

"Let our advance worrying become advance thinking and planning" – Sir Winston Churchill

ELDER LAW TODAY

C. Dan Campbell, P. C.

4245 Kemp Blvd., Suite 800, Wichita Falls, Texas

76308 (940) 696-5015

Fall 2013

Fall has finally arrived! Hope it brings tons of rain to our watershed!

We are excited at the firm to announce the association of John Lane, a younger attorney, who is, at the same time, well seasoned in many areas of law that compliments the practice. In addition to the areas that we focus on (estate planning, business planning, incorporations, limited liability companies and partnerships, contracts, probate, civil litigation pertaining to estates and trusts, Medicaid planning/asset protection planning) John also handles a wide array of commercial law matters and commercial litigation.

This quarterly newsletter will focus on things to consider when selecting a trustee for a trust that you have or may be establishing. What kinds of trusts might you be needing? That depends on your circumstances.

Spousal Care Protection Trust. Let's assume you are up in years and are concerned about what would happen if you or your spouse needed long term care and the other of you, the one at home, died. It would have been highly desirable from a "Medicaid context" to protect the "half" of the assets that the one at home owned who died (by creating in his or her Will a "spousal care protection trust" which basically protects that "half" for the benefit of the surviving spouse, who is in the nursing home, while keeping him or her eligible for Medicaid). I have previously discussed in considerable detail the benefits of the "spousal care protection trust" –if you need a copy of this Elderlaw Newsletter let my office know and we will send it to you. Who should be trustee of this "spousal care protection trust"? Probably one of your children –assuming you trust his or her business judgment and, obviously, his honesty and integrity.

Special Needs Trust. Or maybe you have a disabled child or grandchild who is receiving or may be receiving government benefits (social security disability for example). If you left assets outright to that beneficiary, he would immediately lose eligibility for those benefits. So, you should establish under either your Will or your revocable trust (if you have one) a "special needs trust" for that beneficiary. The question, again, arises: who should you name as trustee of that "special needs trust".

Spendthrift Trust for the Irresponsible Beneficiary. Or, perhaps, you have a child or grandchild or other beneficiary who is a "spendthrift" (a dollar burns a hole in his pocket the moment he receives it) and is up to his ears in debt. Rather than leaving the assets outright to him, you could create an irrevocable trust (under either your Will or revocable trust) that would be designed to protect him from "himself" as well as potential creditors.

Spendthrift Trust for the "Target Defendant" Beneficiary. Another variety of the "spendthrift trust". Quite often a client will come in to my office who has a child who is in a high risk occupation (eg: a medical doctor who has "target" tattooed on his back for a medical malpractice lawsuit). Or maybe the intended beneficiary is in a very difficult marriage where divorce may not be out of the realm of possibility. In either case, I will quite often recommend that, rather than leaving his share of the assets outright to that beneficiary (thereby exposing these assets to potential judgment creditors or claims of his spouse), that instead the client create under either his Will or revocable trust, a "spend thrift trust" with provisions for the beneficiary to be entitled to receive distributions from the trust for 4 reasons: for his health, education, maintenance and support. The trust would be designed to last for his lifetime and upon his death, the beneficiary (under his own Will) would have the right to say who gets the balance of his trust (called a "power of appointment").

Who should be appointed trustee of the trust? This is one of the most important decisions you will make. Many people will appoint a family member, close friend or business associate to be trustee. The trustee will be responsible for managing the trust after you are gone in a manner that hopefully is in keeping with what you would have desired (as expressed, of course, in the trust terms set forth in your Will or revocable trust). He will be responsible for making investment decisions, filing tax returns, and making distributions to beneficiaries. He should have some basic knowledge of estate tax law, trust law and income tax law. Although he can hire professionals to help (CPAs, lawyers, investment advisors) it will nevertheless take a significant amount of time to assemble this team of experts and

coordinate their work and, even though he has help, **it will still be his responsibility!**

You may decide that the Trust would be better off by naming a professional, such as a bank or trust company to do the job. Professional trustees charge a fee based on the size of the trust assets and, in case of modest trust assets, the charges may be hard to justify. One professor, Gerry W. Beyer, at Texas Tech law school, who has written several books on estate planning, says that a trust of \$50,000.00 or less could not afford a professional trustee because of the charges. I somewhat agree with that, but think that the "cutoff" should be \$100,000.00 before a professional trustee could be justified. (The fees of the professional trustee might be subject to negotiation if the family has a close relationship with the bank

or professional trustee –ie: large amounts on deposit with that particular institution, etc.)

