

Asset Protection: Why Procrastinate Now?

Presented By
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September 9, 2009

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Joblessness is at a rate almost beyond belief. The financial markets tumbled. Madoff is in jail. The prospect of double-digit investment returns may be beyond reach for many years. People are grasping. So, why do we still put off helping to protect the assets we still hold? Other than inertia, why procrastinate now?

Because we like immediacy. We are delighted when the price of gas drops 25 cents per gallon or when we get a 2-for-1 coupon at our favorite pizza joint, when Amazon.com offers free shipping, or when the auto dealer knocks a thousand or more off our purchase of a new vehicle. We do not, however, get much satisfaction when having to contemplate, deal with, pay for, or respond to unexpected problems or preventive action.

Even if future threats fail to materialize (and hopefully they don't), the immediate payoff of asset protection is the satisfaction and benefit of a greater level of comfort. Comfort in knowing you finally took action to help protect you and your family's hard-earned assets.

This outline provides specific recommendations for day-to-day ways to help protect your assets.

Here also is the essence of the questions each of us should ask in view of this asset protection outline:

- (1) How well are we protected if someone were to assert a claim against us today?;**
- (2) What would be the cost and burden to our family if we, for example, today fell on the sidewalk, hit our head, and became permanently or temporarily incapacitated physically, mentally, or both?; and**

- (3) Does our procrastination affect us, or potentially affect us, in view of the above two questions?

I. Asset Planning is Not Limited to a Grand Slam

The goal of asset protection is not to seek out and implement a grand slam technique with the idea that one great solution (such as an off-shore trust, or domestic “self settled” trust) will provide all the necessary protection. Rarely do these one-technique approaches work for most clients. Furthermore, these techniques are typically very expensive to implement and maintain.

By contrast, this outline deals with an array of asset protection factors that each of us can be aware of on a day-to-day basis in response to a broad range of areas of exposure, so as to avoid facing death by a thousand paper cuts.

Thus, with this array of asset protection factors, a realistic goal of asset protection is to (i) decrease the target area of your exposure, (ii) place someone else (typically your insurance carrier) on the hook for the time and expense of defending you if claims arise; and (iii) keep your assets out of the easy reach of potential and real claimants.

Now, having said that asset protection is not a grand slam, what comes close to a grand slam for many clients is the use of an inter-vivos QTIP trust. This QTIP Trust also includes significant estate tax planning features and stems from the “qualified terminable interest trust” provisions under the estate and gift tax law. I discuss a QTIP trust only briefly at the end of this outline at page 30.

Even in view of techniques such as the inter-vivos QTIP trust, every client should still be aware of the many asset protection recommendations included in this outline.

II. Time is Our Only Finite Asset

Time is our only finite asset. We can all make more money, accumulate more material items, acquire larger homes, and so forth. But, we can never recover lost time. The clock ticks away without distinction in our net worth and assets.

The lost time in having to worry and respond to claims against you and your family’s assets is a horrible expenditure of time. In my view, this lost time is a greater cost than the dollar expense of dealing with these types of claims. Asset protection should, therefore, enable you to waste less time worrying, sleep better,

calm that lurking voice of procrastination, and reduce your expenditure of time dealing with defending claims that might arise against you and your family.

III. Five Important Preliminary Points.

- A. Fraudulent Transfers. Asset protection needs to be implemented before claims arise. We lawyers have seen far too many individuals -- who have failed to plan for asset protection -- frantically seek out legal assistance only after the claim has surfaced.

Implementing asset protection planning after a claim arises can create significant problems if you transfer property out of your ownership and the transfer results in you thereafter having a net worth less than the amount of the known claims that exist at the time of the transfer. This is referred to as a fraudulent transfer. A court can unwind the fraudulent transfer and thereafter make the property available to a claimant.

- B. A Solvency Letter as Prerequisite. If asset protection planning involves a client's transfer of property to another owner (including to a trust), lawyers will typically require the client to sign a Solvency Letter before moving forward with implementing asset protection planning. This letter is kept in the client's file and provides contemporaneous evidence of the client's financial position prior to making any transfers of property for asset protection purposes. It also helps force clients to be open and forthright with their lawyers about their assets and known or potential claims so that no underpinning of the asset protection is grounded otherwise on a fraudulent transfer situation.

- C. Contracts of Adhesion. The term "contracts of adhesion" refers to certain contracts and agreements where the customer generally has no choice but to sign the agreement in order for the deal to come together.

Examples such as signing a required document for horseback riding, renting a car, obtaining cell-phone service, and other situations where there typically is no alternative other than signing the particular contract. In other words, it is a contract that you are stuck with if you wish to purchase the services.

These contracts of adhesion sometime also operate to waive all possible claims against the service provider or vendor as a result of any injury or

damage that you incur, such as falling off a horse, or injuries sustained while at a skating rink, and so forth.

So, what can you do about these types of contracts?

First, try and not sign the contract and instead merely tender the payment or admission charge, etc. Many vendors (particularly their clerical staff) are more interested in the payment than the details of the paperwork.

Second, make sure that you do not sign an overly broad indemnification provision where you are indemnifying the vendor or service provider from other third-parties. See my separate discussion in this outline on this indemnification subject at page 10.

- D. **Don't Sign Documents if You Don't Have to.** For many of our day-to-day business activities, we are faced with some administrative clerk or other lower-level employee asking us to sign documents. I have found it effective often to casually and in a low-key manner state that I am not going to sign a particular document.

Therefore, simply tell the person in this pleasant manner that you are not going to sign the document, rather than asking if you may not sign the document. In many instances, especially if you are tendering a check for payment at the time the person wishes you to sign papers, the clerk or other lower-level employee will not push the issue. Their primary interest generally is getting the check in hand. You have nothing to lose from trying this no-sign approach. Furthermore, if you do have to sign documents, then always at least have some idea of what you are signing.

- E. **Don't Do Things Half-Way.** We are all human and sometimes like to be thrifty in dealing with certain aspects in our lives. Maybe too thrifty on occasion. This deals with our ranking of preferences as to where we spend out money and effort.

Whether or not you are thrifty, you should not go cheap when obtaining legal work. I have seen far too many situations where we now have a client who previously tried to take a cheaper course of action by preparing legal documents using online forms or signing documents without a review by a lawyer, and so forth. In these situations, good preventive care ends up being significantly less

expensive than having to deal with what has become a much larger problem.

Also, in my view, individuals may be better off to do nothing than to expend time, money and energy doing something half-way. Asset protection planning requires well-grounded preventive planning.

IV. Fairly Simple Asset Protection Options.

There are several relatively simple asset protection options available to a large number of clients, as follows:

- A. **Umbrella Liability Coverage.** Every client should obtain (or confirm that he or she already has) personal umbrella liability coverage to supplement current homeowners and automobile liability coverage. Insurance providers generally have this coverage available in the range of \$1.0 million to \$5.0 million of coverage.

Although this insurance provides coverage for payment of claims, the better part of what you are paying for (with most any liability insurance) is a duty-to-defend. In other words, you are paying the insurance company to get on the hook for your defense and begin paying the legal tab, whether or not the claims are ultimately bona fide.

The insurance company pays its lawyers to defend the claims against you. In our litigious society, defending yourself against uninsured claims can result in expensive litigation even if you ultimately are exonerated completely from the claim.

- B. **Title Insurance.** Many individuals fail to realize that the title insurance they purchase at a real estate closing is lender's title insurance coverage that insures only their mortgage lender. This lender's policy does not insure the property owner against title defects and title claims against the property.

