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VERY SIGNIFICANT CHANGES POSSIBLE IN RHODE ISLAND

By
Michael T. Lahti, Esq.

The Rhode Island Reinventing Medicaid Act of 2015 (the "Act") contains legislation that could have a profound effect upon residents in Rhode Island. The legislation appears to be hastily drafted and, frankly, contains parts that are more restrictive than federal law provides, which might lead to parts being pulled from the legislation or if passed, struck down. In a nutshell, the legislation is attempting to turn Rhode Island into a very "unfriendly" state for seniors who need nursing home care. Here is a quick listing of some of the key points of the legislation.

Notable Change #1. The legislation provides that any transfer of assets, whether through purchasing an annuity or making a loan with a promissory note, results in the imposition of a penalty. This provision conflicts with federal law. If passed, it would be very harmful to the community spouse ("healthy" spouse), when one spouse in a married couple has to go to a nursing home. Traditionally, we have been able to help these healthy spouses avoid massive "spend-downs" at the nursing by retaining assets through the use of annuities and promissory notes. Clearly Rhode Island is trying to take this away.

Notable Change #2. Rhode Island wants to go after "non-probate" assets to collect assets. This would include assets traditionally protected in Rhode Island such as IRAs, 401(k)s, jointly held assets, life-estates, etc. There are serious conflicts with federal law here too, as well as "taking" issues (for instance, taking away other "grandfathered" protections that people may have engaged in). Of note is the fact that Massachusetts tried to make a similar change years ago, but such changes were quickly scrapped.

Notable Change #3. The legislation would require Medicaid recipients to pay 12% interest on any debt for medical assistance reimbursement. Currently Rhode Island is permitted to collect upon death amounts paid without collecting interest. This legislation appears to be attempting to turn government assistance into a loan.

Notable Change #4. All gifts are "presumed" to be made for nursing home purposes, and would require "clear and convincing" evidence to rebut the

presumption. This would be damaging to seniors who make gifts and then suffer an unexpected illness, such as a stroke. This change would at the very least make qualifying for benefits more difficult, as one would have a higher burden to prove that gifts were made for reasons other than for applying for nursing home purposes.

Notable Change #5. Partial cures for gifts made will not reduce the penalty. This is best explained with an example. Assume a grandparent gifts $14,000 to a grandchild, and then unexpectedly needs nursing home care. The gift at this point would need to be returned from the grandchild to the grandparent. But what if the grandchild has spent one-half of the money, and cannot return it? The new Rhode Island legislation would penalize the grandparent on the whole transfer, and the grandparent would not get credit (to reduce the penalty) for amounts returned from the grandchild. This seems patently unfair.

In summary, this legislation appears to be very (too) far-reaching, and was not drafted with precision. It will almost certainly be revised to remove the more severe provisions. Alternatively, if it passes unscathed it will almost certainly be challenged in court. Rhode Island has shown its hand in that it wants to tighten its rules. All this means that seniors will be forced to do traditional type planning sooner.

We will continue to report on this as changes are made. For more contemporaneous reporting, we suggest checking our blog on our website. ♦♦♦

Introductions

Lahti, Lahti & O'Neill is always grateful to receive referrals from our clients and professional colleagues. If you know of anyone interested in our estate planning or elder law services, please have them contact us for a free consultation.

ASK THE ATTORNEY

I have established a Lahti, Lahti & O'Neill, P.C. revocable trust with the intention of avoiding Probate Court. I have put all of my assets into my trust, with the exception of my two cars. My LL&O attorney advised me to leave the cars out of the trust, so the trust would not be exposed in the event of an auto accident. Will my heirs have to go through Probate Court to get title to these cars?

Answer by Mia H. Lahti. Esq.

Whether a car will have to be probated to pass it to heirs depends on whether you're married, and the process is slightly different between Massachusetts and Rhode Island.

In Massachusetts, transferring a car outside of probate is easiest when the decedent was married. Massachusetts has a statute that simplifies the transfer and makes it much like the traditional application for a new title. The surviving spouse brings a certified death certificate to the Registry of Motor Vehicles, and that will result in a new title issuance in the surviving spouse's name.

