



LEGAL NOTES

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NEW YORK'S FREEDOM OF INFORMATION LAW

By Rita G. Rich, J.D.

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The acronym "FOIL" stands for Freedom of Information Law, which is found in Article 6 of the New York Public Officers Law. The legislation was passed in 1978 and requires New York State agencies to allow public access to its records, with certain exceptions. This article is an overview of the statute with some helpful information on obtaining public records.

In discussing the public policy purposes behind the statute, New York's legislature stated that "government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government..." The term, "records," has been defined as all physical forms, including computer drives, DVD's and tape recordings.

Not all governmental records, however, are accessible by the general public. Generally, the exceptions, or deniable records, are certain disclosures that would cause harm, injury or interference, among other terms that reflect common sense parameters. Personal privacy may not be invaded, but when identifying

details are deleted, or consent is given, there is no invasion. Records may be denied when a state or federal statute exempts them from FOIL. For the most part, trade secrets are exempt, as are records of contract awards or bargaining negotiations that could cause harm if disclosed. Law enforcement and criminal investigations are exempt when disclosure would interfere with them or divulge confidential sources or information. If a record would endanger life or safety, it may not be disclosed. Also, lists of names and addresses for the purpose of commercial or fund-raising purposes will not be provided.

Basic inter and intra-agency material must be disclosed, except for records merely reflecting advice that may or may not be heeded. Thus, when a record consists of facts and actual policies or determinations, it should be made available. Of course, computer access codes may be kept secret, as well as the agency's questions or answers to future exams.

Section 87 (3) of Article 6 specifically requires an agency to keep and continually update certain records: final votes; name, public office address, title and salary of every officer and employee; and a list of its records (even if exempt from disclosure), identified by subject.

Section 89 of Article 6 provides for a “Committee on Open Government.” It was formed to give advisory opinions on the Freedom of Information Law, as well as the Personal Privacy Protection Law, both to the public and to the agencies of the government. The Committee does not review actual records; it gives interpretations of FOIL. Its opinions are not binding on anyone, but they may be persuasive and helpful in an appeal. Under the law, every appeal and the agency’s determination is sent to the Committee on Open Government. The Committee reports to the Governor and the legislature annually. The Committee’s opinions are available online.

Records of government agencies are obtained by providing the appropriate records clerk with a clear, written application, possibly with a request for the cost before the copies are made. Reference may be made to the Freedom of Information Law, and it may also be important to ask to whom an appeal should be addressed in the event of a denial.

In conclusion, no matter what the need or purpose for a record of a public agency, every person is entitled to obtain a desired record under the Freedom of Information Law, to, so long as it is not covered by an exception. If the FOIL request is denied, the denial may be appealed within 30 days. Should that appeal be unsuccessful, an Article 78 proceeding under New York Civil Practice Law and Rules may be initiated in the Supreme Court of any county in the judicial district in which the agency refusing to release the record is located.

TIPS TO AVOID A WILL CONTEST

By James Yastion, J.D.

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When you sit down with an attorney to design your estate plan, it is critical to take precautions

to avoid a will contest. Even though you may be certain that your beneficiaries will not challenge the will, many real life cases have proven such a conviction wrong. A childhood injustice by one sibling against another, jealousy regarding one child’s relationship with a parent, or a remarriage can sew the seeds of division during life and fuel a will contest after death. This is especially true where there are substantial assets in the estate.

First and foremost, you will want to make sure an experienced attorney prepares your estate plan. It may be tempting, especially in a modest estate, to prepare your own last will, trust, or other estate planning documents. You may be trying to save money and avoid the legal fee. This may well be a serious mistake, because it could result in your estate expending ten times the amount in legal fees in a will contest.

An experienced estate planning attorney will be intimately familiar with the formal will execution requirements. These requirements must be followed to the letter for the will be valid under New York law. Section 3-2.1 of the Estates, Powers and Trust Law provides that the will must be signed by the testator or the testator must acknowledge that the signature appearing on the will is his own in the presence of at least two witnesses. The testator must also declare to the witnesses that the document is his last will. The witnesses must attest to the testator’s signature within thirty days’ of the will execution and, at the request of the testator, must sign their own names. Any provisions written following the testator’s signature will be invalid; and, beneficiaries under the will should not also be witnesses or they will forfeit their bequests.

Another benefit of having an attorney draft your will is that it creates a presumption of due execution. A presumption is significant because, even if the attorney drafts person does not independently recall the will execution, the fact that the attorney supervised the execution

will often persuade the court that the execution formalities were followed.

Additionally, there are particular clauses in a will that further insulate the will from attack. One such clause is an “attestation clause.” This clause recites the execution requirements and is inserted after the testator’s signature and before the witness’s signature. The existence of this clause allows a jury to infer due execution.

A beneficiary may challenge a will claiming that the testator lacked the capacity to execute a will. The court’s finding will often hinge on the testimony of the attorney draftsman and the witnesses as to whether they believed the testator had capacity (which is further reason to have an attorney draft and supervise the will execution). However, there are several extra steps that can be taken to shore up a finding of testamentary capacity when and if an objection is later lodged on this ground.

Testamentary capacity arises most commonly where the testator is elderly or is suffering from a serious physical or mental ailment. Under these circumstances, you may decide to undergo a psychiatric examination at time of the will is to be signed. A finding of capacity or competency by an impartial professional can be highly probative. Another examination one year after the will execution would create a definitive record. If the testator was competent one year after the will execution, he was even more likely competent earlier since many illnesses including types of dementia tend to worsen over time.

