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BROOKS & BROOKS, LLP

Estate Planning with Certainty

MINERAL INTERESTS – ANTICIPATING MARCELLUS GAS EXPLORATION IN NEW YORK

USE OF ENTITIES BY LANDOWNERS (Oil & Gas Lessors)

It is becoming increasingly popular to use an entity (usually a limited liability company "LLC") as the instrument to house mineral interests held by landowners. There are several reasons:

1. Maintenance of the Property – An LLC allows the landowner to establish a framework for managing and maintaining the property and/or the oil and gas interests during and after the landowner's life. Managememt is vested in the Manager of the LLC and the operating agreement contains management and succession provisions for what types of decisions the manager is eligible to make and the landowner's succession plan, so that certain designated persons would be appointed to serve after the landowner is no longer involved with the LLC by reason of death, disability, or resignation.

2. Maintaining Ownership of the Property - The landowner typically retains the ability to transfer indirect ownership interests in the property and/or oil and gas interests to family members without fractionalizing the ownership of these assets or affecting the continuity of the family's property and/or oil and gas investment strategies.

3. Ability to Restrict Transfers - The terms of the LLC's operating agreement can be tailored to limit who can receive an interest in the LLC and, indirectly, an interest in the underlying property and/or oil and gas interests. Appropriate buy-sell terms in the agreement can enable the landowner to continue the ownership of the property and/or oil and gas interests within the landowner's family lines and restrict the right of non-family persons to acquire any of the interests.

4. Liability Protection - Oil and gas interests owners generally have minimal liability exposure in connection with the production of oil or gas on the properties in which they have retained a royalty interest.

ESTATE PLANNING STRATEGIES

1. Revocable Trusts and Testamentary Planning - Revocable trusts are used widely in estate planning, which also can hold and manage oil and gas interests. These trusts provide many benefits, such as: (a) privacy for the disposition of the Grantor's estate assets, (b) estate tax planning through the creation of multiple trusts, (c) a management plan during a period of incapacity of a Grantor, (d) avoiding probate in the Grantor's state of residence and in states that the Grantor may own real estate interests.

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Free Workshops

June 18, 2013

Old Library, Olean
6:30 to 8:30 p.m.

July 11, 2013

Moonwinks, Cuba
with Kevin Gildner
Community Investments
6:30 to 8:30 p.m.

July 16, 2013

VFW, Randolph
6:30 to 8:30 p.m.

August 20, 2013

Holiday Valley, Ellicottville
with Laura Dealy
Manning & Napier
6:30 to 8:30 p.m.

2. Irrevocable Asset Protection Trust – This type of trust is commonly used by a Grantor to transfer assets to individuals, usually of a lower generation, to provide the following benefits: (a) continued direct or indirect control of the assets through the Trustee, (b) creditor protection for the beneficiaries, (c) protection from marital discord, and (d) estate tax exclusion – sometimes a trust is designed specifically so the assets in the trust are not included in the Grantor's taxable estate and also not included in the beneficiaries' estates.

We at Brooks & Brooks have helped many clients develop plans to preserve and protect property interests, so that they may be passed down to family members for generations to come. With the possibility of deep well oil and gas exploration coming to New York, we believe the need for this type of planning will be even greater.

A Look at Medicare "Observation" vs. "Inpatient"

According to a Brown University Study, over the last three years there is a 25% increase in the number of patients that have been classified as "outpatient" under "observation" rather than being formally admitted as "inpatient." *Why is this important?*

Apparently the answer lies in reimbursement rates. The Medicare system is pressuring hospitals to classify patients as under "observation" because the reimbursement rate to the hospital is 1/3 of what it would be for that same person as "inpatient." This problem is further complicated because if Medicare determines that the hospital incorrectly classified the patient as "inpatient" rather than under "observation," the hospital will be liable for the cost of services it rendered to that patient.

Generally speaking, it is not unusual for hospitals to classify a patient in its ER to be one under "observation" until the patient has been formally admitted. However, it appears that in order for the hospital to avoid penalties imposed by Medicare as a result of the re-admission of the patient and also to avoid costly audit expenses by Medicare, hospitals are keeping patients in "observation" status rather than formally admitting them as "inpatient."

What does this mean for the patient? By being classified as under "observation," the Medicare patient's hospital stay is covered by Medicare Part B, rather than Part A. Part B results in the patient having more deductible costs out of pocket. This situation is compounded gravely if the Medicare patient is discharged to a skilled nursing or rehabilitation facility. If the patient has been classified as "inpatient" and has a three night stay in the hospital; and if that same patient requires skilled services in the nursing home (therapy), then Medicare is responsible to pay the nursing home in full for the first 20 days and from the next 80 days, to pay everything except $144.50 per day. With private pay cost of skilled nursing/rehabilitative care being what it is, it is obvious that a discharge from hospital while being classified as "observation" can result in thousands of dollars of additional costs to the patient at the skilled nursing/rehabilitative services facility.

The good news is that there is a federal lawsuit currently pending which is challenging the actions of Medicare and the hospitals. In the meantime, it is very important that Medicare patients be vigilant as to the status of their own admission to the hospital and with the help of their physicians and advocates, they should insist that they be admitted as "inpatient" unless "observation" status is absolutely warranted. This is critically important if the patient will likely require skilled nursing or rehabilitative services upon discharge.

"Picture a law written by James Joyce and edited by E.E. Cummings. Such is the Medicare statute, which has been described as "among the most completely impenetrable texts within human experience." Rehab. Ass'n of Va. v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994). "