On Law

A Monthly Publication from CMDA

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Cummings•McClorey CMDA Davis & Acho, P.L.C.
Attorneys and Counselors At Law

Firm Expands Trusts, Estates and Elder Law Practice Group

Since the Firm's inception in 1965, our skilled and experienced attorneys have offered a broad range of estate planning services to our clients. Each client is unique, and we take the time to understand their specific needs to create a plan that ensures assets accumulated during their lifetime are protected and distributed appropriately.

As CMDA continues to grow and practice areas continue to develop, we are pleased to introduce the newly-expanded **Trusts, Estates and Elder Law practice group**. While the majority of services that fall under this practice group have been offered by our Firm for nearly 50 years, we are pleased to now offer clients the services of an elder law attorney.

Elder law focuses on the legal issues that come with aging, such as: How will we afford the cost of nursing home care should either or both of us need it? Who will care for us when our health declines further? Can we remain in our own home with assistance or will we need to go to a nursing home? When is the best time to apply for Medicaid benefits?

Sean J. Nichols has joined our Firm as an Of Counsel attorney in our Livonia office. He focuses his practice on elder law, estate planning, and probate law. Prior to joining CMDA, Mr. Nichols owned his own practice in Plymouth, MI where he assisted clients with all aspects of elder law and estate planning, including assisted living/ nursing home planning, guardianships, conservatorships, probate, and real estate matters.

He received a Juris Doctor degree from Michigan State University School of Law and an undergraduate degree in economics from the University of Michigan. Mr. Nichols' experience handling elder law matters is a welcome addition to the Firm's Trusts, Estates and Elder Law practice group.

We have lengthened our newsletter this month and focused every article on estate planning and elder law matters. We hope you find the content useful and informative.

What is Elder Law?

Sean J. Nichols

Elder law is a fairly new and growing area of the law and focuses on the legal issues that come with aging. Some of the most common legal questions that arise are in regard to Medicaid nursing home planning, guardianships, and conservatorships.

Medicaid Nursing Home Planning

One of the most difficult decisions many families face is whether to put a loved one in a nursing home. Family members try to avoid this option because they would prefer to care for their loved one at home and are concerned with the high costs associated with nursing home care. Nursing homes may be the best option in some cases, however, as they provide a level of care that many families cannot provide. Mr. Nichols assists clients with obtaining affordable nursing home care and preserving as much of their estate as possible.

Medicaid is a joint federal and state program that pays for

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Probate 101: An Overview

Karen M. Daley

What is Probate?

Probate is the court-supervised process of locating and determining the value of the assets owned in the individual name of a deceased person, referred to as a "decedent," paying the decedent's final bills, estate taxes and expenses of administration, and then distributing what is left of the decedent's assets to his or her heirs. If a person dies leaving a valid will, then their estate is distributed in accordance with the provisions in their will. If a person dies without a will, this is called dying "intestate," and their property must be distributed in accordance with Michigan's law of intestate succession.

When is Probate Necessary?

Generally, probate is necessary when a person dies leaving property in his or her own name or having rights to receive property, such as a wrongful death claim or a debt owed to the decedent. However, not all property in which the decedent has an interest will be subject to probate. Property that will pass to a new owner on death without going through probate includes: (1) property owned by the decedent and another person as joint tenants with right of survivorship; (2) beneficiary designated properties, such as life insurance, pension benefits, and IRAs; and (3) properties owned by a revocable trust.

What Are the Types of Probate Estates?

Informal Estates

Unsupervised administration of an estate may be conducted using informal or formal proceedings. In an informal proceeding, no court hearings are necessary, a personal representative is appointed by the court and given authority to probate the estate, and most of the activities involved in probating the estate are done without court involvement.

Formal Estates

While very similar to informal proceedings, probating a decedent's estate using formal proceedings provides the security of a court order deciding issues within the estate. Formal proceedings are conducted by a judge, rather than the probate register, with notice given to interested parties. Formal proceedings may be used to begin the administration of an estate or they may be used at any time during the administration of an informal estate to have issues within the estate decided by court order.

Small Estates

Michigan law provides a streamlined process for distributing the assets in a decedent's estate if the balance of the estate after the payment of funeral and burial expenses is $18,000 or less. The process is usually quick and no court hearings are necessary.

Supervised Estates

Supervised administration of an estate is available in limited circumstances and provides close oversight by the court during the probate process. They are the most expensive of the probate estates because litigation is usually involved. With proper planning, court supervision of estates can usually be avoided.

How Long Will Probate Take?

The time it takes to probate an estate depends on how complicated the estate is. For example, complicated tax situations, questions regarding the value of property, the need to sell assets, disputes over debts, lawsuits against the estate, or difficulty finding heirs can all cause delays. A lawsuit involving a challenge to the will may cause long delays. As a result, probate can take anywhere from six months to several years. However, the average estate takes approximately one year to get through probate, unless you are able to use the procedure for small estates which is much faster.