By contrast, the property owner should purchase -- at the closing -- what is called an owner's title insurance. The premium is much lower for the owner if the owner's policy is issued at closing at the same time the lender's policy is issued. In the absence of an owner's policy, claims against the title will be defended by the insurance company only for the benefit of the lender, not for the benefit of the owner. Thus, an owner's title insurance policy will cover the owner from claims against the title.

The real value of the owner's policy is that the title insurance company has a duty-to-defend. It is on the hook to engage its own lawyers to defend a title dispute pertaining to the property, such as boundary disputes or rights-of-way disputes, and so forth. If the owner of the property has title insurance, the handling of the property dispute generally requires nothing more than the owner informing the title insurance company of the claim. The title insurance company then has to carry the ball in responding to and defending against the claim, and paying its lawyers.

- C. Cash Value and Death Proceeds of Life Insurance. The Georgia statutes under O.C.G.A. § 33-25-11 provide that the death proceeds from life insurance on a Georgia resident at his or her death (including annuity contracts) are exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise. If, however, the life insurance proceeds are payable to the insured's estate, the proceeds will be treated in the same manner as any other assets of the estate and will be subject to creditors of the estate. In other words, the protection from attachment or garnishment does not apply to insurance payable to the insured's estate.

The cash surrender value of life insurance policies issued on the life of a citizen or resident of Georgia also is not subject to claims of creditors unless the insurance policy was assigned to or for the benefit of the creditor or unless the purchase, sale, or transfer of the policy is made with the intent to defraud creditors.

So, what is the protection for payment of premiums, if any?

The present statute does not use the word premiums. Thus, although still untested in the courts, the payment of premiums by the insured, even when the insured is insolvent, arguably does not cause the insurance policy and its cash value to lose the creditor protection under O.C.G.A. § 3-25-11.

Prior to the present version of this statute, Section 33-25-11(b) stated that "the amount of any premiums for said insurance paid with intent to defend creditors" would inure for the benefit of the creditor from the proceeds of the policy. See *Ambase International Corporation v. Bank*

South, N.A., 196 Ga. App. 336 (1990). This premium reference no longer exists under the above current insurance statute.

- D. **Signing Documents as an "Agent"**. The principal is the person who grants an agent the power to act on behalf of the principal (such as the agent named as attorney-in-fact under a financial power of attorney). The agent needs to be extremely careful about the manner in which he or she signs documents or contracts on behalf of the principal so as to avoid personal liability.

The agent must sign only as agent, and not in his or her individual capacity. The agent should include both a specific reference to the name of the principal within the body of the document or contract and the signature page must make clear that the agent is signing only as an agent on behalf of the principal. In addition, the agent's signature itself must include a clear reference that the agent is signing as agent. This requires generally the agent's signature of the principal's name, followed by "by John Doe under power of attorney for Jane Doe". [Jane Doe is the principal in this example, and John Doe is the agent.]

Why is the above technicality important? Georgia law under O.C.G.A. § 10-6-86 imposes personal liability on an agent if the agent signs a contract and fails to indicate the agent is signing in a representative capacity. *See, for example, Associated Services of Accountable Professionals, Ltd., Inc. v. Workman*, 265 Ga. App. 348 (2004). [A home healthcare agency sued a patient's daughter claiming she did not sign the healthcare contract sufficiently in her representative capacity for her father under a healthcare power of attorney. The court, however, did not uphold the healthcare agency's claim.]

As an aside, Georgia law now provides that the agent named under a Georgia health care directive will not be personally liable for health care facility and services contracted for or on behalf of the principal. *See* O.C.G.A. § 31-32-7(e)(3).

- E. **Signing under "(SEAL)"**. Individuals frequently sign documents, contracts, and so forth, with their signature being designated as under "(SEAL)". In some cases, this seal reference is designated with "(L.S.)". These references appear at the end of the signature line. However, most people (including many lawyers) do not know the effect of signing under seal.

Anyone who signs a document, especially a document that subjects the person to some type of liability, needs to understand what a signature under seal means. This meaning also varies from state to state. For Georgia purposes, a document signed "under seal" will extend the statute of limitations to 20 years rather than a shorter period of limitations that otherwise applies to the particular situation without the seal. A document under seal also creates a presumption that the parties exchanged the consideration covered by the agreement. In other words, one party cannot assert, without having the burden to overcome the presumption, that an agreement under seal is not supported by consideration (the exchange of consideration between the parties). See *Autrey v. UAP/GA AG Chem. Inc.*, 230 Ga. App. 767 (1998).

As to the longer statute of limitations, contracts under Georgia law are generally subject to a 6-year statute of limitations. The signature-under-seal that extends the period to 20 years is covered under O.C.G.A. § 9-3-23. This can be good or bad, depending on where you stand in the transaction covered by the "Seal" document.

Keep in mind that there are two requirements under Georgia law in order for a document to be considered "under seal." There must be both a reference to seal in the body of the instrument of an intention to use the seal and the reference to "Seal" or ("L.S.") at the end of the signature space. This is the reason many documents conclude with the statement "signed under hand and seal, this _____ date of September, 2009". The signature line will include "(SEAL)" or "(L.S.)". See, for example, *Chastain v. L. Moss Music Co.*, 83 Ga. App. 570 (1951).

So what is practical advice for this point?

The point is that under certain circumstances you should strike-thru the reference to "SEAL", add your initials to the strike-thru, and sign without the SEAL. Many times you will get no objection due to most people (including many lawyers) not knowing what SEAL means.

- F. No Legal Requirement to Support a Spouse. Why this point? The primary point is to be careful in signing any contract or other obligation on behalf of your spouse. For example, in an emotional height of concern during a medical emergency, one spouse may inadvertently sign hospital admission papers as the primary party responsible for the other spouse's hospital services, and so forth, rather than more

appropriately signing as an agent. This can create unnecessary liability exposure.

Under Georgia law there is no legal obligation to support one's spouse, except under certain situations involving divorce and alimony. See O.C.G.A. § 19-6-1 ["alimony is an allowance out of one party's estate, made for the support of the other party when living separately. It is either temporary or permanent"].

The better approach is for the agent-spouse who signs the documents on behalf of the other spouse to sign only in a capacity as agent for the other spouse.

Here is an important point. Whether or not the spouse who signs on behalf of the other spouse is named under a financial power of attorney, the spouse still should sign "By Jane Doe, as attorney-in-fact for John Doe." This helps keep the agent-spouse from taking on the personal liability for the other spouse. This is not to create any shortcoming for the hospitalized spouse; rather it is a common-sense way to avoid unnecessary financial exposure and obligations that otherwise are avoidable.

- G. Divorce Options if Mentally Incapacitated. Why this point? If a person becomes permanently mentally incapacitated, the optimal care situation may be Medicaid provided nursing home care regardless of the age of the person.

For married couples, both the non-incapacitated and incapacitated spouses' assets are "countable" assets in determining whether the incapacitated spouse can qualify for Medicaid. Thus, virtually all of the family's financial resources may have to be exhausted by private-paying for the nursing home care until the assets for both spouses are depleted enough thereafter to qualify for Medicaid nursing home assistance.

This nursing home question is particularly relevant for younger married couples with young children. The entire family's financial situation can be seriously jeopardized by this nursing home exposure if one of the younger parents becomes incapacitated.

One option as a possible defense for this situation is to include an express provision in each spouse's financial power of attorney

document that allows the non-incapacitated spouse to obtain a divorce from the incapacitated spouse if necessary. This arguably would sever the married-couple link to the countable assets qualification for Medicaid.

