americans care for a sick or disabled family member, according to the U.S. Department of Health and Human Services. A care giving agreement outlines the duties and responsibilities of the caregiver and how he or she will be paid. Problems can arise if the arrangement is not in writing and, therefore, not clear to all family members. A care giving agreement ensures that the care is paid for and that family members do not fight after the family member has died. If the caregiver is being paid and the family member must enter a nursing home the payments to the care giver can cause problems when the family member applies for Medicaid. Payments to a care giving family member for services rendered are not considered gifts that are subject to a penalty period. However, Medicaid will consider the payments to be gifts if there is not a written contract or agreement in which the family member agrees to pay the caregiver. An elder law attorney who can tailor the contract to suit the particular situation should draft the contract. Please call if you are a caregiver and want to discuss putting a care giving arrangement in writing.

INCREASED LIMIT FOR SMALL ESTATE AFFIDAVIT

The Governor signed into law SB 2630 which increased the limit for a Small Estate Affidavit from $50,000.00 to $100,000.00. With the increase a probate estate does not have to be opened unless a deceased individual's assets exceed $100,000.00. Assets that must go through probate are assets in an individual's name with no beneficiary, no joint tenant and not in a trust. If the deceased individual had a Will, the assets must go through probate if they exceed $100,000.00.

This new law is a welcome change that will allow individuals with nominal assets to avoid the time delays and expenses associated with probate. A Small Estate Affidavit is usually prepared by an attorney who is familiar with the form and the attachments that a bank or other company will request. A Small Estate Affidavit is prepared listing each asset owned by the deceased individual and the value of the asset on the date of death. One Affidavit will be needed to bring to each bank or broker. The assets will be distributed to the persons named in the Affidavit. Those individuals are either the beneficiaries named in the Will or the heirs of the deceased individual if there was no Will.

PENDING PUBLIC AID REGULATION

Currently there is a regulation pending that could affect Public Aid applications and finances for community spouses. Typically the community spouse (the spouse still living at home) is allowed to keep:

1. $92,760.00 in assets
2. The residence
3. A vehicle
4. Personal belongings
5. Prepaid Burial
6. $2,319.00 income per month

Under the present Public Aid regulations, the community spouse can choose not to disclose his or her separate assets and it will not affect the Public Aid application for the spouse in the nursing home. There are several situations that I have found where the spouse's assets may be separate and not in joint tenancy. Those situations include a retirement account, such as an IRA or 401(k) which is always in an individual's name, never in joint tenancy. Another situation occurs when a couple has married later in life after having previously been married. Rather than combining their assets, they keep them separate so that the children from each spouse will inherit his or her parent's assets. Another situation where spouses may have separate assets is when there is a large estate and the assets have been separated for estate tax planning purposes. The choice not to disclose assets is advantageous for a spouse with separate assets that exceed the current asset limit allowed by Public Aid, which is currently $92,760.00. Under the proposed regulation the community spouse would be required to disclose his or her assets and would be limited to a total of $92,760.00. The result may be that more spouses will get divorced so that the community spouse can keep more than $92,760.00 in assets. Another result may be that parents will gift more assets to children to hold for the community spouse. When the decision is made regarding whether the regulation will go into effect, it will be reported in this newsletter.

PUBLIC AID RULES REGARDING HOMES

Public Aid classifies certain assets as exempt. An exempt asset does not have to be sold to pay for nursing home care. The home is exempt in the following situations:

1. The spouse resides in the home.
2. A disabled or minor child resides in the home.
3. A sibling has resided in the home for the past year and has an equity interest in the home.
4. A child has resided in the home for the past two years and has helped the parent either financially or personally so that the parent could remain in the home.

In situation number one, spouses usually own their home jointly. If one of them is in a nursing home and receiving Public Aid benefits, the home can be transferred to the spouse who is still living in the home (the community spouse). The home does not have to be sold to pay for nursing home care. If the spouse in the nursing home is competent and can sign his or her name, then that spouse can sign the deed transferring the home to the community spouse. If the spouse is not competent, then an agent under a power of attorney or a guardian can sign for the spouse in the nursing home.

In situation number two, if a minor or disabled child has been living with the parent and the parent is now in a nursing home and receiving Public Aid benefits, the home can be transferred for the child's benefit. If the minor or disabled child has a guardian, the home should be transferred to the guardian. A minor or disabled child cannot hold title to real estate.

An example of situation number three, is if two sisters live together in a home and they are each an owner of the home. If they have lived in the same home for at least one year prior to one of them going to a nursing home and receiving Public Aid benefits, then the home does not have to be sold to pay for nursing home care. The home can be transferred to the sister remaining at home.