Why is it Important to Have a Probate Attorney?

You are not required to hire an attorney to probate an estate, but probate can be complicated and you can be personally liable if you do something wrong. Probate law is an area that is very specialized and includes a lot of deadlines, documents and red tape. One minor omission or missed deadline can have serious consequences. A probate attorney can be used to take a personal representative through the entire probate process from start to finish. A probate attorney can also be hired to advise the beneficiaries of an estate on legal and other matters that arise during the course of the probate process.

Karen M. Daley

Karen M. Daley is an attorney in our Livonia office and is the head of the Firm's appellate practice group. She concentrates her practice on appellate law, municipal law and probate law. She may be reached at (734) 261-2400 or kdaley@cmda-law.com.

Elder Law (cont.)

health care, including nursing home care, for low income individuals. Most people who need nursing home care will eventually need Medicaid. To ensure as much money is preserved as possible, it is critical to have a clear understanding of Medicaid's complicated rules *before* a loved one begins receiving benefits. For example, if your loved one applies for Medicaid benefits while their assets exceed the eligibility limit, the application will be denied. Additionally, they may be advised to "spend-down" to a certain amount. This is where the wrong move can be very expensive. With the assistance of an elder law attorney, strategic moves can be made to protect as many resources for the family as legally possible. When there is a spouse still living at home, this can be the difference between financial security and financial devastation. Families trying to navigate the complicated Medicaid process without the knowledge and experience of an elder law attorney can end up unnecessarily spending their every last dime to pay for nursing home bills.

An elder law attorney can assist clients with the lengthy and complex application process and can also help clients plan for Medicaid's estate recovery program to prevent the loss of a home or estate.

Guardianships and Conservatorships

If a loved one is unable to make important financial or health care decisions due to a medical condition, such as being seriously ill or having Alzheimer's disease, a friend, family member, or even a neighbor can hire an attorney to help. An attorney will petition the Probate Court to ensure the correct guardian and conservator is appointed to help their loved one (also referred to as a "ward"). A **guardian** makes important decisions regarding the health and maintenance, while a **conservator** manages the finances of their loved one. After the guardian and conservator have been appointed, an attorney will ensure they fulfill their legal obligations to the ward.

Please contact CMDA for assistance with any elder law matter, including nursing home planning, guardianships, and conservatorships.

Sean J. Nichols

Sean J. Nichols is an Of Counsel attorney in our Livonia office where he concentrates his practice on elder law, estate planning, and probate law. He may be reached at (734) 261-2400 or snichols@cmda-law.com.

Eleven Estate Planning Mistakes to be Avoided

Linda Davis Friedland

We have all heard the probate horror stories. Someone's last will and testament took five years to be probated, generating hundreds of thousands of dollars in attorneys' fees. All of the assets from someone else's estate were stolen by the personal representative (executor), leaving the family with nothing. The probate judge was unfair. Such stories instill fear about probate administration, which can lead to estate planning decisions with unintended consequences. The following are the top eleven mistakes one should avoid:

1. Adding a Child's Name as Co-Owner to Residential Deeds, Vehicle Titles, Brokerage Accounts, etc.

Adding a child's name to a deed, title, or account as a co-owner conveys ownership, with all the legal rights and responsibilities that go with it. Parents usually regret this decision once they learn that they cannot sell, mortgage, or even refinance their home without their child's consent and involvement. For bank or brokerage accounts, distribution checks cannot be cashed or rolled over without the signature of all listed owners. Perhaps the most important concern is liability exposure. Assets to which child's names are added are at risk for levy by their creditors.

Capital gains taxes are a rarely considered, but very important concern. In most situations, when one sells a capital asset such as a home, the capital gains tax would be based on the difference between the sales price and the original purchase price. This is known as the "tax basis." Typically, when a child inherits a home from his parents, he enjoys a "step up" basis, meaning his tax basis would be the value of the home at the time of his parents' death. Then, if the child immediately sells the home, there would be no capital gain.

If the child is added to the deed prior to the parents' death, however, he will only enjoy the step up in basis for the percentage of the home he did not own prior to his parents' death. Depending on the value of the equity in the home, adding a child's name to the deed may create a "taxable event," requiring the filing of a federal gift tax return.

2. Leaving Everything to One Child, with the Understanding that He or She "Will do the Right Thing"

Many parents will add the name of just one of their children to their assets, with the understanding that this child "will do

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Eleven Estate Planning Mistakes to be Avoided (cont.)

the right thing" for his siblings. Typically, the selected child is either the oldest, the perceived smartest, or simply the one who happens to be still living at home. These arrangements are almost always an invitation for probate litigation, especially when the selected child feels entitled to more than his fair share.

