

CREATIVE WRITING: DRAFTING TO ADDRESS SOCIAL CHANGE

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CREATIVE WRITING AND DRAFTING TO ADDRESS SOCIAL CHANGE

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Drafting Technology

Drafting Technology

- Automated Drafting Programs
 - Very good base of knowledge, BUT...
 - Consider differing situations and scenarios
 - Important Tax Provisions versus Important Medicaid Provisions
 - Identify the Issues
 - Example: The inclusion of the Trustee's ability to adjust between principal and income
- Contending with DIY Programs

Drafting for Scenarios Where Children Are Living with Parents

Drafting for Scenarios Where Children Are Living with Parents

- Will the child want to remain in the home after the parents are gone?
 - Term of years
 - Select a qualified trustee
 - Who will be responsible for expenses, taxes, upkeep, etc.?
 - What happens at the end of the term?
 - Right of first refusal
 - See enclosed sample trust language
- Important: Make sure you know who your client is!

IRA/Retirement Account Drafting Techniques

- Conduit versus accumulation
- Making sure beneficiary designations are correct
- Right of election issues
- Issues when there is also an SNT in the trust/will
- See enclosed sample trust language

The Ability to “Swap” Assets in a Trust

- IRC Section 675(4)(C): “...a power to reacquire the trust corpus by substituting other property of an equivalent value.”
- Grantor Trust Status
- A possible way to correct old wrongs
- Medicaid issues

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Powers of Attorney: Avoiding Turnover Proceedings

- Include transfers to caretaker child, transfers to disabled children, transfer to siblings
- Possibly avoid the language that requires equal gifting
- Include language that gifting can be done to a trust for the benefit of the lineal descendants (and not only directly to lineal descendants)

POA cont.

- Assess the capacity of the principal
- Important to speak with the principal alone
- Review the family situation, trust issues
- Take copious notes
- Ensure that the client FULLY understands all the powers, especially the gifting powers
- Discuss durability of the document with client
- Where a client wants a “springing” POA, be sure to explain the pros and cons

Miscellaneous Important Drafting Techniques

- Assess income issues very closely
 - Income now versus income in the future when Grantor is on Medicaid
 - Consider the income tax implications
- Ability to revoke or amend an irrevocable trust
 - Keep a close eye on EPTL 7-1.9
- The importance of a limited power of appointment
- Allow for changes to the trust as time goes by
- Grantor’s right to change trustee – pros and cons

Hypothetical Number 1:

Mom age 65 comes to your office to discuss protecting her unencumbered \$300,000.00 home in White Plains. She will be retiring from hotel management at the end of the year. Mom intends to live off her SS and RMDs from her IRAs that total \$500,000.00. Mom has \$80,000 in cash savings.

Mom explains that she is a breast cancer survivor, is an insulin dependent type two diabetic, and has hypertension.

Mom is divorced from her husband for over twenty years. She has three children: Denise, a 40-year-old married stay at home mom with a profoundly disabled child; Sam, a 38-year-old divorced CPA who has one child; and Sonny, an unmarried 36-year-old struggling artist that lives with her.

Mom wants to treat her three children equally upon her demise, but she is very concerned about Sonny and wants to make sure that he is not left homeless. She would like to provide that Sonny be allowed to remain in the home for a period of time, but also is concerned that he may not be able to afford the taxes. She would like to put aside a fund to allow him to do this, but is clear that all children should be treated equally.

Hypothetical Number 2:

Mrs. Smith, age 72 and in good health, comes into the office to discuss asset protection strategies. During the meeting, attorney learns that her husband passed away six months. Mr. Smith died with the following assets:

IRA worth \$900,000: Mrs. Smith was listed as the primary beneficiary and the three kids (all of whom are healthy and above majority age and in stable financial positions) were listed as contingent beneficiaries.

\$1.5 million home in Great Heck owned with Mrs. Smith as tenants by the entirety which they purchased in 1971 for \$19,000.

Brokerage account worth \$100,000 with no named beneficiaries

Mr. Smith has a will leaving everything to Mrs. Smith, with his children as equal contingent beneficiaries.

Mrs. Smith has the following assets:

IRA worth \$800,000.

\$700,000 in liquid assets (mainly cash accounts).

Her only source of income is Social Security and she will now receive the Social Security survivors' benefit.

What issues should you, as the attorney, address here?