Keep in mind that the burden on the trustee may increase astronomically if there is discord within a family. This is one very good reason why a professional trustee is worth its weight in gold. For example, the testator who has had multiple marriages (with beneficiaries from more than one marriage) may want to use a professional trustee to reduce bickering and potential litigation among heirs. The testator might also want a professional trustee if he is concerned that a family member may try to "trump" his intended estate plan.

Well, that's it for now! I hope we all have a great cool and WET fall!



Elder Law Today is written by C. Dan Campbell, Attorney at Law, who is Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law and Civil Trial Law. **This newsletter is not intended to be nor should it be construed as the giving of legal advice. Before taking any action referred to in this newsletter you should consult with an attorney who is knowledgeable in this area of law.** This newsletter is published as a service of C. Dan Campbell, P.C., 4245 Kemp Blvd., Suite 800, Wichita Falls, Texas 76308. Visit our website at: www.cdancampbell.com

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ATTORNEY AT LAW
4245 KEMP BLVD., SUITE 800
WICHITA FALLS, TX 76308**

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C. Dan Campbell, P. C.

4245 Kemp Blvd., Suite 800, Wichita Falls, Texas 76308 (940) 696-5015

Summer 2013

For this quarter's Elder Law Today, I thought I would summarize some articles I have read dealing with how to select a caregiver. There are two basic types: (1) home health care aides (who provide personal care - bathing, toileting, grooming, blood pressure checks, empty colostomy bags, administer meds, etc.) and (2) home care aides (who are basically "companions" and who help in meal preparation, laundry, housekeeping, running errands, etc.) So, how do you know which "type" to hire? There is a website you can go to that has a "needs assessment checklist" –the website is: www.caregiverslibrary.org

After you determine which type you need, how do you go about finding that person? Two choices: go through an agency or "go it alone". There are advantages and disadvantages to each. The advantage of using a healthcare "in home" nursing agency is you can have some assurance that the aide has been screened for criminal background issues and competency to do what he/she is being hired to do. Also, you can also assume that the aide has been trained and will be supervised in the tasks that he/she is assigned to do. Also, another significant advantage is that since he or she is part of an organization, if the aide decides to quit (or is sick and unable to be at your home) the agency will provide a substitute on a moment's notice. Also, the agency will be responsible for payroll taxes, worker's compensation, insurance and bonding of the employee which can be a big relief.

On the other hand, hiring someone yourself, if the person comes recommended from a reliable person who has used that aide, may give you peace of mind knowing that you can trust that aide to discharge his/her duties in a competent manner. And, hiring someone directly means that you will be paying less per hour or day. One article I read suggested in order to locate potential candidates "cast a wide net" – get suggestions from the older person's primary care physician or nurse; the

local hospital's social work department; local social service and/or disease specific organizations (eg: Alzheimer's Association); area agency on aging; the older person's minister; and/or friends and neighbors who have used the prospective home health aide. (And as far as handling the payroll taxes, worker's compensation, insurance, you could hire an accountant to take care of this for you.)

10 Questions to Ask a Prospective Aide:
(these come from one article I read that suggested to ask these questions):

1. Provide me with your name, address, t/p #, Social Security #, current photo I.D. (driver's license, etc.), so I can run a background check.
2. Provide me with any certificates showing that you have received specialized training in handling particular conditions that my loved one is dealing with (eg: Alzheimer's, Parkinson's etc.)
3. Are you trained in CPR – do you have any certificate showing you have been trained in CPR?
4. Tell me about your experience as an in-home aide?
5. Please provide me with references as to previous persons you have worked for?
6. Why did you leave your last position?
7. What are your expectations if I hire you?
8. What hours/days will you be available?
9. What hourly/daily rate do you expect and when do you expect to be paid?
10. What do you like/dislike about rendering home care?

