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# Brooks & Brooks, LLP
## Estate Planning with Certainty

## THE NEW FUTURE

Within the next 10 years or so, more wealth will be passed down from the current generation to the next than at any time in the past. The post war (WW II) period has seen the largest expansion of the American economy than ever before, leading to a great number of people having a great deal of value in their personal estates. As this wealth passes down to the next generation, we expect to see problems in at least three areas.

***First,*** there will be the death tax issue. Many seniors now have taxable estates of their own, which will be passed down to the next generation and added to what their children already have, creating even more wealth. That wealth will be taxed yet again in their children's estates.

***Second,*** as the cost of long-term care continues to rise nationally, wealth passed down from seniors to the next generation may be subject to long-term care expenses by their children as they age. Again, a big beneficiary of this circumstance will be government.

***Third,*** as our society continues its trend to be more litigious, seniors' children may be more susceptible to creditor and divorcing spouses' lawsuits, which could jeopardize their inheritance.

***WHAT TO DO?*** We believe a growing trend will be the use of asset protection trusts. Here's how it works: the senior client develops an estate plan using one or more trusts. Upon the senior's passing, the distributable assets will continue to be held in trust for the benefit of children beneficiaries (or other beneficiaries). The beneficiaries then have the "use" of the trust fund, but without having to "own" the fund. This allows the beneficiaries to enjoy the income as a supplement to their own retirement and, depending upon how the trust is structured, they may also use some of the principal of the trust if they need.

If structured correctly, the principal of the trust will never be taxed to the child beneficiary when the child passes on. However, the child will have the ability to determine who will be the next beneficiary of the trust fund and with that comes the ability to continue the trust for the next generation's benefit and beyond.

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**Free Workshops**

<u>*April 17, 2012*</u>
Myers Steakhouse
Salamanca
6:30 to 8:30 p.m.

Justice Learned Hand, U.S. Appeals Ct. Justice - *"There are two systems of taxation in our country: one for the informed and one for the uninformed."*

***The New Future, cont'd.***

The power of using this technique with respect to death taxes can be very compelling. If a senior has a federally taxable estate, the amount of tax, when considering state death taxes also, can amount to 50% or more! This will also apply in the children's generation. What this means is that when each generation passes, the governments are standing in line with their death tax hands stretched out collecting taxes on money that has already been taxed at least once. By keeping the funds outside of the tax system (in a trust), they can be allowed to grow and remain intact for several generations.

On the creditor protection side, if the trust is structured as a "total protection trusts," then all of the principal can be totally protected from any beneficiary creditors' claims, including a potential beneficiary's divorcing spouse. This obviously can have a tremendous effect on inherited money. If principal payments to a beneficiary can only be made in the trustee's discretion, then courts cannot force a trustee to make a payment to a beneficiary or on the beneficiary's behalf. In a beneficiary divorce proceeding, the entire amount of the funds cannot be considered as "marital property" and thus is not subject to division and payment to the beneficiary's spouse.

A further benefit of this technique comes into play if the beneficiary has children in college. A direct inheritance adds to the amount the child beneficiary must report on his or her FASFA Form and could decrease the amount of financial aid his or her children might receive. By having the fund held by a trust, the child does not have to claim that he or she owns it, because it is owned by the trust, even if the child is the trustee! Again, use without direct ownership.

We at ***Brooks & Brooks, LLP*** have successfully represented many clients in developing plans to eliminate or reduce estate taxes, protect assets from the Medicaid Spend Down Rules and protect beneficiaries from creditors. In certain circumstances, we have assisted clients in developing plans which will protect against all three of these concerns. Each client's circumstances are unique to the client and the client's family. Understanding the client's concerns and desires helps us to recommend and implement a plan which will achieve the client's wishes.

## MEDICAID

**Be careful who you loan money to!**

A recent case, Komanoff Center v. Daines, 85 A.D. 3d 1183, held that a Medicaid applicant was denied benefits because an "uncompensated transfer" to her daughter, which was to repay the daughter for her mother's expenses that were advanced by the daughter with the "expectation" that mother would reimburse her daughter later.

The mother did, in fact, reimburse the daughter and that reimbursement was held as "an uncompensated transfer" (gift) and the mother was denied Medicaid benefits. On appeal to the Appellate Court, the Court determined that the Medicaid denial was "rational and not arbitrary and capricious"; and further, there was no contemporaneous written agreement showing the intention. The lesson: if you are going to advance payments for someone else's expenses, get a promissory note from them right away... and then get your money back quickly!