3. Having Estate Planning Documents Prepared by an Inexperienced Attorney

Some inexperienced attorneys present seminars for the sole purpose of scaring people away from probate and toward more costly estate plans involving the use of trusts.

These attorneys may not mention, however, that some smaller probates may be completed quickly in Probate Court, with just a simple will. While estates with complex tax considerations typically require the use of trusts, some estates would be better served by administration through the Probate Court. For example, if there are concerns regarding the trustworthiness of the named trustee, then court supervision may be necessary to ensure the proper distribution of assets. An experienced planning attorney will take a detailed history for each client, analyze it, and then provide the pros and cons for each estate planning option.

4. Poor Trustee Selection

If an estate plan requires a trust, the most important decision with respect to the plan will be selection of the trustee. Michigan law provides enormous power to trustees. In most situations, the selected trustee will manage and distribute your assets without court supervision.

Too often, the person for whom the trust is drafted will select a favored son-in-law or best friend who happens to be "good with numbers." This should not be the primary consideration. Trustees are usually permitted to hire attorneys, accountants, financial planners, and other professionals to assist in the administration of the trust. Instead, the individual selected to serve as trustee should be the one believed to be the most trustworthy. The trustee should share the person's goals and values and should have a clear understanding of how the person would want his assets to be managed and distributed. Absent court intervention, the trustee will have complete control over the trust's checkbook.

5. Improper Tax Planning

An estate plan that reduces probate fees will not necessarily reduce the federal estate tax. Probate fees are governed by state law, and the federal estate tax is calculated according to the Internal Revenue Code and corresponding Treasury Regulations. For example, naming a beneficiary on an insurance policy will avoid probate, but the face value of the insurance policy could still be subject to the federal estate tax.

The estate tax exclusion amount was finally made permanent by Congress in 2012. For 2014, single taxpayers may now exclude up to $5,340,000 from the federal estate tax. Married couples, if proper planning is in place, may exclude up to $10,680,000 by either using credit shelter trusts or by electing portability as provided by the 2012 Tax Act. To elect portability, an Estate Tax Return (IRS Form 706) must be filed by the deadline.

With over $10,000,000 available for their applicable exclusion amount, married couples may be tempted to ignore estate planning altogether. However, couples who have credit shelter trusts in place as part of their estate plan should meet with an experienced estate planning attorney to determine whether the use of credit shelter trusts is still necessary to achieve their goals. Otherwise, surviving spouses could find that access to their once joint accounts is unnecessarily restricted by an outdated estate plan. An outdated estate plan may also subject certain trusts to the new 3.8% Net Investment Income Tax imposed by the Affordable Care Act, also known as "Obamacare."

6. Failure to Plan by Same-Sex Couples With Recognized Marriages

In *United States v. Windsor* (June 26, 2013), the U.S. Supreme Court overturned the Defense of Marriage Act (DOMA) on constitutional grounds. Specifically, the Court found that DOMA violated the Equal Protection Clause of the Fifth Amendment. The IRS then issued Revenue Ruling 2013-17, and IRS News Release 2013-72, which state that the terms "marriage" and "spouse" in the Internal Revenue Code will be interpreted as including same-sex marriages. The Revenue Ruling also provides that a same-sex married couple's state of residency is irrelevant for purposes of Federal recognition of the marriage, so long as the individuals are lawfully married in a domestic or foreign jurisdiction whose laws authorize same-sex marriage. This means that the IRS will recognize same-sex marriages only, and not registered domestic partnerships, civil unions, or other similar formal relationships that are not specifically denominated as a marriage under the particular jurisdiction's law.

Just as importantly, the IRS will apply this Revenue Ruling retroactively, for "open tax years." For most taxpayers, open tax years will generally mean within the three-year statute of limitations. So same-sex married couples may file amended tax returns and claim refunds going all the way back to 2010 or earlier for special circumstances, such as if the taxpayer had signed an agreement with the IRS to extend the statute of limitations.

7. Failure to Complete the Estate Plan

This is perhaps the saddest and most frustrating mistake.

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Eleven Estate Planning Mistakes to be Avoided (cont.)

Probate attorneys see many beautifully drafted trusts with nothing in them. To fund a trust, one must legally place the desired assets into the trust by either designating the trust as the owner, naming the trust as a beneficiary, executing an assignment, or by executing a pour-over will with the appropriate provisions. Assets should also be listed in the trust's schedule of assets. Each method of funding has a different purpose and tax consequence.