In situation number, four the home does not have to be sold and can be transferred to the child. The child must prove that he or she has lived in the home for two years. Proof includes copies of bills with the child's name and address, dated two years prior to the Public Aid application. Proof can also include an affidavit from a neighbor stating that the child has resided in the home for two years prior to the date of the Public Aid application.

Public Aid has rules pertaining to reimbursement to Public Aid for payments made on behalf of a client. One way Public Aid gets reimbursed is to file a lien against real estate. A lien will not be filed in the following situations: **If** a spouse lives in the home; **if** a disabled or minor child lives in the home; **if** a sibling lives in the home, is an owner of the home and has lived in the home for more than one year prior to the other sibling's application for Public Aid.

A lien will be filed in the situation where a child has lived in the home for two years prior to the parent's Public Aid application. If the home is transferred to the child, however, Public Aid will not file a lien. Therefore, it is very important that a deed is signed transferring the home to the child if the client wants the child to get the home. The home should probably be transferred in the other situations also because if the Public Aid recipient's name is on the home and the resident of the home dies, Public Aid can file a lien at that time.

In each instance where Public Aid will file a lien, notice must be given. However, if notice of the lien is given by sending it to the owner of the home who resides in the nursing home, that notice may never reach the person who is still living in the home. The resident of the home may not know about the lien until he sells the home or refinances a mortgage on the home. Therefore, if the client does not want a lien filed against the home, it is important that the home is transferred from the client's name so that Public Aid does not have the opportunity to file the lien.

Public Aid will not file a lien against real estate that is held in a land trust. A land trust is a trust established with a bank, where the bank holds the legal title to the real estate and the owner of the home is the beneficiary of the trust. The owner of the home has the rights of ownership of the home and gives the bank direction to transfer the property when it is going to be sold. The interest that the owner of the home has in the land trust is legally not an interest in real estate, it is an interest in personal property. A lien cannot be filed against personal property. Therefore, Public Aid does not have a method to lien property in a land trust. Real estate held in a land trust is protected from a lien being filed by Public Aid. If the real estate was transferred to the land trust shortly before the Public Aid application is filed, Public Aid can deny the Public Aid application because the transfer was an unauthorized transfer and is subject to Public Aid's penalty calculation. Unauthorized transfers and penalty calculations are two topics that will be addressed in a future newsletter.

In summary, the home can be protected from being sold to pay for nursing home costs. However, a Public Aid applicant must be aware of the rules. It is wise to seek the advice of an elder law attorney when filing for Public Aid or when such an application is anticipated. The sooner planning is done, the better. Please call to schedule an appointment if you would like assistance with Public Aid planning or application.

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New FDIC Rules for Living Trust Accounts

The FDIC has simplified the rules regarding insurance for accounts held in the name of a living trust. A living trust is a revocable trust that allows the owner to retain full control over the assets and to designate beneficiaries for those assets after the owner's death. The FDIC insurance rules were changed because they have been confusing for both customers and bankers. Under the new rules, the FDIC will insure up to $100,000.00 for each "qualifying" beneficiary entitled to the money in an account in the name of a living trust. A qualifying beneficiary is defined as the account owner's spouse, children, grandchildren, parents and siblings. Also, the new rules will not limit insurance if there are conditions in the trust document that dictate when or whether a beneficiary will inherit the money in the living trust bank account. For example, a trust could state that a beneficiary doesn't receive money until that person reaches a certain age or graduates from college. The new rules allow insurance for that beneficiary's share of the trust money; prior rules did not. If the owner of a trust leaves money in the account to his two children, the account would be eligible for FDIC insurance of $200,00.00—$100,000.00 for each of the two children.

The new rules do not require that the names of the beneficiaries appear in the records of the bank. The FDIC determined that that requirement was unnecessary, especially since living trust depositors could amend the trust document to change the beneficiaries at any time.

The FDIC will be issuing new publications to make the public aware of the change in the rules. They will also plan special educational programs to explain the new rules to bankers. The new FDIC rules were effective on April 1, 2004.

Gifts and the Gift Tax

Many clients have questions about making gifts to family members and the gift tax. Gifts are often made for estate tax planning or Public Aid planning. Under the current tax law, gifts up to $11,000.00 per person per year do not have to be reported on a gift tax return. If gifts exceed $11,000.00 per person per year then a gift tax return will have to be filed on Form 709. There will be no gift tax due unless gifts exceeding $1 million have been made. So, gifts larger than $11,000.00 can be made, but then a gift tax return should be filed. The gift tax return is necessary because if a person exceeds $11,000.00 per person per year in gifts that person is using part of his lifetime unified credit. Because of the unified credit each person can transfer up to $1.5 million after death and there will not be any estate tax due. If gifts exceeding $11,000.00 per person have been made, the giver is using part of his unified credit during his lifetime and will not be entitled to use all of it at his death. The gift tax return lets the IRS know that the person has used part of his unified credit during his life.