The power of attorney for each spouse can include a provision along the following lines:

Divorce Options During My Mental Incapacity. If I am mentally incapacitated as determined below, my attorney-in-fact (including my wife Jane W. Doe acting as my sole attorney-in-fact) shall have the power to file a complaint for divorce on my behalf from my wife Jane or to consent on my behalf to a judgment of divorce from my wife Jane if in my attorney-in-fact's sole discretion such divorce provides any benefit to my wife or my children, including but not limited to, the protection of my wife's assets, the preservation of assets for my wife or our children, my qualification for governmental benefits for medical or nursing home care, or any other benefit to my wife or my children that otherwise would not exist in the absence of such divorce. The determination of my incapacity shall be made in the same manner as set forth below under paragraph (bb) of this Power of Attorney. My attorney-in-fact also shall be held harmless for any reason from any action or failure to act under this paragraph. [Underlining added.]

Finally, this divorce option may in some instances not be appropriate in view of their certain client's religious views, and so forth.

- H. Don't Sign Indemnification Agreements. Local churches, neighborhood community associations and community centers, for example, make their facilities available for private parties, such as children's birthday parties and so forth. In many cases, there will be a written agreement that sets forth the rental payment (if any), scheduling of the party, and the rules and regulations.

Keep in mind that these written agreements also will often include an indemnification provision. This is a provision where the person signing the agreement (such as a mother setting up a birthday party for her child and its friends) is essentially agreeing to defend and pay any third-party claims that might arise against the facility or organization.

The following is a excerpt from a local Atlanta neighborhood center rental agreement that is required when someone wishes to rent the facilities for a party or other gathering. This excerpt is an extremely broad indemnification clause that subjects the renter to the possibility

of defending and holding harmless the recreation center from any and all claims of virtually any nature and from any other person:

Renter shall indemnify, hold harmless and defend [recreation center], its officers, directors, agents, employees and members from and against any and all claims and demands (including, without limitation, court costs, expenses and attorneys' fees), whether for injury to person, loss of life or damage to property, that are the result of any act or omission by Renter, or any of Renter's Employees or Guests or that otherwise are in any way related to or arising out of the entry into the Recreation Center, Premises and/or the use of the Recreation Center (or any of the equipment or furnishings therein, by Renter or any of Renter's Employees or Guests. This indemnification shall survive any termination of this agreement and/or the completion of the Usage Term. [Underlining added.]

So what do you do with a provision like this?

First, don't be the eager volunteer to sign this agreement when there is the possibility that other participants may be willing to sign the agreement to facilitate the party. Second, tender the rental check without offering the signed agreement. Third, if you have to sign the document, inquire as to whether your umbrella liability policy will apply in this type of situation. Fourth, if necessary, find another place for the party.

- I. **Use a Contractor's Affidavit.** Most of us who hire contractors to repair or improve our homes rarely give thought to our financial exposure if the contractor fails to pay his or her subcontractors. In short, Georgia law provides a procedure where a subcontractor, materials provider, vendor, architect, land surveyor, and a wide range of material and service providers in the chain can obtain a property lien that attaches to the customer's residence. In other words, this typically is a lien that you cannot remove until the lien is paid and satisfied. These statutory provisions are under Georgia law at O.C.G.A. § 44-14-361.

From an asset protection prospective, this subcontractor lien can occur even where you have clear evidence that you paid the contractor in full. You also do not have to have any knowledge that your contractor failed to pay a subcontractor for labor, services or materials. Thus, the relevant issue is whether the contractor paid the subcontractors.

So, what can you do?

Georgia law provides an option for protecting yourself in this situation. You can use a "contractor's affidavit". A contractor's affidavit is a sworn written statement from the contractor to you under O.C.G.A. § 44-14-361.2. These statutory provisions provide that the sworn written statement from the contractor must state that the contractor has been paid (from you) the agreed price or reasonable value of the labor, services or materials; and, that at the time of the contractor's sworn statement, the contractor is not aware of any valid preliminary notice or claim of a lien that exists as to the work.

The property owner ideally should prepare and give the contractor a draft copy of the contractor's affidavit at the onset of the work and make the contractor aware that he or she will have to sign the sworn statement before getting paid for the work. The contractor should then give the property owner the original signed contractor's affidavit in exchange for payment after completion of the work. A sample John Doe copy of a contractor's affidavit is attached hereto as Exhibit A.

- J. Independent Contractor Letter for Child-Care Providers. Many families use one or more child-care providers to provide home child care of babysitting for the children. In situations where the child-care provider is not an employee who works full-time and exclusively for a family, it may be appropriate to use an independent contractor letter for a non-employee child-care provider or babysitter.

Although there are various employment tax considerations that exist in the distinction of an employee versus an independent contractor (and which I do not address further in this outline), if the provider is an independent contractor, my recommendation is to use some form of letter or agreement that clearly characterizes the child-care provider as an independent contractor.

The primary non-tax asset protection reason is to prevent the child-care provider from being deemed an agent of the family, such as an employee. Under this agent relationship, if the child-care provider damages another's property or has an automobile accident and so forth, the family may be treated as the primary responsible party (thus, the principal) with liability for the actions of their agent (the child-care provider). By contrast, the status of independent contractor provides a level of argument to help reduce or eliminate this principal/agent exposure for the family.

The independent contractor letter or agreement should also specifically refer to the child-care provider's option not to use his or her own automobile for transporting the family's children, if necessary. If the provider uses his or her automobile, the independent contractor agreement can provide some manner of reimbursement, such as 50 cents per mile.

As an example of an independent contractor letter, I attach a "Joe Doe" version to his outline as Exhibit B.

- K. Prenuptial Agreements. Prenuptial agreements for married couples set out how their property will be handled and divided in the event of divorce. These agreements can be an effective means for some couples to provide a level of asset protection and avoid disputes and controversies in the event the marriage fails.

For many clients, the greatest hurdle is getting both soon-to-be-married individuals to agree prior to the marriage to use a prenuptial agreement and agreeing to the terms. This is all much easier said than done in most cases because clients typically wait until the week or two before the marriage to broach the subject of a prenuptial agreement.

For purposes of this outline, I do not include a broad discussion of prenuptial agreements, other than to point out that the following five elements, at a minimum, are essential in helping a prenuptial agreement withstand attack later if a divorce occurs. These elements are:

1. Separate legal counsel is absolutely imperative so that one spouse cannot later argue that he or she was disadvantaged due to the absence of legal counsel. Also, the same lawyer cannot represent both individuals for purposes of preparing a prenuptial agreement.
2. If there is a disparity in the value of assets between the two individuals, or if a disparity will likely exist in the future, the prenuptial agreement needs to include an acknowledgment that each party understands the present disparity and understands that a disparity may exist in the future and that each party will not challenge the prenuptial agreement on the basis of the disparity. Thus, full financial disclosure is essential. *See, for*

example, Corbett v. Corbett, 280 Ga. 369 (2006) (after 15 years of marriage, a prenuptial agreement was rendered unenforceable due to the husband's failure to disclose certain income the court determined was material to the agreement).

3. The prenuptial agreement should include a provision for each party to waive the right for future modifications of alimony as otherwise provided under Georgia law at O.C.G.A. §19-6-19 *et seq.* This waiver should exist even if the prenuptial agreement does not in its present form require any alimony payments.
4. The prenuptial agreement needs to require that each of the parties after they get married will sign whatever documents are needed in order to waive ERISA retirement benefits that otherwise exist under federal law for married couples.
5. In most situations, a prenuptial agreement generally should not waive the following rights that will exist by virtue of the marriage: social security survivor's and spouse's benefits; benefits under properly executed beneficiary designations for life insurance policies; and the right to recover damages from a wrongful death claim or from loss of consortium resulting from injury or death of the other spouse.