A failure to fund a trust means that the assets will pass to beneficiaries through probate or in accordance with the last beneficiary designation on the account or insurance policy. The result could be that the wrong beneficiaries receive the wrong assets, with possible adverse federal estate tax consequences. Expensive litigation could then follow.

Equally important to the failure to fund a trust is the funding of a trust with inappropriate assets. For example, it is not always advisable for a married couple to place their primary residence into a trust, because this would alter their ownership as a "tenancy by the entireties." The result could be decreased protection from creditors. While there are circumstances in which it would be appropriate to place a primary residence into a trust, this should never be done without the advice of an experienced estate planning attorney. The same rationale applies to Individual Retirement Accounts (IRAs). Changing the ownership of an IRA from an individual to a trust creates a "taxable event" and could have adverse tax consequences.

8. Failure to Preserve Homestead Exemption

If a primary residence is placed into a trust, the correct statutory election should be made with the local municipality in order to preserve the Homestead Exemption. This is necessary in order to limit the rate at which the local municipality can increase property taxes.

9. The Unknown Estate Plan

All the money, time, and effort that one puts into an estate plan will be useless if no one can find it. Fiduciaries and/or beneficiaries should know that an estate plan exists and where the documents are located.

Depending on the bank, beneficiaries may need a court order to gain access to a safe deposit box. Some banks will allow limited, supervised access to a safe deposit box in order to allow family members to view a will. One should be familiar with the bank's policies and procedures regarding access. Other options for storing planning documents include a fireproof safe at home or the attorney's office. Wills may be filed with the County Probate Court.

If confidentiality is not an issue, some insurance claims adjusters have recommended that important documents be stored in the refrigerator. If the seal remains intact, the refrigerator may provide better protection from fire and water damage than a desk drawer.

10. Burial Instructions Contained in Wills

In most cases, wills are not reviewed until after the funeral. So, if one wishes to be buried in a Corvette, arrangements should be made outside of the estate plan.

11. Unequal Distributions among Children

An estate plan that provides for unequal distributions among children is not a mistake, per se. However, unequal distributions may cause discord among the children and then lead to probate litigation. Such estate plans should be created only after careful consideration.

Some parents may leave more money to an irresponsible child, under the belief that this child "needs the money more." The unintended message, however, could be that the irresponsible child is being rewarded, while the responsible children are being punished. Other parents amend their estate plans often, disinheriting children and then bringing them back as a form of punishment or reward for particular behavior. When creating an estate plan, parents should be mindful that this could be their last word to their children. There may not be time to amend the estate plan after the family fight of the week is resolved.

Attorneys at CMDA are available to prepare estate plans, answer questions, and review estate plans currently in place to ensure that the plans are updated as tax laws and family situations change.

Linda Davis Friedland

Linda Davis Friedland is an attorney in our Livonia office where she concentrates her practice on commercial litigation, employment and labor law, corporate and business law, estate planning, utilities Law and municipal Law. She may be reached at (734) 261-2400 or lfriedland@cmda-law.com.

On September 23, 2014, Linda Davis Friedland will be presenting at the **New Era of Estate Planning in Michigan Seminar** in Romulus, MI. Ms. Friedland will be speaking on two topics: "Factors to Consider when Determining Whether to Use Credit Shelter Trusts in this New Era of Portability" and "Conduit Trusts as Beneficiaries to Retirement Assets."

This full-day seminar is presented by Lorman Education Services. Additional information, including online registration, can be found at www.lorman.com.

Office Locations

MICHIGAN

Livonia
33900 Schoolcraft Road
Livonia, MI 48150
Telephone: 734.261.2400
Facsimile: 734.261.4510

Clinton Township
19176 Hall Road
Suite 220
Clinton Township, MI 48038
Telephone: 586.228.5600
Facsimile: 586.228.5601

Traverse City
400 West Front Street
Suite 200
Traverse City, MI 49684
Telephone: 231.922.1888
Facsimile: 231.922.9888

Grand Rapids
2851 Charlevoix Drive, S.E.
Suite 327
Grand Rapids, MI 49546
Telephone: 616.975.7470
Facsimile: 616.975.7471

CALIFORNIA

Riverside
3801 University Avenue
Suite 560
Riverside, CA 92501
Telephone: 951.276.4420
Facsimile: 951.276.4405

MISSOURI

Kansas City
1600 Baltimore Avenue
Suite 200B
Kansas City, MO 64108
Telephone: 816.842.1880
Facsimile: 816.221.0353

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Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features or to be removed from the mailing list, please contact Jennifer Sherman.

To reference previous issues of On Law, please visit www.cmda-law.com.

CMDA: On Law
33900 Schoolcraft Road
Livonia, Michigan 48150
(734) 261-2400
E-Mail: jsherman@cmda-law.com

Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first-rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

33900 Schoolcraft Road
Livonia, Michigan 48150

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