J.L. Williamson Law Group LLC

The New Focus of Modern Estate Planning

Some of you may have read articles I've written regarding changes to the federal estate tax rules. While estate tax planning is still of primary concern to some, the new catalyst for estate planning is long-term care costs. And for those in the middle class, failure to plan for the inevitable and exorbitant costs of long-term care can result in much more devastating consequences than even the most draconian estate tax regime.

Many people are under the false assumption that Medicare will pay their long-term care expenses. That is false! If you or your parents require assisted living or nursing home care, you have only three options: privately pay for these services; hope the long-term care insurance you've purchased, if any, will pay for these services; or try to qualify for Medicaid.

For those in their late 60s or early 70s, purchasing long-term care insurance may not be a viable option — though it is still something to strongly consider if you can afford it. If long-term care insurance is not an option, that leaves only two other options: paying from personal funds or qualifying for Medicaid. Currently, the average cost of a nursing home in Georgia is approximately $6,500 per month. At that rate, it won't take long for the wealth you've accumulated over your lifetime to be consumed.

Is there a way to protect your assets from being devoured? Some of you reading this article may own assets that have been in your family for generations. Will you have to sell them to pay for your nursing home costs? Maybe not, if you properly structure your estate plan to account for you or your parents' impending long-term care needs. A properly structured irrevocable trust will help protect what you or your parents have worked so hard to build and keep.

These types of trusts differ, in several important respects, from standard revocable trusts that you may have incorporated into your estate planning strategy. First, these trusts must be irrevocable — meaning that, outside of certain special circumstances, the terms of these trusts cannot be changed. Second, the persons creating these trusts (the grantors) should not serve as trustees of these trusts.

Grantors, however, can reserve income rights to the property inside these trusts. For example, if you have a piece of property, such as farmland, that you want to protect but rely on lease payments or timber sales from the land to pay your living expenses, it is possible to put the farmland inside one of these special trusts but require that all income from the land be paid back to you. Additionally, many of these trusts contain the power, exercised in the grantor's will, to change the ultimate beneficiaries of the trust. This is known as a special power of appointment. By retaining this power, you or your parents can ensure that the assets inside the trust will receive a step-up in basis when those assets are distributed after the death of the grantor. This is important if any capital assets such as stocks, bonds, or real estate are inside the trust because it can greatly reduce the amount of capital gains taxes the beneficiaries will have to pay. Such tax savings are not available with outright gifts, and that is a significant reason why this type of planning is far superior to gifting assets outright to children.

Many of these trusts that we draft contain "trust protector" provisions. These provisions provide for the appointment of someone who can amend the trust, even though it is irrevocable, to comply with unforeseen changes in the tax law, the trust code, or the Medicaid rules. Having a trust protector provides for maximum flexibility in trust administration and can also be used to resolve disputes among beneficiaries, thereby avoiding a potentially costly and lengthy court battle.

A carefully drafted irrevocable trust can add significant tax and nontax benefits to your overall estate plan, yet these types of trusts are, in the author's humble opinion, underutilized. As with any estate planning technique, it is important to carefully review your particular circumstances with an expert estate-planning attorney before deciding whether one of these types of trusts is appropriate for you or your parents' situation.