V. Most Vulnerable Area of Exposure: Your Elderly Years.

The care and oversight of our property during our elderly years, in my experience, is the most vulnerable area of exposure we each may face in dealing with asset protection.

This is worth repeating. The care and oversight of our property during our elderly years, in my experience, is the most vulnerable area of exposure we each may face in dealing with asset protection.

There are countless devastating situations where an elderly person's assets are mismanaged, misappropriated and, in some instances, simply stolen. The misappropriation and theft is also problematic in that it generally occurs over a long period of time with repeated smaller amounts that mask red flags identifying the problem.

Furthermore, individuals who fail to plan for these issues prior to becoming elderly (or disabled at a younger age) face the threat of a court-appointed guardianship which in many cases is far from an optimal remedy. A court-appointed guardianship can be extremely time-consuming, expensive, and greatly limits the flexibility otherwise needed for the care and management of your property. Furthermore, whether the court-appointed guardian is competent and possesses judgment and skill will be the luck of the draw.

So what can someone do to best protect themselves in their elderly years? The following suggestions are applicable to virtually every one of us:

- A. A Declaration of Trust (Revocable Trust). A Declaration of Trust is a written revocable trust and can be a person's core estate planning document in place of a last will and testament. The person (you) who creates the revocable trust is the "settlor." You can also be the sole trustee. You can amend or revoke the trust while you are alive. The trust uses your own SSN number and does not require a separate trust income tax return. At the time of your death, the Declaration of Trust becomes your core estate planning document and includes the provisions for your family and other beneficiaries that you would otherwise include in your last will and testament.

From an asset protection perspective, the primary benefit of using this Declaration of Trust during your lifetime is to avoid your family having to obtain a court-managed guardianship to oversee your property.

How does the Declaration of Trust help in the situation?

The key point is the trust document includes provisions for naming the successor trustee or trustees who will step into your shoes in the event you are later incapable of handling your own affairs.

By contrast, merely relying on a written financial power of attorney for the management of property if you are incapacitated is not alone sufficient. Increasingly, the ease of convincing a third-party to rely on a financial attorney-in-fact document that the attorney-in-fact (the agent) presents as his or her authority to act on your behalf is becoming more problematic each year.

Here is the specific problem. If a third-party will not rely on the financial power of attorney, the only other option in the absence of

having the Declaration of Trust is to obtain a judicial determination of the principal's incapacity and a court-managed guardianship. Under Georgia law, once the guardianship is in place, the financial power of attorney effectively becomes no longer operative. It is the court-managed guardianship that will control.

Now, back to the above Declaration of Trust. A successor trustee is not an agent, but is the legal owner of the trust property. Thus, the trustee is not acting in the capacity of an agent on behalf of the trust. A third-party is, therefore, typically much more inclined to deal with a trustee rather than dealing with an attorney-in-fact under a power of attorney.

1. **Tie-In to a Financial Power of Attorney.** Keeping in mind an optimal situation is to have your assets under the management of a successor trustee in a Declaration of Trust rather than agent (attorney-in-fact), an excellent belt-and-suspenders approach with the above Declaration of Trust is to include the following provision in your financial power of attorney. This can help give the attorney-in-fact authority to transfer assets into the Declaration of Trust in your older years or if you become incapacitated rather than the attorney-in-fact continuing to oversee the assets as an agent (attorney-in-fact) under the financial power of attorney. The person you name as your successor trustee can be the same person named as your attorney-in-fact in the financial power of attorney (typically your spouse).

Here is the property transfer provision for the power of attorney:

(s) To transfer any portion or all of my real or personal property on my behalf to any revocable trust of which I am the settlor (in some instances referred to as my "Declaration of Trust"), or any corporation, limited liability company (LLC), or partnership (whether limited or general partnership) now in existence or created hereafter in exchange for my receipt of an interest in such corporation, LLC or partnership (whether a limited or general partnership interest); [Underlining added.]

2. **Power to Amend the Trust During Incapacity.** For optimal flexibility, the Declaration of Trust can include a provision that allows the trust to be amended if you (the settlor of the trust) are

incapacitated (the settlor is the person who creates and funds this revocable trust). By contrast, this amendment flexibility does not exist for a Last Will and Testament. For example, if a person signs a Will today and becomes permanently incapacitated tomorrow, the Will is for all practical purposes etched in stone. A court will typically not allow an amendment to a Will unless there is some scrivener's error or ambiguity in the Will that requires a judicial remedy.

Thus, the Declaration of Trust can include the following amendment provision in the event of incapacity:

1.4 A court of competent jurisdiction at all times during my incapacity without a judicial determination of my incapacity (see section 7.10) shall have the power by judicial reformation or modification to alter, amend, or modify this trust agreement if the alteration, amendment or modification is in my best interest, or in the best interest of my estate or the collective estates for me and my wife for estate or gift tax purposes. [Underlining added.]

B. Develop a Relationship with a Trusted Investment Manager.

Part of sleeping well at night is knowing that someone is assisting you with the preservation (and hopefully growth) of your investment assets. We cannot all be experts in all areas of our lives.

Also, the Madoff tragedy shows how people's lives can be turned completely upside down if they lose their life savings. The lesson has been, and still is, that you must take actions to protect your investments and savings.

Here are some points to consider for the asset protection of your investments:

1. **Know What Your Rate of Return is for Your Investments.** Many people who handle their own investment management have no idea what are the annual and cumulative rates of return for their investments. This means most people do not know whether the return on their assets is at least keeping up with inflation.

Relying simply on marketing and advertising materials from mutual funds for their 1-year, 5-year, 10-year, etc. historical rates of return does not adequately reflect a particular individual's own experience with the success or failure with the funds. The variance in these marketing rates of return can vary significantly depending on what is the starting and ending points of the various reporting periods.

Thus, not knowing your rates of return is enough, in my view, to compel you to use an investment manager for your investment assets, rather than trying to handle the task without professional assistance.

2. Investment Management Fees. It is essential that you know what direct and indirect fees/commissions you are paying if you are handling your own investments, but do not let the concept of fees bias you against using an investment manager. Some clients are reluctant to use investment managers due to their fear of the management fees. These clients typically further state they handle their own investments by using their own selection of mutual or index funds and, therefore, do not need to pay an investment manager.

We lawyers do not, and cannot, give investment advice. But, I do inform clients -- who do not use an investment manager -- that they should look at what fees they are paying, including mutual and index fund management fees, 12b-1 expenses, redemption fees, load fees.

For example, *Kiplinger* magazine recently reported that the general average expense for domestic equity funds is 1.4%; bond funds 1.1%; and international funds 1.9%.

The client who is reluctant to consider an investment manager should compare his or her mutual fund management fees expenses to the fees an investment manager will charge to handle the client's investments.

Using an investment manager in comparison to self-directed investments may actually result in a reduction of fees in some instances.

3. **Functional Separation and Oversight.** This was the Achilles Heel in the Madoff situation. The phantom investment assets Madoff ostensibly held for his clients were also under his own phantom custody. Thus, the periodic statements the clients were receiving listed descriptions and number of shares, and so forth, that were non-existent. No one, including Madoff, had custody of the purported stock and other investments.

Because investment firms differ as to their structure and procedures, the key point is to review and discuss with the investment firm what is its functional separation and oversight for the investments and the underlying securities.

This functional separation and oversight involves factors including the external auditors (such as a CPA firm), the internal controls and procedures of the investment firm, and the insurance coverage for the investment account. Madoff, unfortunately, illustrates that governmental regulatory oversight, alone, is not a sufficient safeguard.