What if one child has a spouse that "causes concern" and one child suffers from a disability and is on Medicaid?

Hypothetical Number 3:

You just finished assisting Mr. Guy in getting his wife approved for Institutional Medicaid, and Mr. Guy advises you he has terminal cancer and it is clear he likely will pass away before Mrs. Guy. Mr. Guy's assets are as follows:

House worth \$400,000
IRA worth \$400,000
Liquid Assets of \$300,000

What are the options for drafting Mr. Guy's estate plan?

Hypothetical Number 4:

Grant was told in the waning days of 2012 that the estate tax exclusion was going down to \$1 million. Grant was advised by his attorney to transfer \$1 million dollars in very low basis assets (brokerage, etc.) to an irrevocable trust that was a completed gift for both Medicaid and estate tax purposes. The trust did not include a limited power of appointment. The beneficiaries of the trust were Grant's children, with a charity as a contingent beneficiary in the event a child predeceased Grant. Trust allows Grant to substitute assets of equal value. By 2018, the assets within the trust appreciated to \$2 million.

Grant is now 90 years old, in failing health. His assets outside of the trust consist of a \$200K in a traditional IRA, \$500K in a Roth IRA and \$750K in cash in the bank. Grant never went into a nursing home and will most likely remain at home. Grant comes into the office to ask if he can do some Medicaid planning for potential home care. What would you do?

A. Pursuant to the provisions of this Will, certain property is directed to be held in separate trusts in accordance with the provisions of this Subdivision for the benefit of certain of my issue (such issue for whose benefit a trust is created hereunder shall be referred to in this Subdivision as the "Beneficiary"), such property shall be held by my Trustees and managed and disposed of for the benefit of such Beneficiary as follows:

1. My Trustees are authorized, at any time or from time to time, to pay or apply such part or all of the net income and principal of this trust to or for the benefit of such Beneficiary, or such Beneficiary's issue living from time to time, as my Trustees determine in their absolute discretion. In exercising their discretion under this Paragraph, my Trustees may but need not take into account any other resources available to or for the benefit of such Beneficiary. Any income not distributed in any trust year will be accumulated and added to principal.

2. Notwithstanding the foregoing, if this trust shall have been named as the beneficiary of death benefits under any qualified retirement plan, or as the designated beneficiary of any individual retirement account, beginning in the year following my death, my Trustees shall annually withdraw the minimum distribution required under Internal Revenue Code

Section 401(a)(9) from the trust's share of the plan or account. My Trustees may withdraw additional amounts from the trust's share of the plan or account as my Trustees consider advisable. Any amounts withdrawn by my Trustees from any such plan or account shall immediately be distributed to the Beneficiary. My purpose in including the direction is to ensure that the life expectancy of the trust Beneficiary may be used to calculate the minimum distributions required by the Internal Revenue Code. This Section must be interpreted consistent with this intent despite any direction to the contrary in this instrument.

3. Upon the death of the Beneficiary, the principal of the trust remaining at that time, and any accrued and undistributed income on hand, shall be distributed to or for the use of such one or more members of a class consisting of the issue of such Beneficiary, outright or in further trust, and in such proportions and subject to such terms and conditions, as the Beneficiary shall appoint by Will admitted to probate, it being my intention hereby to vest in such Beneficiary a limited testamentary power of appointment. This limited testamentary power of appointment shall be exercisable only by a specific reference thereto in the Will of the Beneficiary and shall not be deemed to have been exercised by any general residuary article contained therein. To the extent that the Beneficiary shall fail effectively to exercise the limited testamentary

power of appointment conferred in the foregoing sentence, the remaining principal and any accrued and undistributed income on hand shall be distributed to the then living issue, per stripes, of the Beneficiary, or, if none, to the then living issue, per stirpes, of the parent of the Beneficiary who shall have been an issue of mine, or, if none, to my then living issue, per stirpes, subject, however, in all of the foregoing instances, to the provisions of this Subdivision A.