Well, that's it for now. Hope you have a great summer. And, as the signs say "Pray for Rain"

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Spring 2013

ELDER LAW TODAY – SPRING 2013

Well, as they say, “Spring has sprung” and I thought I would take this opportunity to give a brief review of the “basics of Medicaid”. For some of you this will be “old hat”. For others, you may learn something you didn’t know. In order to understand Medicaid qualification, you first need to know how Medicaid treats your assets. Basically, Medicaid breaks your assets down into two separate categories: exempt (non-countable) and non-exempt (fully countable).

In Texas the following assets are generally not “countable” for Medicaid qualifying purposes:

- The home so long as its value does not exceed \$536,000.00 in equity (in case of a single person applying for Medicaid, he or she will need to sign an “intent to return home” affidavit even if it never actually takes place). Beware, though, if a single person applies for and receives Medicaid, it will be necessary to take legal steps to prevent the homestead from being taken by the State when the nursing home resident dies (the so called Medicaid Estate Recovery Program). We know how to protect the homestead from MERP!
- One vehicle (regardless of its value and regardless of whether or not the Medicaid recipient is able to drive). Again, we need to beware of MERP and make sure the car does not become subject to the Medicaid Estate Recovery Program when the Medicaid recipient dies.
- Household and personal belongings, such as furniture, appliances, jewelry and clothing.
- Prepaid funeral plans and burial plots (the funeral plans must be “irrevocable” meaning they cannot be “cashed in”).
- Cash –on hand or in a checking/savings account of no more than \$2000.00 for a single person.
- Term life insurance policies

All other assets are not exempt –they are “countable” for Medicaid qualifying purposes.

This includes checking accounts, savings accounts, CDs, money market accounts, stocks, mutual funds, bonds, annuities, IRAS, pensions, rent houses, cash surrender value of life insurance policies, and practically every other asset you can think of!

While the Medicaid rules themselves are pretty complicated and somewhat tricky, for a single person it’s safe to say that you will qualify (assuming you meet the medical necessity and income tests) if you have only exempt assets plus a small amount of cash (not over \$2000.00).

For a married couple, where only one spouse is in the nursing home, the rules are much more liberal in terms of what assets the “spouse at home” can keep. Generally, the “spouse at home” can keep one-half of the “countable assets” up to a maximum of \$115,920.00. Of course, this does not mean that there are not things that can be done to protect assets beyond this \$115,920.00.

It has been our experience, that in at least 90% of the cases we see, substantial assets can be protected –even if the client did not take any steps prior to entering a nursing home. (Now this is not to say that advance planning is not good. With advance planning the likelihood is that much more assets can be protected than if nothing is done until the time that entry into the nursing home is at hand). But the point that I am trying to make is simply this: contrary to popular belief (and what your neighbor or even an attorney who is not knowledgeable in this area of law may have told you) *we can still protect substantial assets even if no advance planning occurred!*

How much can we protect? As a general rule of thumb, for a single person, we can often protect fifty percent (50%) or more of his or her countable assets. And for a married couple (with one spouse at home) we can often protect all of their countable assets.

Well, I hope this “refresher” course has been helpful to you. If we can ever be of assistance in helping you or a loved one protect assets if long term care is needed, please call. Also, if you or

your loved one is a military veteran or the surviving spouse of a veteran, and you are curious as to whether a VA Pension (“aid and attendance”) might be available to pay for private duty nursing services in your home or to help pay for the costs of an Assisted Living Facility give us a call.

That’s it for now. Have a wonderful Spring!

P.S. I am giving a seminar on Tuesday, April 9th, at 5:59 p.m. in the Chase Bank Tower, 4245 Kemp Blvd, 5th Floor Conference Room, Wichita Falls, Texas . The topic will be “Medicaid Planning-The Basics and Beyond”. If you are interested in attending please call our office to make a reservation.

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