For other family members, in Massachusetts, a probate will be required to transfer ownership if the family member's name was not on the title. If the car is the only asset that needs to be probated, Massachusetts has a simplified probate process for small estates called voluntary administration.

In Rhode Island, upon death title to a married decedent's car will automatically transfer to the surviving spouse upon presentation of the death certificate to the Division of Motor Vehicles. If the decedent is unmarried and the sole person on the title, then a personal representative of the estate will need to be appointed by the probate court. Rhode Island also has informal administration for small estates. After being appointed, the "voluntary informal executor" can then sign title over to the person named in the will as inheriting the car. The DMV will require a copy of the will. If there is no will, then the personal representative would need to complete paperwork establishing who the heirs of the decedent are.

The car is registered at the same time of the transfer, and there are additional fees for registration. Rhode Island has a "No Cost Policy", which applies only to spouses and not to other family members. In both states, the car should be insured, or the current insurance maintained, before attempting to register it. ♦♦♦

WHEN IT COMES TO ESTATE SETTLEMENT, WE'RE NOT PAUL NEWMAN…

If you've not seen Paul Newman's classic courtroom drama The Verdict in which Paul plays a down-and-out Boston lawyer who finally gets a big case, you should view at least the first scene. Paul reads the newspaper death notices, goes to each funeral and awkwardly hands each widow his card.
We don't do that. Well, yes, we do pay attention to the death notices, but if one of our clients passes away, we will not contact the heirs. We consider that to be a predatory practice. It's up to the heirs to contact us.

In virtually every case, following a client's death, there is legal and tax work that needs attention. Our practice is, once we are contacted, we set up a meeting and send a punch-list of items to be brought to the meeting. If at the conclusion of the initial meeting, the heirs and legal representatives decide not to retain us, there's no charge for the meeting. If we are retained, we set up a timetable of events to be attended to by us, by the client, by the tax and investment advisors and others. Then, unless instructed otherwise, we "quarterback" the entire estate and trust settlement process. The objective is to provide as smooth and economic a transition as possible.

We follow the same practices in cases where a client has become incapacitated. There are virtually always important legal steps to be taken. But again – particularly since there are no "incapacity notices" published in the newspaper – it's up to the loved ones to contact us. ♦♦♦

INHERITED IRAS REACHABLE IN BANKRUPTCY: U.S. SUPREME COURT

By
Stephen T. O'Neill, Esq.

In its 2014 Clark v. Rameker decision, the Supreme Court ruled that although your IRA or qualified retirement plan is protected from claims of creditors while you're alive, once you've departed, there is no bankruptcy protection for your beneficiaries.

Your IRA or qualified plan beneficiary will get the best tax result if distributions are "stretched out" over the beneficiary's life expectancy as generally allowed by the IRS Required Minimum Distribution ("RMD") regulations. This is done by establishing an "IRA Beneficiary Account" and taking distributions from that account over the beneficiary's lifetime, in accordance with an IRS "Single Life Table."

In other words, getting the best tax result is not rocket science. But following Clark v. Rameker, what can be done to protect a stretched-out inherited IRA from the claims of creditors? The answer is, you should make your benefits payable at death not directly to the beneficiary but to a "spendthrift trust " for the benefit of that beneficiary. In the words of one expert commentator, "[a]s you can never be sure whether the beneficiary will eventually have creditor issues, using a trust to ensure creditor protection is almost a no-brainer."

Deciding to use a trust as beneficiary of IRA or qualified plan benefits may be a "no-brainer," but drafting that trust correctly is definitely a "brainer." Here's why: a spendthrift trust (or any trust, for that matter) qualifies for tax-deferred stretchout of RMDs over the trust beneficiary's lifetime, only if it contains certain provisions mandated by the IRS' RMD Regulations. Moreover, for the reasons set forth in my Chapter entitled "Using Standalone Retirement Distribution Trusts" in the 2009 book Estate Planning Strategies, WealthBuilders Press LLC (this Chapter is also found on LLO's website), it is far preferable to name a stand-alone trust as opposed to your living trust as beneficiary of post-death IRA or qualified plan distributions. And as also discussed in that Chapter, there are alternative ways to design such a trust, depending on your objectives and the beneficiaries' personal circumstances.