**SAMPLE REAL PROPERTY TRUST WHERE CHILD HAS ONE YEAR OCCUPANCY PERIOD AND RIGHT
TO PURCHASE PREMISES AT END OF TERM**

A. If my daughter, **JANE DOE**, shall survive me and shall have been residing in the real property known as and located at 123 Main Street, Anytown, New York (the "Premises") at the time of my death, I give all of my right, title and interest in and to the Premises, including, without limitation, the residence and all improvements thereon, and including all insurance policies relating thereto, to my Trustees, hereinafter named, to hold in a separate trust for the benefit of my daughter, **JANE DOE**, as follows:

1. a. My daughter, **JANE DOE**, shall have the sole and exclusive right to use and occupy the Premises for one (1) year, from the date of my death (the "Occupancy Period"). Such right of use and occupancy shall be contingent on my daughter, **JANE DOE**, paying all expenses attributable to the Premises, including, but not limited to, mortgage payments, utilities, homeowner's insurance premiums, taxes, assessments, landscaping, snow removal, and normal maintenance and upkeep, during the period of her use and occupancy.

b. Upon the expiration of the Occupancy Period, or such earlier date agreed to by my Trustees and my daughter, **JANE DOE**, I direct that my Trustees shall offer the Premises for sale to my daughter, **JANE DOE**, for seventy-five percent (75%) of

its fair market value, as hereinafter defined. My daughter, **JANE DOE**, shall provide written notice of her intention to purchase the Premises from the Trust to my Trustees prior to the expiration of the Occupancy Period, via next day delivery using any nationally recognized overnight courier service that provides records of its deliveries, and she shall be ready, able and willing to close on such sale within one hundred and twenty (120) days from the end of the Occupancy Period.

c. The fair market value of the Premises shall be determined by an appraisal performed by an independent licensed real estate appraiser selected together by my Trustees and my daughter, **JANE DOE**. If my Trustees and my daughter, **JANE DOE**, are unable to agree upon an appraiser, then each of my Trustees and my daughter, **JANE DOE**, shall select an appraiser. If the appraisers selected by my Trustees and my daughter, **JANE DOE**, are unable to agree as to fair market value of the Premises, then such appraisers shall select a third appraiser who shall determine the fair market value and whose determination in this regard shall be conclusive and binding on my Trustees and my daughter, **JANE DOE**. The costs of all appraisers shall be charged against the principal of my residuary estate and treated as an expense of administering my estate.

d. If my daughter, **JANE DOE**, opts to purchase the Premises in accordance with the provisions of Subparagraph b of this Paragraph and shall have closed on such purchase, this trust shall terminate and the Net Proceeds, as hereinafter defined, shall be distributed as part of my residuary estate in accordance with the to the provisions of Subdivision A of ARTICLE THREE of this Will.

e. In the event that my daughter, **JANE DOE**, has not provided written notice to my Trustees of her intention to purchase the Premises by the end of the Occupancy Period, or, in the event of the death of my daughter, **JANE DOE**, prior to the end of the Occupancy Period, or, in the event my daughter, **JANE DOE**, fails to close on the purchase of the Premises within one hundred and twenty (120) days from the end of the Occupancy Period because she was not ready, unable or unwilling to close by such time, or, in the event that my daughter, **JANE DOE**, delivers written notice to my Trustees consenting to the earlier sale of the Premises to a third party prior to the end of the Occupancy Period, the Premises shall be sold, this trust shall terminate and the Net Proceeds, as hereinafter defined, shall be distributed as part of my residuary estate in accordance with the provisions of Subdivision A of ARTICLE THREE of this Will.

f. As used herein, the term "Net Proceeds" shall mean the sales price of the Premises minus applicable

brokerage commissions, advertising costs, costs connected with readying such Premises for sale, legal fees paid in connection with such sale, any applicable transfer taxes and other customary and ordinary costs (other than capital gains taxes) related to the sale of the Premises.

2. In the event my daughter, **JANE DOE**, does not exercise the right to purchase the Premises provided to her under the provisions of subparagraph b of Paragraph 1 of this Subdivision, I direct that my daughter, **JANE DOE**, be charged the sum of \$1,000 for each month or partial month beyond the end of the Occupancy Period that she shall occupy the Premises. I authorize my Executors and Trustees to make an adjustment for any such sum due from my daughter, **JANE DOE**, from the distribution of my residuary estate under the provisions of Subdivision A of ARTICLE THREE.

