September-October 2014 Volume 24, Issue Number 4

BROOKS & BROOKS, LLP

Estate Planning with Certainty

Pitfalls of Self-Made Estate Plans

A recent interesting case from the Erie County Surrogate's Court reinforces the need to have one's estate plan documents carefully prepared under the supervision and assistance of a competent estate planning attorney.

In Matter of Borowiak, Judge Howe refused the surviving spouse's petition to interpret her husband's Will to give her the entire estate. The decedent had apparently prepared his own Will and appointed his wife to be "sole executor of my estate…". Curiously, the Will did not provide for any distribution of his estate to named beneficiaries. His surviving wife contended that because it was **not** an attorney drafted Will, a relaxed view of the contents of the instrument should be taken and that the designation of her "to be sole executor of my estate" should be construed as encompassing language to mean "to inherit all my estate." The wife asked the Court to interpret the language of the Will from the decedent's point of view, as a layman, and more liberally than would be the language of an attorney, especially that the decedent's use of the term "sole executor" should be interpreted to mean that he intended the phrase to both appoint her as the estate fiduciary and name her as the sole beneficiary.

Simply stated, the Court denied the construction request and ruled that the estate be distributed under intestacy (as if there were no Will), which meant that the surviving wife had to share the estate with a daughter. The Court opined that the purpose of a Will construction proceeding is to determine a decedent's intent from a reading of the entire Will document. The Judge added that the prime consideration of all construction proceedings is to determine the intent of the decedent as expressed in the Will.

The Court pointed out that the intent must be gleamed not from a single word of phrase but from a "sympathetic" reading of the Will as an entirety and in view of the facts and circumstances under which the provisions of the Will were framed. The Court noted that the decedent's Will contained only two substantive provisions, a designation of his wife as executor and his do not resuscitate instructions in case of an accident or some other event. (The second provision is not one that should be inserted in a Will, but rather in a Health Care Proxy and/or Living Will.)

The Court further found that under the appropriate statute, only the first substantive paragraph of the decedent's Will constituted a Will within a meaning of the statute and relevant case law, its sole purpose being to direct who shall be the executor. As a result of no dispositive provisions in the Will, the Court was constrained to rule that it was not statutorily, linguistically, or legally proper to interpret the instrument as the wife requested and as such, her Petition was denied.

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Free Workshops

October 21, 2014

Westfield YWCA with
Andersen Cuddihy, Inc.
6:30 to 8:30 p.m.

November 13, 2014

Olean Bartlett Country Club
6:30 to 8:30 p.m.

November 20, 2014

Fredonia White Inn with
Luke Buehler
Summit Wealth Management
6:30 to 8:30 p.m.

Pitfalls of Self-Made Estate Plans, Cont'd.

It would appear from this case that the decedent either wanted to save attorney's fees in the preparation of the Will, or thought he knew what he was doing. It is very apparent that this was not the case. We can assume that he may have intended that his wife have and enjoy everything that they had worked their lives to accumulate, since that is our experience in representing clients. However, when it comes to probate and New York Law, there can be no assumptions. New York Law assumes, if you do not have a Will, that you have intended to benefit not only your spouse, but also your children at the same time. To provide otherwise, one must take action and be sure that action is going to be upheld in Court, or through a trust, which avoids the Probate Court entirely.

Another Example of What Not to Do to Protect Assets from the Medicaid Spend Down Rules

A 2013 Bankruptcy Court decision (*In re Woodworth, 2013 WL 486669)* is yet another example of how risky it is transfer money/assets directly to children as a means to later qualify for Medicaid. In the Woodworth case, a parent had transferred her life savings to her daughter, ostensibly to protect it from the Medicaid Spend Down Rules later. Eight years after the transfer the child engaged in some complicated, but ill-fated asset protection planning with a non-attorney planner using the money received from her mother. Then daughter files for bankruptcy and the argument surfaces that the daughter has made a fraudulent transfer of money/assets. The daughter admits to the fraudulent transfer; however, claims that the money was not hers and thus not part of the bankruptcy estate. The mother even testifies that she "never intended to make a gift" to her daughter and further stated that she gave the money to her daughter to render herself

As what now has become almost too predictable, the Court held in favor of the bankruptcy trustee and against the transferee of the funds. The asset protection planning the daughter engaged in was reversed and the money was essentially given back to the daughter's bankrupt estate. Mother's entire life savings were drained away to daughter's creditors because she did not engage in appropriate predictable asset protection planning.

Had mother created an asset protection trust for Medicaid purposes and funded it with her life savings, it would have been protected from her daughter's creditors and would have still been available to her (income only) and to the daughter following the daughter's personal bankruptcy.

We at Brooks & Brooks have counseled clients for years to consider a Medicaid Asset Protection Trust as the only real technique that will accomplish the protection of assets that is desired and will keep those assets protected from other family members' problems, whether it be a divorce, creditors or even a child's premature death. In the Woodworth case, the mother risked her family wealth to her daughter's creditors, but she also risked the possibility that her daughter could have died prematurely and then where would mother's wealth have gone? It would have passed through the daughter's estate and be distributed to whomever was her beneficiary.

General Estate Planning Knows No Bounds!

A recent Florida 3d Circuit Court of Appeals Case (Goodman v. Goodman) gives us information on a very unique estate planning technique to benefit a potential beneficiary. In this case, a husband petitioned to adopt his 42 year old girlfriend, which, if completed, would give her access to a trust fund created by the husband and his spouse for their "children." Interestingly, the case was vacated by the Court for lack of notice to the relevant parties... was one of the relevant parties the husband's wife?