- C. **Don't Move Out of Your Home at the Request of Your Kids.** There are far too many situations where an elderly widow or widower ends up living in a relatively small apartment or condominium primarily at the request of their children. Although there are any number of well-intended reasons the children use to influence their parent to make these moves, the move is inappropriate in many situations.

We have all heard any number of reasons why these situations occur. From a planning perspective, one might try and argue that Mom or Dad's reduction in assets that inure to the benefit of the children is a method of asset protection or easy estate planning. Or Mom and Dad will be protected from losing their assets to a nursing home, and so forth.

However, in my view, this reduction in assets also can produce one of the most severe and damaging effects on the widow or widower's sense of autonomy and independence. Or, simply on the widow or widower's joy of life. The benefit of preserving assets for the children is not worth this cost in many family situations.

The solution? Have a family agreement or pact with your children, or prepare a letter of intent, stating that you desire to remain in your own home until your death, to the greatest extent possible, and without regard for the value of your estate or the financial interests of your children. Or if you wish to make a gift of the residence, at least retain a life estate.

- D. Don't Give Too Much Away to Your Kids in Your Older Years. Subject to whether you have a high net-worth and fall into the following paragraph E immediately below, parents should not be compelled to give too much away to their children prior to death.

Children can exert tremendous pressure in trying to convince their parents that giving them gifts prior to death is necessary for tax planning or for protecting against the threat of nursing home expenses, etc.

This point centers on the same loss of autonomy and independence I referred to above under paragraph C.

- E. But, as to Your Kids if You Have a High Net-Worth. By contrast to the above two situations, some older clients with large estates hold on to too much of their net-worth due to an unwarranted fear that they ultimately may run out of money.

The problem here is that these clients generally have more than enough assets and, therefore, end up paying far too much estate tax at death. Every dollar held beyond what the client needs will likely be taxed at the 45% estate tax rate. By contrast, there are numerous ways to help reduce a potential estate tax burden without the parents becoming destitute (that I do not discuss in this outline).

From an asset protection perspective, these high net-worth clients should obtain assistance from a CPA, financial, or investment professional and run financial projections on how much of the clients' net worth can be given up (through effective estate and gift tax planning) and still maintain the cash-flow and reserves necessary for their lifetimes. To do otherwise too often results in a considerable amount of unnecessary estate tax payable after the clients' deaths.

- F. Reduce the Threat of Contested Wills. One of the other most time-consuming and wasteful expenditures of funds involves litigation

where beneficiaries challenge the Will. This generally is a challenge using what is called a "caveat". The person filing the caveat is referred to as the caveator.

This caveator generally will attack a Will by stating that the Will was not signed in proper manner and thus, the formalities of executing the Will are subject to the attack; that the person who signed the Will did not have sufficient testamentary capacity to know what he or she was signing; and that the person was under undue influence or fraud, or both, as to the Will.

These types of litigation cases trigger a considerable amount of emotion among the parties and unfortunately can result in one or more parties trying to take a scorched earth approach in perpetuating the litigation. This regrettable situation can result in one party having the attitude that "I don't care if I ever get anything from the estate. I just want to make sure that my sister gets nothing".

There are two primary ways to help reduce this threat of a Will contest: (1) adhere absolutely to all formalities for the signing of your Will with assistance from a well-qualified attorney; and (2) use the above Declaration of Trust as your core estate planning document in lieu of a Will. It generally is much more difficult for a beneficiary or other interested party to challenge your testamentary capacity or to assert undue influence as to a trust document that you signed and placed into operative effect prior to your death.

VI. Other Asset Protection Options.

The following asset protection options have greater complexity and require more time and expense for implementation. However these options are also extremely effective in many client situations.

- A. Long-Term Care Insurance. Medicaid does not pay for "assisted-care", but covers only nursing home care. Some clients are under the mistaken impression that Medicaid will be beneficial for them if they ever need elderly assisted-care and housing.

Some children of clients will also push their parents to give away their property (of course, to the children) so as to qualify Mom or Dad for Medicaid nursing home care.

This is a mistake. Instead, clients should find every way possible to help ensure that they can afford private-pay assisted-care rather than Medicaid nursing home care. Remember, Medicaid does not cover assisted-care.

Here are some important points to consider:

1. What is "Assisted-Care"? This is housing care of the elderly that provides a substantially greater degree of autonomy for the resident compared to nursing home care. It is also about half the cost of nursing home care.
2. How Different from "Nursing Home Care?" Nursing home care is for residents who need the staffing of 24-hour registered nurses; by contrast, assisted-care generally does not require a 24-hour nursing staff and is for residents who need daily or periodic assistance, including close oversight of their prescription medicine schedules.
3. Possible Financing Options for Assisted-Care. Private-pay planning for assisted-care, for example, can be accomplished with long-term care insurance, or the use of a reverse mortgage, or the use of a second-to-die life insurance policy. The second-to-die policy allows a client to use his or her other assets to pay for assisted care (other than what is needed to pay the insurance premiums), and helps provide assurance that some level of inheritance (funded with the insurance) passes to the client's children in the event the client's assets are depleted substantially for assisted-care.

The long-term care insurance option is essential for most clients. Furthermore, a well-qualified salesperson who is trustworthy, competent, and knowledgeable in this area can be very helpful in the selection process. In many cases, the most cost-effective time to purchase long-term care insurance is when you turn 50.

- B. Joint-Ownership Property Agreements. Joint ownership of property in Georgia does not prevent lawsuit judgment holders or other claimants from levying a joint-owner's share of the property to satisfy a judgment. Thus, for example, the mere fact that a husband and wife own their home jointly in Georgia does not protect each spouse from claims against the other spouse. In the worst case, one spouse can end

up being the joint owner with a claimant who is successful in executing a claim against the other spouse's portion of the property. This is a surprise most people do not want.

Under Georgia law jointly-owned property that is owned as joint tenants with right of survivorship passes by law automatically at the time of death of one joint owner to the surviving joint owner. Thus, at death the joint interest is not subject to the estate claims of the deceased joint owner. But, this death treatment still leaves exposed any claims against a joint owner that develop while the joint owners are alive (as I mentioned above).

As an aside, some states (but not Georgia) have joint ownership called a tenancy-by-the-entirety, which is a special type of joint ownership for married couples. Tenancy-by-the-entirety provides an excellent degree of asset protection for both spouses. By law, a claim against one spouse cannot attach to that spouse's portion of the joint property that is held as a tenancy by the entirety.

So, what can a joint owner do in Georgia for a level of better asset protection for jointly-owned real estate?

The owners can agree in writing to a joint property agreement. This is a written agreement that is recorded in the real property deed records, with a cross-reference back to the ownership deed for the property.

Essentially under this agreement none of the joint owners can sell or transfer their joint interest in the residence without first offering it for sale to the other joint owner(s). The written agreement can also provide that any required sale between the joint owners is subject to an extended installment payment arrangement (for example, 20 years with a balloon payment). The asset protection goal is that a third-party claimant can seek to obtain only a charging order to receive what, if any, payments occur under the long-term installment arrangement.

One caveat. Keep in mind this written joint property agreement is not effective generally if a third-party claim against the jointly-owned property involves a claim where both joint owners are mutually and jointly liable. This, by the way, is the same risk that exists for the above tenancy-by-the-entirety property for mutual claims.

VII. Asset Protection with the Use of Trusts.

A trust ideally protects the trust property from claims that exist against the beneficiaries of the trust. For example, if a beneficiary gets divorced or has a lawsuit judgment, a question will generally surface as to what extent, if at all, can the other spouse or claim holder force the trustee to make a distribution from the trust on behalf of the beneficiary to satisfy the claim?

