



Will Power

Craig R. Hersch *Florida Bar, Board Certified, Wills, Trusts & Estates Attorney; CPA*

EXCEPTION CREDITOR

Last time I discussed one of the issues found under Florida's new Trust Code that takes effect July 1, 2007. Today I'm going to address another issue, one that concerns how to protect the inheritance you leave for your children and grandchildren. Many of my clients have brought up their anxiety that if they were to leave amounts to one of their children, and if that child gets a divorce, that the spouse will take the money away.

This is a valid concern. Assume that "Nancy" leaves amounts to her two daughters, "Monica" and "Vickie". Monica is in a bad marriage and has confided in her mother that upon her children's graduation from high school, Monica plans to leave her husband, "Don". Nancy knows that Monica and Don have declared bankruptcy before, and may have to do so again. Don hasn't held a steady job for years, but spends as if he makes millions. Monica is jointly liable on all of their debts.

Nancy worries that if she leaves Monica amounts outright, that Monica's creditors, or worse, Don will get to those funds leaving Monica destitute for her own retirement years.

Here a thorough review of the new Florida Trust Code is in order. If Nancy restates her trust to leave amounts in trust for Monica (as opposed to an outright distribution), Nancy may be able to save the money for Monica's retirement, depending upon the terms of Monica's trust share that Nancy has her attorney draft into her revocable living trust document.

The attorney explains to Nancy, however, that if Monica's trust share is written in such a way that the trustee is required to distribute the income to Monica, then her creditors may be able to get to the inheritance. And worse, if Don gets a judgment of alimony from Monica, Don can get to the inheritance as well.

This is because the new Florida Trust Code states that certain types of creditors are "exception creditors" and can get to the assets. Generally speaking, exception creditors include an ex-spouse's alimony, child support and government liens, such as for a tax liability.

Nancy wants to prevent this from happening. The Florida Trust Code provides a roadmap. Discretionary trusts, (ones that don't mandate distributions from the trustee; instead the distributions are in the trustee's discretion) can be used to circumnavigate the problem. They must be deftly drafted and the client must carefully consider all variables, such as income, estate and generation-skipping transfer tax issues.

The Florida Trust Code clarifies the law with regard to these situations. Consult your counsel to ensure that you have protected your loved one's inheritance the best you can as, the law allows.

©2006 Craig R. Hersch. You may contact Craig at hersch@sbslaw.com