You may also want to videotape the execution ceremony to provide further evidence of capacity. Of course this could help or hinder the case for the last will depending on the condition of the testator. Provided the testator will appear rational, aware, and lucid, videotaping can give unparalleled, graphic proof of testamentary capacity that could be impossible to rebut.

Next, it is important to avoid the existence or even appearance of undue influence by one or

more beneficiaries upon the testator. A commonly employed ground to defeat a will is that a beneficiary -- often one who receives a greater share of the estate -- had the opportunity to, and did in fact, exercise influence over the testator such that the will does not express the wishes of the testator, but instead reflects the wishes of the beneficiary. Of course, there may be circumstances where the testator wants to benefit one beneficiary more than others, in which case the following additional precautions should be taken.

First, it is helpful to write a letter or note to be stored in the attorney draftsman’s file describing the reasons why you are choosing to benefit one beneficiary more than others. For example, you may have made a substantial gift to another beneficiary in lieu of a full share under your will. Indeed, you may write a letter to the beneficiary who is to receive less of the estate than another to explain what you intend to do and why. Of course, you should draft the letter and it should not be drafted by or with the assistance of the benefited beneficiary.

Second, you should avoid using the favored beneficiary’s attorney, even if he or she comes highly recommended. If you have your own attorney, that attorney should be used or, if there is none, find an unassociated attorney with no connections to the family.

Third, the favored beneficiary should not be present at the estate planning meetings or the will execution ceremony. If you need assistance in going to the attorney’s office and the favored beneficiary is the only person who can bring you, at the very least the beneficiary should wait outside the meeting room, or maybe even leave the building entirely during the will signing.

Additionally, you should set up the meetings with the attorney yourself, if possible. In one case that I handled, the favored beneficiary attended every single meeting with the testator. In another case, the favored beneficiary not only attended each meeting, but also scheduled every

meeting. The most extreme case was where the favored beneficiary attended every meeting, set up all of the meetings, and the testator was not even present at any of the meetings! This last case resulted in a complete victory for the person contesting the will on the grounds of undue influence.

Finally, the testator must take extra precautions to avoid an appearance of undue influence where he has a confidential relationship with the favored beneficiary. A confidential relationship can arise either as a matter of law, such as where there is a power of attorney, or as a matter of fact where the facts show the testator was weak and susceptible to influence and that he relied on the beneficiary.

When completing your estate planning, it is important to not only be mindful of the financial impacts of the estate plan, but also how it will impact a potential will contest. Taking into account the precautions above may make a huge difference in ensuring that the inter-generational transfer of wealth is smooth and litigation free.

LIFE ESTATE DEED OR MEDICAID TRUST? IT'S NO CONTEST!

By Richard J Shapiro, J.D.
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In an elder law practice, one of the most commonly requested legal services is for the preparation of a deed transferring a parents' home to their children, with the parents reserving a "life estate" interest in the home.

The general purpose of such an arrangement -- often referred to as a "life estate deed" -- is to protect the home if the parents someday need long-term care assistance and hope to qualify for Medicaid coverage. However, under virtually any scenario, transferring a home to a

Medicaid Asset Protection Trust ("MAPT") is a better option than using a life estate deed.

If successfully implemented, both the life estate deed and the MAPT will protect a primary residence *so long as* the homeowner does not apply for Medicaid long-term care coverage for at least *five years* from the date the strategy is implemented. But the MAPT has a number of significant advantages over the life estate deed that makes the MAPT the strategy of choice. Here are some of the key differences:

- If the home is sold after being conveyed to the MAPT, the entire capital gain will qualify for the capital gain exemption that is available only to owners of a primary residence (\$250,000 exemption for individuals, \$500,000 for married couples). By contrast, if the home is sold after being conveyed with a life estate deed, the portion of the home that has been transferred to the "remainder beneficiaries" -- that is, the children -- *will* be subject to capital gains tax. Assume, for example, that a 75-year-old widow executes a life estate deed transferring the remainder interest in her home to her children and the house is sold during the mother's lifetime. If the capital gain from the sale were to equal \$200,000, the children would be liable for a capital gain tax of approximately \$20,000, since about 48% of the gain will be attributed to the children's remainder interest that is *not* exempt from capital gains tax.
- A transfer to children using a life estate deed is typically an irrevocable transfer. If a parent later has a falling-out with a child, the parent will be unable to "undo" that transfer. By contrast, a properly structured MAPT will include a "limited power of appointment" that permits the parents to change the trust beneficiaries during the parents' lifetimes, and retains for the parents the

right to decide who receives the trust assets after the time of the parents' deaths.

- If a child owning a remainder interest in the home via a life estate deed subsequently gets divorced or is successfully sued, the divorcing spouse or judgment creditor may be entitled to all or part of that child's remainder interest in the home.

If a parent someday enters a nursing home and the children elect to sell the parent's residence, under the life estate deed technique the Department of Social Services will be entitled to

reimbursement for the portion of the sale proceeds equal to the value of the parent's remaining life estate interest at the time of sale. So, even after expiration of the five-year look back period, if a 75-year-old in a nursing home is on Medicaid and their home is sold for \$250,000, Medicaid will be entitled to reimbursement for the parent's 52% portion of the sale proceeds (or \$130,000). In contrast, there is no Medicaid reimbursement requirement if a residence held by a MAPT is sold while the parent is receiving Medicaid assistance.

EDUCATIONAL WORKSHOPS

Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:

Estate Plans That Work™

October 14, 2010 – 3:00 p.m. to 6:00 p.m.

Protecting Your Assets from Nursing Home Costs

October 26, 2010 – 4:00 p.m. to 6:00 p.m.

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.

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