As to how potentially iron-clad the trust is in insulating the trust property depends on the written provisions and type of trust. The level of protection for trust beneficiaries also depends on (i) who creates and funds the trust, (ii) the language in the trust agreement, and (iii) whether the trustee is independent or non-independent.

- A. Self-Settled Trusts Typically Do Not Provide Protection. A self-settled trust generally includes as a trust beneficiary the same person who funds the trust. This, for example, is where John Smith creates his own trust, such as “The John Smith Declaration of Trust” and transfers his own property to the trust. There are many good reasons for John Smith setting up this type of trust [see my Declaration of Trust discussion above at page 15].

However, asset protection for John Smith is not a reason. Under the law in most states, a trust funded by the person who is also a beneficiary of the trust is called a “self-settled” trust. In most cases, John Smith cannot stand behind his own trust for asset protection defensive purposes.

Although beyond the scope of this outline, a limited number of states (not Georgia) offer levels of asset protection for these self-settled trusts. There are costly and complex requirements that generally as a practical matter place these types of non-Georgia trusts out of the reach of many clients.

- B. Third-Party Trusts Can Offer Protection. A trust funded by a third-party who is not a beneficiary of the trust can offer asset protection, with the level of protection depending on what kind of written distribution provisions exist in the third-party trust. These trusts are typically called “third party trusts.”
- C. Trust Distribution Provisions. Generally for third-party trusts the degree to which a trustee may be forced to make distributions in order to satisfy claims that exist against the beneficiaries depends on the

written distribution provisions in the trust document. Essentially, these provisions make the third-party trust either (i) a mandatory distribution trust, (ii) a support trust, (iii) a fully discretionary trust or (iv) a discretionary-support trust.

1. **Mandatory Distribution Trust.** The trust provisions mandate that certain distributions must be made to the beneficiaries, such as all income. There is no asset protection to the beneficiary as to the mandatory distribution amounts. A creditor or judgment holder can generally step into the shoes of the beneficiary and require the trust (by court order of garnishment, if necessary) to distribute the mandatory amounts from the trust to the creditor to satisfy claims on behalf of the beneficiary.
2. **Support Trust.** This is probably the most typical trust distribution provision. The reason is that the tax law also requires use of these support trust provisions so as to avoid certain estate and gift tax problems when a family member or beneficiary is serving as the trustee. This support trust is typically referred to as an ascertainable trust with the trustee being able to make distributions for the “health, education, maintenance and support” of the trust beneficiaries. Sometimes called a HEMS trust.

The courts generally conclude that a support trust is not fully discretionary, but instead gives the trustee discretion only as to the timing, manner or size of the distributions needed to achieve the health, education, maintenance and support of the beneficiaries.

A beneficiary under a support trust, therefore, possesses a quasi-property interest in the trust; this means the beneficiary (or a court on behalf of the beneficiary) has the power to compel the trustee to make distributions if the beneficiary can demonstrate a necessity for his or her health, education, maintenance or support (or whatever other support language is used in the particular trust document). See *Eckes v. Richland County Social Services*, 621 N.W.2d 851 (N.D. 2001).

Here is the chink in the armor of a HEMS support trust.

A court can order the trustee to make distributions from the trust to satisfy a claimant as to support items for the trust beneficiary, including alimony and child support. By contrast, a fully discretionary trust [discussed immediately below] is not subject to court order for support items.

3. **Fully Discretionary Trust.** A discretionary trust is a trust where the trustee has absolute discretion as to the payment of trust principal and income to beneficiaries. *See Henderson v. Collins*, 245 Ga. 776, 779 (Ga. 1980); Restatement, Second, Trusts § 155 (1959). A creditor or claimant cannot attach the assets or income of a discretionary trust to satisfy a claim against a beneficiary. *Henderson* at 779.

A discretionary trust gives the trustee absolute discretion over whether, when, and how much a distribution should be to a beneficiary and provides the greatest amount of asset protection for the trust property.

4. **A Discretionary-Support Trust.** Some trust documents include hybrid distribution language, such as: "The trustee may make distribution of income and principal for the beneficiary's health, education, maintenance and support." This hybrid language fits somewhere between a support trust and a discretionary trust. *See, for example, Lanier v. Lanier*, 218 Ga. 137 (1962)(the court referred to the trust at issue as a discretionary support trust; the trust provided that the beneficiaries are "to be given amounts the trustees in their sole discretion deemed proper to support them in comfort and happiness").

If you use a hybrid trust, keep in mind the law is relatively untested for these types of trust. First, there may be instances where the IRS argues the hybrid trust does not meet the ascertainable HEMS requirement for estate and gift tax purposes. Second, a court may possibly conclude the hybrid trust is a support trust in deciding whether to require the trust to satisfy support claims against the trust beneficiaries.

5. **Who is an Interested Party for a Trust?** Fully discretionary trusts insulate against a broadening definition of who is an interested party who has standing to sue the trust (by suing the trustee). Thus, the type of trust affects who is an interested party as to the trust. Georgia law at O.C.G.A §53-12-2 defines an interested party as a trustee, beneficiary, or any other person having an interest in or claim against the trust. The statute states further that “This meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.” O.C.G.A. §53-12-2(4).

Why is this important? It points to how broad is the group of persons who have standing to sue the trustee of a trust so as to try and satisfy a claim against a trust beneficiary, and also who is an interested party who has standing to seek a removal of a trustee. See O.C.G.A. §53-12-176. The concern, of course, is having to deal with an interested party who is not a trust beneficiary, but who can assert a claim against the trust, such as for alimony from a trust beneficiary.

In short, a fully discretionary trust provides the most narrow group of interested parties, limited primarily to the trust beneficiaries. By contrast, a support trust has a broader range of potential interested parties, particularly non-beneficiary parties (such as divorcing spouses) who rely on the exceptions to the Georgia spendthrift clause statute. [I discuss spendthrift clauses below under a separate heading.] For more information on this interested party issue, see the majority and dissenting opinions in *Richards v. Richards*, 281 Ga. 285 (2006).

6. **The Best of Both Worlds.** For most clients the use of a family member or trust beneficiary as trustee works fine; correspondingly, the required HEMS support provisions are fine in most situations instead of fully discretionary trust provisions. This HEMS support trust feature may not, however, provide the optimal asset protection for the trust, if greater protection is needed at some point in the future.

As illustrated by the excerpts below, a solution is to include a trust that can be characterized either as a support trust if a

family member is serving as trustee (a non-independent trustee) or as a fully discretionary trust with an independent trustee who is not a family member or beneficiary. Thus, the support trust effectively is the best of both worlds and can be flipped if necessary into a fully-discretionary trust without amending the trust document (by the way, amendments are not available for most trusts). This is discussed further below.

One caveat. As set forth above under excerpt section 6.2, if a beneficiary later chooses to remove a trustee and replace with an independent trustee, that beneficiary's removal and replacement power will thereafter be limited only to independent trustees. This limitation helps firm up the asset protection argument with a fully discretionary independent trustee by preventing the beneficiary from merely switching back and forth between independent and non-independent trustees.

Here are excerpts of provisions that give a trust the dual-option of triggering the fully discretionary trustee provisions instead of the support trust HEMS provisions (health, education, maintenance and support:

4.3 The Trustee is authorized to apply, in the Trustee's discretion subject to section 6.9, the principal from any trust under this Article IV for the benefit of my wife for her standard of living, after taking into account other resources reasonably available to her.

6.2 If any beneficiary (other than me) under this trust agreement removes a trustee and appoints an Independent Trustee under the provisions of this Article VI, that beneficiary's removal and appointment power thereafter shall at all times be limited only to trustees that are Independent Trustees as defined under section 6.10.