3. In the event my daughter, **JANE DOE**, exercises the right to purchase the Premises provided to her under the provisions of subparagraph b of Paragraph 1 of this Subdivision, but she shall fail to close on the purchase of the Premises within one hundred and twenty (120) days from the end of the Occupancy Period because she was not ready, unable or unwilling to close by such time, I direct that my daughter, **JANE DOE**, be charged the sum of one thousand dollars (\$1,000) for each of the first four (4) months beyond the end of the Occupancy Period

that she shall occupy the Premises, and the sum of two thousand dollars (\$2,000) for each month or partial month beyond the initial four months following the end of the Occupancy Period. I authorize my Executors and Trustees to make an adjustment for any such sum due from my daughter, **JANE DOE**, from the distribution of my residuary estate under the provisions of Subdivision A of ARTICLE THREE.

Commentary:

1. Set occupancy term.
2. Detail out who pays what expenses during the occupancy term.
3. Spell out the purchase option, if any.
 - a. How exercised:
 - i. Method: written notice, mailing method
 - ii. Deadline for exercising option
 - b. How purchase price determined.
 - c. Who pays for what closing costs? Any deviation from standard treatment of closing costs.
4. Identify what happens if option not exercised or don't close. Penalty for holdover.

SAMPLE REAL PROPERTY TRUST FOR THE LIFETIME OF A CHILD

A. If my daughter, **JANE DOE**, shall survive me and shall have been residing in the real property known as and located at 123 Main Street, Anytown, New York (the "Premises") at the time of my death, I give all of my right, title and interest in and to the Premises, including, without limitation, the residence and all improvements thereon, and including all insurance policies relating thereto, to my Trustees, hereinafter named, to hold in a

separate trust for the benefit of my daughter, **JANE DOE**, as follows:

1. My daughter, **JANE DOE**, and only my daughter, **JANE DOE**, and no other person, shall be entitled to the rent-free use, possession and enjoyment of the Premises or any other personal residence owned by the Trust. By this Paragraph 1, it is my intention that my daughter, **JANE DOE**, be considered the beneficial owner of such personal residence within the meaning of New York Real Property Tax Law § 425(3)(c), as amended from time to time.

OR

1. My daughter, **JANE DOE**, shall have the right to reside in the Residence owned by this trust.

2. My Trustees shall sell any personal residence held in the trust upon written notice to the Trustees from my daughter, **JANE DOE**, requesting the sale of such personal residence. Absent a request by my daughter, **JANE DOE**, as set forth in the first sentence of this Paragraph 2, my Trustees shall be prohibited from selling any personal residence owned by this trust during the life of my daughter, **JANE DOE**. The written request provided for under the foregoing provisions of this Paragraph 2, may be made by my daughter, **JANE DOE**, or her agent duly authorized under a Durable General Power of Attorney. Further, in the event of a sale of any such residence pursuant

to the foregoing provisions of this Paragraph 2, the Trustees may purchase a new residence within twelve (12) months from the sale of the Residence, in an amount not to exceed the Trust assets, upon written notice to the Trustees from my daughter, **JANE DOE**, requesting such purchase. The replacement residence will continue to be titled in the name of, and managed and disposed of in accordance with the provisions of, this Trust.

3. During the term of the trust, my daughter, **JANE DOE**, shall be responsible for the payment of utilities, homeowner's insurance premiums, common charges, taxes, assessments, landscaping, snow removal, and normal maintenance and upkeep of any personal residence owned by the trust.

4. This trust shall terminate upon the first to occur of (a) the death of my daughter, **JANE DOE**, or (b) in the event a replacement residence is not purchased within one (1) year of the sale of any residence held by the Trust in accordance with the provisions of Paragraph, at which time the remaining assets of the Trust shall be to my then living issue, per stripes.

Commentary:

1. Just right to reside or more detailed language to approximate equivalent of life estate.
2. Who pays what expenses?
3. Option for child to request/direct sale?
 - a. If so, can a replacement residence be purchased or would trust terminate upon sale?

- b. What if replacement residence costs less than sale proceeds from initial residence, what happens to excess proceeds?
 - i. Stays in Trust? What happens to principal and income during remaining trust term?
 - ii. Distributed to ultimate beneficiaries?
 - c. What if child wants to purchase a replacement residence that is worth more than the sale proceeds from initial residence, can they contribute to purchase and house is then owned part by trust and part by child?
4. Can agent under POA for child direct sale?

A. For all purposes of this Will, my daughter's husband's son, **JIM BEAM**, shall be considered a child of my daughter, **MARY BEAM**, and, therefore a grandchild child of mine and, by extension any of his children shall be considered grandchildren of my daughter, **MARY BEAM**, and great grandchildren of mine.