Contact us if you want to discuss how to best protect your beneficiaries' inherited IRA benefits after your death in a post- Clark v. Rameker environment. ♦♦♦

HOW TO DISTRIBUTE AN IRA TO A TRUST POST-DEATH

By
Stephen T. O'Neill, Esq.

A propo of the two preceding articles about our being better than Paul Newman and about Protecting IRAs, here's an extract from guidance we recently provided a financial advisor who was about to meet with a widower. They were making arrangements for post-death payments from his deceased wife's IRA which was payable to a Standalone Retirement Distributions Trust. This trust, which we had designed and drafted several years earlier, was for their grandchildren-

Dear Jack:
You wanted to know how the above referenced Retirement Distributions Trust, and Jane's IRA which is payable to it, are to be administered and distributed as a result of Jane's death.

I am attaching an executed copy of the Trust. Under the IRS Required Minimum Distribution ("RMD") Regulations, a copy must be furnished to the IRA custodian not later than October 31 of the year following the year of Jane's death, i.e. by 10/31/16, but please arrange to have this done as soon as convenient and copy us.

The IRA beneficiary is as provided in beneficiary designation forms that Jane signed in 2006, i.e. "One equal share to the separate trust for each of my grandchildren under the Jane Smith Retirement Distributions Trust for Grandchildren dated January 6, 2006."

Jane's husband Peter is successor Trustee of the IRA Inheritance Trust as of Jane's death. As of her death, Jane had one grandchild, Noah Smith. Thus the IRA must be converted to an IRA Beneficiary Account known as "Jane Smith IRA Beneficiary Account f/b/o Peter Smith as Trustee of Jane Smith Retirement Distributions Trust dated 1/6/06" or words to that effect.

Peter as Trustee is required, not later than December 31, 2016, and for each year thereafter, to begin having the IRA custodian make RMDs to him as Trustee of a trust account that he must also establish before the end of this year, based for 2016 on the 12/31/15 annuity contract balance and on Noah's attained age in 2016 under the attached IRS Single Life Table (age 17, Divisor:66.0); and with the prior year's divisor reduced by one for each subsequent year (again based on the prior year-end IRA balance). In other words, you only refer to the Table in year one, and thereafter you reduce the divisor by one each year.

So for example, in 2016 the trust is to receive a RMD of 1/66 of the IRA's 12/31/15 value; in year 2 1/65 of its 12/31/16 value, etc. Assuming a prudent investment strategy is followed, the potential for tax-deferred buildup of the IRA vehicle is nothing short of fantastic. You might want to run the numbers for Peter. Actually we have a program that does this, based on client and financial advisor input.

Also, since you told me yesterday that Jane (who is over 70 ½) has not taken her full RMD for 2015, under IRS' RMD Regs her remaining 2015 RMD must be distributed not to her or her estate but to her beneficiary. So you should immediately cease making any distributions to Jane or to any account of Jane's, and then have Peter create a Trust account with you or some other financial institution, titled "Peter Smith or successors in trust as Trustee under Jane Smith Retirement Distributions Trust dated December 6, 2005," or words to that effect, for purposes of receiving a lump sum distribution of Jane's undistributed 2015 RMD by 12/31/15 as well as all future years' RMDs. The IRA Inheritance Trust is a "conduit trust" under IRS Regulations. This assures that the trust qualifies as a "designated beneficiary" under the IRS RMD Regs and is entitled to stretch out RMDS on a tax-deferred basis over, in this case, 66 years. This means that each time a distribution is made to the trust, it must be remitted in that same tax year to Noah or, while he is under 21, to a Uniform Transfers to Minors Act ("UTMA") account for his benefit of which Noah's father or mother may serve as custodian.

Once you are in a position to make Jane's 2015 undistributed RMD, we can talk about establishing a Trust account.

The trust account will need a tax ID# and will have to file annual state and federal fiduciary income tax returns. The returns should be extremely simple, showing one item of income and a corresponding "conduit" distribution of that income to the three beneficiaries, for a net taxable income of zero. But you'll want to confirm this with Peter's tax preparer. ♦♦♦