

MEMORANDUM

KEY CONSIDERATIONS WHEN ESTABLISHING AN ESTATE PLAN TO PROTECT AN ILL SPOUSE

This is general guidance to assist you when you have taken certain steps in your position as a spouse married to a mate who is suffering from a long term illness or is very likely to suffer from a long-term illness in the near future. By taking the steps you have to either modify an existing estate plan or create a new one, you are helping ensure that you have done all you can to protect your ill mate.

We have discussed the importance of asset protection for your ill spouse so that he/she will be able to access affordable health care in the future if you have predeceased him/her. By protecting assets upon your demise, however, we are looking forward also to purchasing quality health care over and above what programs of government financial assistance, such as Medicaid, may be able to offer your ill spouse.

Within your estate plan documents, we have laid a foundation so that if you pass away before your ill spouse, the assets controlled by your estate plan will be in a position to be sheltered. Note: It is only those assets that you have allowed your estate plan to control which will be sheltered and protected, to be used for the future benefit of your ill spouse. It is only through the provisions we have drafted into your estate plan that we have the legal ability to protect assets for your spouse within a testamentary trust without the government seeing those sheltered assets as available for assessing financial eligibility coverage for long term health care for your spouse.

So, it is now time for you to review all of your assets and take critical steps in order to accomplish the purpose of your estate plan: Allowing your estate plan to control your assets at the time of your demise. In other words, it is time for you to sit down and make a list of all of your assets which ownership or beneficiary designations need to be coordinated with your estate plan to achieve maximum protection for your ill spouse if you predecease him/her. Your assets include: vehicles; stocks; bonds; home; real property (wherever situated); bank accounts; brokerage accounts; certificates of deposit; savings and money market accounts; life insurance policies; annuities; retirement accounts (including 401k, IRA, 457 etc.); corporate or partnership interests; outstanding notes payable to you; and any other assets with value that you may own.

Do not lose sight of this fact: It is your goal to have assets under your estate plan's control. This means that you will be transferring the ownership of assets (such as real property, stocks, bank accounts etc.) from joint ownership with your ill spouse to your name and ownership alone. If you have created an estate plan using a revocable living trust, then the ownership of the asset should be transferred to you, as trustee of your revocable living trust. You will not want to leave your ill spouse's name as an

owner on any assets of any value. You are purposefully removing ownership of assets out of your ill spouse's name into your name (or the name of your trust) so that your estate plan will control those assets upon your demise. If at all possible, we recommend that only a joint checking account with minimal values be maintained with the ill spouse's ownership on it.

When considering the specific assets to transfer, it is important to understand that there may be complications with transferring certain assets. Some accounts cannot simply remove the name of your ill spouse. So, new accounts may need to be opened. The assets from the old accounts may need to be moved to the new accounts; and then the old accounts will be closed. In addition, there are times when assets transfers cannot be undertaken because it is simply not possible (we lack the legal documentation such as Power of Attorney for the ill spouse) or the downsides to the asset transfers are too great.

In addition to transferring ownership on assets, you should examine the beneficiary designations on all of your own life insurance policies and annuities and retirement accounts. Upon your demise, it is customary that the values in these accounts or death benefits are paid out to the beneficiary(ies) you have selected. So that your ill spouse is not the recipient of these values or death benefits without appropriate sheltering, we recommend you change the beneficiary designations so that your estate plan will control how those values or death benefits are handled. Beneficiary designations should be handled as follows:

a. If your estate plan is based upon a Last Will & Testament, then the beneficiary designation should reflect:

To the trustee of the testamentary trust under my Will dated _____ for the benefit of my spouse, [name of spouse].

b. If your estate plan has used a revocable living trust, then the beneficiary designation should reflect:

To the trustee of my revocable living trust dated _____.

It is possible that you will use the assistance of a financial advisor to assist you in transferring assets or changing your beneficiary designations. Your financial advisor may even caution you about certain beneficiary designations changes, such as those on tax-deferred assets like IRAs or 401ks. Your financial advisor may discuss the benefits of having tax-deferred assets like IRAs or 401ks name your ill spouse as a beneficiary so that there will be no tax implications when your spouse receives these accounts. On the other hand, if your ill spouse receives your tax-deferred accounts as the named beneficiary directly, and not through your estate plan, then you have negated the certainty for sheltering these assets for your ill spouse. Once again, it is only by allowing assets to be controlled by your estate plan upon your demise that we have certainty with sheltering those assets for the benefit of your ill spouse. Unfortunately, there is a competing objective between maximizing income tax benefits by leaving these accounts to your ill

spouse directly, and, protecting those assets by sheltering them through your estate plan for the future benefit of your ill spouse. Ultimately, you will have to choose between these two competing objectives.

When addressing assets that may be owned in your ill spouse's name alone, and provided it is possible to transfer the ownership from your ill spouse to you, then doing so would be consistent with your goal of sheltering those assets under your estate plan. For instance, if your ill spouse owns a life insurance policy or annuity, you should consider changing the ownership to yourself. It is only if there are serious negative tax or other implications that you would not proceed in this manner; so a full review of these circumstances is advised before proceeding. You should not transfer out of your ill spouse's name his/her own IRAs or tax-deferred retirement accounts. Before any transfer of ownership on these assets owned by your ill spouse, was ever contemplated, further legal counsel must be obtained discussing ramifications associated with any such transfers.

We appreciate the opportunity to work with you on your estate plan. We are available to assist you with any additional considerations you have (or your financial advisor has) on which you may require further explanation. Although we do not offer any tax advice, our legal counsel will be available to you (or your representative or financial advisor) at our customary hourly rate.

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