

What You Should Know About Trusts, by, Ann-Margaret Carrozza, Esq.

“Put not your trust in money, but put your money in trust” counseled Oliver Wendell Holmes nearly 100 years ago. The advice remains sound- depending upon whether you select the right trust for your situation. The following pointers should help you begin.

1. What is a Trust? A trust is a legal agreement which creates an entity to own one’s assets. It can be thought of as a mini company which is governed by whatever rules the person creating it decides upon. A properly drafted trust can protect assets for a disabled beneficiary, reduce taxes and prevent assets from being lost to a divorce.

2. A Trust sounds too complicated. Can’t I simply put my house in the kids’ names, to protect it from future possible long term care expenses? **NO!!!**

A simple transfer of the house to the children will result in the loss of your STAR property tax exemptions. It will also result in negative capital gains consequences to the kids. Last but not least, the house will be exposed to the children’s future possible liabilities, such as divorce claims. To prevent a future possible ex-son or daughter-in-law from having an ownership interest in your home, brush up on some trust basics:

3. Does a Living or Revocable Trust protect one’s assets in the event that Long Term Care is needed? **NO**

Think about it. A Revocable Trust allows me to serve as my own Trustee and have access to the trust assets whenever I wish. How, then, can I turn around and expect a Nursing Home to disregard the assets in the trust? Because I can get ‘my hot little hands’ on the assets whenever I wish, then so can a nursing home! Contrary to the claims of many Revocable Trust promoters, (my mother is a regular at these seminars for the free refreshments) this estate planning tool should not be used if one’s goal is to protect assets from future possible health care costs.

4. Is it possible to protect one’s assets without using a totally Irrevocable Trust that can never be changed? **YES**

It is true that an Irrevocable Trust is the best way to protect one’s assets from being decimated by long term care expenses. What comes as a surprise to many, though, is that the trust does not have to be totally irrevocable. I view trust drafting as an art form. A properly drafted trust will provide the person creating it (the Grantor) with as much retained power as possible. If our goal is to protect the home from future possible Long Term Care expenses, then the Grantor does not have to give up all ownership rights. The terms of a good Asset Protection Trust will allow me to change the person I’ve selected as my trustee at any time. This power comes in handy in the event that I have a falling out with my Trustee or they move away. It is also a good idea to retain the ability to change one’s named beneficiaries. I may initially name my 3 children to be equal beneficiaries upon my death. Life’s curve balls, however, may cause me to want to change this in time to come. If a child were to predecease me, I want to be able to give

his or her share of the trust to my grandchildren, rather than to an in-law. A good trust will provide that the real estate can still be sold, but ONLY with my written permission. Will the trust cause us to lose property tax exemptions? No (Thanks to the legislation I sponsored in 1998).

The best part about the Asset Protection Trust, is that upon my death, my named beneficiaries receive all trust assets without probate, and all built in capital gains are totally eliminated.

5. Is it necessary to put all of one's assets into the Asset Protection Trust? **Probably Not.**

Most of my clients initially put their house, condo, co-op, and investment real estate into the trust. Liquid assets typically remain in the person's own name. In the event of a long term illness, one's retirement accounts (401k, IRA, 403B etc) are already protected by virtue of NYS law. The unprotected assets can then quickly be transferred into the trust (provided that there is a good Power of Attorney in place). Do we have a 5 year look back problem? Not if we apply for Community Medicaid (home care). There is no 5 year look-back and related transfer of assets penalty with Medicaid home care.

6. The current Medicaid lookback period is 5 years. What happens if I do a trust and the law changes? Am I grandfathered? **Yes**

The so-called Medicaid Lookback period (amount of time that an asset must be out of my name before it is invisible to the Medicaid program) went from 3 years to 5 years in 2006. There is currently a bill pending in Congress to further lengthen the lookback to 7 years. However, the law that exists on the date that you create your trust is what counts.

7. What happens if I create the trust for my house and then become ill before the 5 year period has fully run? Do I get "partial credit"? **Yes**

Let's say that I create the trust for my house, and then require long term care in 4 years. In this case, I would only have to privately pay for the cost of a nursing facility for one year. I would then reach the magical 5 year threshold at which point, the assets in the trust are invisible for purposes of Medicaid eligibility.

8. I have Long Term Care Insurance. Do I still need a trust? **Yes**

The average cost of long term care in our area exceeds \$500 per day. To the extent, that the LTC insurance covers less than this amount, we may still need to access the Medicaid program to cover the shortfall.

Ann-Margaret Carrozza is an attorney and TV legal contributor who also served for 14 years as a NYS Assemblywoman. She can be reached at 516.741.7870. Office locations: Bayside, Glen Cove, and Port Jefferson. www.myelderlawattorney.com