6.9 When a Trustee is not an "Independent Trustee" (Independent Trustee defined in section 6.10), the distribution powers of that non-Independent Trustee shall not be fully discretionary, but instead shall be limited to making distributions of income and principal, in the non-independent Trustee's discretion, only for the ascertainable standards for the health, education, maintenance and support of the beneficiaries to whom distributions can be made, after taking into account other resources reasonably available to the beneficiaries. Whether or not an Independent Trustee is serving and regardless of this section 6.9, the Trustee may make distributions to my wife to enable her to make annual exclusion gifts as provided under section 3.6. Nothing in this section 6.9 shall eliminate or deny my wife's right to all income for purposes of any trust or trusts under Article III or Article IV for which my personal

representative claims a marital deduction and my wife shall in all events be entitled to all income from any such marital deduction trust regardless of whether the trustee is an Independent Trustee.

6.10 An "Independent Trustee" shall be a trustee that is not "related or subordinate" to me or to any beneficiary under this Declaration of Trust within the meaning of Section 672(c) of the Code. [Underlining added.]

D. **"Spendthrift" Clauses.** This is a written provision that is typically included in a trust document. It serves two primary purposes.

First, the clause prevents a trust beneficiary from anticipating, assigning or transferring a future-interest in the beneficiary's interest in the trust income or trust principal. For example, a child cannot purchase a new automobile by promising the seller that the seller will receive whatever future payments the child expects to receive from the trust. This also generally prevents the seller in this example from suing the trustee to compel payment to satisfy these types of future promises from a beneficiary.

Second, the clause prohibits the trust beneficiaries from all getting together and agreeing to the termination of the trust. By contrast, if the trust does not have a spendthrift clause, there are situations where the trust beneficiaries can all agree to terminate an existing trust under certain circumstances (typically with court approval).

Even though the spendthrift clause is designed to provide the above protection, the issue can arise as to whether (i) there is an exception to the spendthrift clause and (ii) if the exception applies, whether a third-party claimant can garnish the trust by filing a garnishment against the trustee as to any distributions that will be made to the trust beneficiary.

As to the exception to a spendthrift clause, many states have laws that will not allow a spendthrift clause to protect the trust beneficiary against certain third-party claims and judgments to the extent of the trust beneficiary's interest in the trust. This exception exists under Georgia law at O.C.G.A. § 53-12-28(c), trumping a spendthrift clause and allowing a claimant to garnish distributions to a beneficiary from the trust so as to enable the distributions to satisfy (i) tort judgments,

(ii) taxes, (iii) governmental claims, (iv) alimony, (v) child support, or (vi) a judgment for necessities that were not voluntarily provided by the claimant.

This exception to the spendthrift clause protection focuses on whether a third-party claimant can garnish the trustee of the trust so that the claimant receives the trust distributions first before the beneficiary gets the distribution.

Also, if the third party can file a garnishment action against the trustee depends on whether the trust beneficiary has an “interest” in the trust income or principal. This point focuses on whether the trust is fully discretionary or a support HEMS trust.

A beneficiary of a fully discretionary trust is considered not to have any interest in the trust income or principal. Thus, a third-party should not be able to garnish the trustee of a discretionary trust to satisfy its third-party claim. By contrast, a trust beneficiary may be considered to have an interest in a support HEMS trust that gives a claimant the right to garnish the trustee under these exceptions to the spendthrift clause.

Furthermore, and as I already touched on above, a third-party claimant is not an interested party in a fully discretionary trust and may therefore have no standing to pull the discretionary trustee into a litigation arena to deal with whether the spendthrift exception should apply, and so forth. By contrast, the range of potential interested parties in a third-party HEMS support trust may be broad enough to allow the third-party to use litigation against the trustees to invoke the spendthrift clause exception.

- E. Special Needs Trust Provisions. Whether a beneficiary of a trust will lose his or her governmental benefits, or lose eligibility for these benefits (such as for Medicaid provided prescription medications, and so forth) depends on the terms of the trust. The law generally protects a beneficiary from losing these benefits if the trust is created and funded by a third-party and includes certain special needs provisions. This type of trust is referred to a “special needs” trust.

Thus, an aspect of asset protection is to help ensure that trust beneficiaries do not lose their eligibility for governmental benefits in the absence of these special needs trust provisions in the trust

document. This can cause the loss of a significant financial benefit that has the effect of unnecessarily exposing the trust assets to cover the lost benefits.

But the problem is that many families do not know whether someone down the family line ultimately may end up needing the special needs provisions.

In view of this uncertainty, and as a preventive measure, the core estate planning documents for clients should give the trustee a mechanism for creating a special needs trust if necessary in the future. This preventive measure includes both disclaimer and distribution-in-further-trust provisions in the trust document that effectively allow a beneficiary to disclaim coupled with the trustee using the distribution-in-further-trust power to carve out a new subtrust that will at that time include whatever provisions are necessary for the special needs trust protection. This subtrust creation is sometimes called a trust decanting power. The trust can include, for example, the following disclaimer and decanting provisions:

1.7 Any property interest disclaimed by a beneficiary other than my wife under this trust agreement who at the time of such disclaimer is disabled and, as a result of such disability, is receiving governmental assistance or eligible for such assistance shall as a result of the disclaimer instead be held in further trust for that beneficiary as a third-party special needs trust pursuant to section 7.2.

7.2 In exercising the power to distribute property under section 1.7, Article V and section 8.4, an Independent Trustee (defined in section 6.10) may, in the Independent Trustee's discretion without judicial approval and without the consent of the beneficiaries, for the benefit of any one or more person or persons who are within the entire class of beneficiaries to whom distributions can be made under this trust agreement (whether as a current or remainder beneficiary) make a distribution in further trust to an existing trust for any one or more of such beneficiaries or may create a new trust for any one or more of such beneficiaries as provided under this section 7.2. If the Independent Trustee creates a new trust, the Independent Trustee may select as the trustee or trustees of that trust any person or persons (including the Independent Trustee as a sole- or Co-Trustee trustee of such new trust); may change the legal situs of such new trust different from that of this trust agreement; may create limited powers of appointment in favor of any one or more person or persons who are within the above class of beneficiaries under this trust agreement; may limit the distribution standards in such new trust only to the ascertainable standards for the health, education, maintenance and support of the beneficiaries; may include spendthrift provisions in such new trust; may create current or remainder interests in and among any one or more of the members of the class of beneficiaries of such new trust, or may create a fully discretionary

special-needs trust (often referred to as a third-party special needs trust) for any disabled beneficiary so as to qualify for or preserve governmental benefits for such beneficiary. In order to take into account the provisions of this section 7.2 without liability, an Independent Trustee shall be held harmless from the exercise or non-exercise of the Independent Trustee's discretion as provided under section 6.14. [Underlining added.]

F. **Inter-Vivos QTIP Trusts.** I provide only a brief outline of the asset protection benefits and asset protection features of this inter-vivos QTIP trust. The general design is that this is a trust that one spouse funds while she is alive (the "funding spouse") for the benefit of the other spouse (the "QTIP beneficiary spouse").

1. **The Basic Operation of this QTIP Trust.** This inter-vivos QTIP trust is a written trust document. The funding spouse creates and funds the trust. Ideally, the QTIP trust funding amount should be at least the amount needed for the other QTIP beneficiary spouse to use his full \$3.5 million estate exemption if he is the first-to-die.

