

Warrior Estate Planning

4-16-13 by James M. Kane, Attorney

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We are all warriors when it comes to protecting our family, particularly our kids. Core estate planning can (and should) fall into this warrior mindset.

This mindset can (i) enhance asset protection for our family (e.g. divorce, bankruptcy, failed business ventures, Medicaid long-term nursing home care, and (ii) reduce or eliminate having down the road to pay lawyers to clean up the consequences of our procrastination if we become incapacitated or die without adequate planning.

This newsletter focuses only on the following asset protection feature for your family.

An Independent Trustee

The trust provisions (in your Will or trust) ideally must include provisions enabling a beneficiary to step down as trustee in order for an independent trustee to step in for the beneficiary as trustee, if warranted in the future.

More particularly, if sharks later surface (divorce, bankruptcy, lawsuits, etc.) the beneficiary-trustee steps down as trustee and appoints an independent trustee. The trust document gives the independent trustee full discretion as to when and how much to distribute from the trust to the beneficiaries.

It is a combination of the fully discretionary

power coupled with an independent trustee that produces the ironclad asset protection.

A full-discretionary independent trustee versus a family member HEMS trustee is the primary technical point dealing with this asset protection. HEMS is short for a trustee's distribution power being limited to "health, education, maintenance and support" HEMS is not full discretion. The tax law requires that a family member-trustee be limited to HEMS.

And family member HEMS trustees are generally referred to as non-independent trustees. This is fine, and it is typical for family members to be trustees.

However, for planning purposes here is a key distinction. HEMS distributions standards are substantially weaker for asset protection compared to fully-discretionary powers. Trusts with HEMS alone do not provide this greater level of asset protection.

This means ideally the trust document needs to include HEMS in addition to the option for a beneficiary later, if necessary, to trigger the fully discretionary powers with an independent trustee.

Finally, if a beneficiary-trustee ends up with a need for iron-clad asset protection and triggers in a fully discretionary independent trustee, all trustees thereafter must continue to be fully-discretionary independent trustees.

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