Thus, this means the value of the QTIP trust if the QTIP beneficiary spouse dies first will be included in the value of his estate. By contrast, if the funding spouse dies first, the entire value of the QTIP trust will be included in her estate, with the availability of a partial QTIP deduction if needed so as to make the funding spouse's estate non-taxable.

The written terms of the trust make the QTIP beneficiary the sole beneficiary for his lifetime. He is entitled to all income. If the QTIP beneficiary spouse dies first, then the funding spouse becomes the sole QTIP beneficiary for her lifetime. Ultimately after both spouses' deaths, the trust property can pass outright or in trust for the children.

Upon creation of the QTIP trust, the funding spouse retains a limited power of appointment over the entire QTIP trust property with the power to appoint to her spouse or children. This adds a level of excellent flexibility and also makes the QTIP funding an incomplete gift for gift tax purposes.

2. **The Tax Features.** This inter-vivos QTIP trust is typically funded by the funding spouse with the greater amount of assets, with the following results for tax purposes. It:
 - (a) assures that each spouse uses his or her entire estate exemption (currently, \$3.5 million for each spouse); this is because the QTIP trust assets are includible in the estate of whichever spouse is the first-to-die, regardless of whether it is the funding spouse or the QTIP beneficiary spouse who dies first;
 - (b) this effectively gives the funding spouse with the greater assets a double estate tax exemption, by tagging the inter-vivos QTIP trust assets with the poorer spouse's otherwise unused estate exemption. Thus, the spouse with the greater assets (using this year's \$3.5 million estate exemption) can protect \$7.0 million from estate tax;
 - (c) may potentially result in a stepped-up basis for a portion or all of the QTIP trust assets (for income tax purposes) upon the death of the poorer spouse; and
 - (d) does not require a separate trust income tax return during the funding spouse's lifetime.

Keep in mind the primary tax planning benefit I discuss here centers on items (a) and (b) for avoiding the loss of the poorer spouse's otherwise unused \$3.5 million estate exemption. The item (c) stepped-up basis for the QTIP trust assets for income tax purposes, if the poorer spouse dies first, is a potential opportunity and any related income tax savings will be in addition to the benefits of using both \$3.5 million estate tax exemptions.

3. **The Asset Protection Tax Features.** For asset protection purposes, this inter-vivos QTIP is excellent for many clients.

Assume, for example, the funding spouse funds the inter-vivos QTIP trust with \$2.0 million of her investment assets (particularly if these are longer-term investment assets that are not necessary for current spending needs). Upon this creation and funding of the QTIP trust, the other spouse, who is the QTIP

beneficiary spouse, becomes the sole beneficiary of the QTIP trust for his lifetime. The funding spouse is the sole trustee.

Assuming the funding of the QTIP trust is not made at a time when pending claims exist, the funding spouse is protected for asset protection purposes in that she is not a beneficiary of the trust until, and if, the other QTIP beneficiary spouse dies first. The QTIP beneficiary spouse is also protected for asset protection purposes in that he is not the spouse who funded the trust, thus the trust is not a self-settled trust as to the beneficiary spouse. The asset protection for the QTIP beneficiary spouse can be even stronger by using an independent trustee (rather than the funding spouse as trustee), with the independent trustee having fully discretionary powers as trustee.

Asset Protection: Why Procrastinate Now?
by James M. Kane, Attorney
Chamberlain, Hrdlicka, White, Williams & Martin
September 9, 2009

EXHIBIT A

CONTRACTOR'S AFFIDAVIT

The undersigned is an officer of _____, Inc., whose business address is 1996 Smith Drive, Suite 110, Atlanta, Georgia 30333 (the "Contractor"), and is authorized to execute this Contractor's Affidavit both in a representative capacity on behalf of the Contractor, as well as in his [or her] individual capacity, this _____ day of September, 2009.

The Contractor has performed work for Jane J. Doe (the "Owner") consisting of the Contractor's provision of labor, supplies, and materials for the repair and construction of _____ (the "Work") at the Owner's residence located at 1234 Peachtree Street, N.E., Atlanta, Georgia 30303 (the "Property").

The Contractor acknowledges that the Contractor has received full payment from the Owner of USD \$ _____ for the agreed price and reasonable value of all labor, services, materials, and completion of the Work and that this full payment is for all amounts due and payable from Owner to Contractor for this Work.

The Contractor acknowledges there is no outstanding balance or unpaid amount owed by Owner to Contractor for labor, services, or materials for the Work, consisting of but not limited to, equipment, parts, supplies, appliances, fixtures, or subcontractor labor, that may in any manner otherwise attach as a lien to the Property.

The Contractor represents and acknowledges that there are no valid preliminary notices or claims of lien that exist or have arisen as a result of the Work nor any notices or claims of liens that have not been previously cancelled, dissolved, or expired as of the date of this Contractor's Affidavit.

The Contractor agrees to indemnify and hold harmless Owner against any damages, loss, attorneys' fees, or other costs arising out of any lien or other claim filed by a subcontractor, supplier, materialman, laborer, agent, or other third-party in any way relating to or arising from the Contractor's provision of labor, supplies, and materials for the Work.

The Contractor signs this sworn written statement before a notary public under hand and seal as of the date first written above.

Sworn to, signed, sealed and delivered
in the presence of:

John Doe, Inc.

By: _____

James Doe, Vice President

Notary Public

My Commission Expires: _____

(Corporate Seal)

(Notary Seal)

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September 9, 2009

EXHIBIT B

JOHN M. DOE
191 Peachtree Street, N.E. 34th Floor
Atlanta, Georgia 30303

Tuesday, September 14, 2009

Ms. Angela Smith
by Hand Delivery

Re: Your Childcare Services as an Independent Contractor

Dear Angela:

This letter summarizes the status of your independent contractor work for your childcare services for our three children. As to your status as an independent contractor, we are not your employer and you are not providing these services to us as an employee.

You and we understand that you also may provide childcare services for other families and that we are not limiting or restricting you from working for other families. We also are not requiring you to commit to a fixed or rigid work schedule on our behalf.

You can provide our childcare services on your own schedule. You also have the right at all times to reject or change our request for the time and date of your childcare services. However, we would appreciate you giving us at least 24 hours advance notice for any change in your schedule. You can give us notice by telephone or e-mail. My e-mail address is: john.doe@chamberlainlaw.com

As part of your childcare services for us, you may decide, completely on your own, whether or not to transport our children to local parks, restaurants, camp or other locations, as part of your childcare services. You understand that you are not obligated or required by my wife Jane or me to use your automobile for transporting our children. If you do use your automobile, at your request we will provide you with funds for any park admissions fees or other charges for these excursions. We will also reimburse you 50 cents per mile for any use of your car for transporting our children.

Also if you choose to use your automobile for our children, we understand you will not be transporting our children as our agent nor as an employee on our behalf. Your transportation of our children with your own automobile will be solely as an

independent contractor under the above terms. You also represent to us by your signature below to this letter that you maintain your automobile in good operating condition, that you and our children will use seat-belts at all times, and that you will maintain adequate automobile liability insurance coverage for your own automobile.

Finally, we discussed with you the income tax withholding status for your work as an independent contractor. You understand that we will not withhold federal or state tax from the money we pay you for your childcare services, nor will we withhold employment taxes on your behalf. You may wish to consult with your own tax advisor as to your own tax situation and how this independent contractor status may affect you.

We are very pleased with your childcare services and hope that you find the work enjoyable and worthwhile from your perspective.

Thank you.

Sincerely,

John M. Doe

By my signature below I acknowledge that I have read this letter, that I understand the contents of this letter, and that I am providing childcare services to John and Jane Doe as an independent contractor, and not as an employee consistent with the terms of this letter.

Angela Smith

Date