Remember to transfer assets to trusts

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Having a car is nice, but if you don't put gas in it, it won't go.

It's a similar story with irrevocable trusts, which are a popular tool of older individuals trying to protect their assets in order to qualify for long-term Medicaid care.

But setting up the trust isn't enough – individuals must transfer assets into the trust, which many of them fail to do.

In fact, the elder law firm Genser Dubow Genser & Cona has found that about 80 percent of clients with existing trusts have not properly or adequately funded them, rendering the asset-protection plan meaningless.

"We have people come to us because they are looking to get Medicaid for nursing home care, and they have an existing trust that was set up by another attorney, often many years earlier," said Paul Hyl, a partner who heads up the trusts and estates department for the Melville firm.

"Once we start gathering the asset information, we find many of these new clients didn't transfer funds into the trust or retitle assets as needed."

The result?

"If you haven't funded the trust, you haven't sheltered the assets, and it's as if the trust doesn't exist," said David R. Schoenhaar, a senior associate in the trusts and estates department at Uniondale-based Ruskin Moscou Faltischek. Once the error is realized, he said, the individual can still put the funds into the trust, but they will be subject to a five-year look-back period; if the individual

needs nursing home care within the five years, Medicaid eligibility will be delayed.

“You’re starting the clock at that point,” Schoenhaar said.

The problem of improperly funded trusts isn’t new, Hyl said, noting longstanding problems with trusts set up by what he termed “self-professed elder law attorneys” who don’t have a true concentration in that area of the law.

“But then we started noticing it was happening with clients of experienced elder law attorneys and we decided we should take a look at our own practices, to see if it could be happening with our own clients,” he said.

Typically, an attorney will set up the trust for the client and, at or around trust signing, give the client instructions about how to transfer assets into the trust. Some attorneys offer to assist the client with transferring funds to the trust, “but this is something that clients generally don’t want to pay the attorney for,” Schoenhaar said. “They say they will do it on their own.”

But often, they forget, or they don’t have a clear understanding that they have to do something.

“Clients don’t see estate planning as a process; they see it as a one-time deal, and once the document is signed, they think it’s over,” said Brian Andrew Tully, a founding partner in the Melville elder law and estate planning firm Tully & Winkelman. “Lawyers have to do a better job of explaining to clients that it’s not over – that they have to transfer funds into the trusts.”

But even with the best of explanations, life has a way of interfering. To ensure clients follow through, David R. Okrent, a Dix Hills-based elder law and estate planning attorney, said he meets with them annually, free of charge, to review the

trust. This is unusual in the industry; more typically, a law firm may offer the individual or family a maintenance plan for a fee to review the trust on an annual basis.

About three months ago, the Genser firm instituted a new Trust Assistance Program, which involves follow-up, as well as steps to transfer certain assets, at no charge to clients.

“Three months after the trust signing, we call clients to see if they transferred the assets,” Hyl said. “They seem surprised that we’re calling, and grateful. Some say they have, in fact, retitled their bank account, but others didn’t get to it yet.” In the latter case, the firm will call again after another three months.

While clients have to move their own bank accounts, for certain assets, Hyl’s firm has started taking a more active role, downloading forms to transfer insurance policies and annuities.

“We fill out the change-of-ownership forms for clients to sign at trust signing,” Hyl said. “It takes additional time, but we feel it’s worthwhile, because it’s the right thing to do.”

In addition to better serving clients, Hyl noticed a business benefit from this value-added service.

“It allows us to develop relationships with financial advisors and insurance agents, who see we’re going above and beyond for our clients,” Hyl said. “In the three months since we instituted the program, we have already received two referrals from financial advisors that we hadn’t worked with before.”

A large portion of funds for irrevocable trusts typically comes from real property, which in itself generally does not present a problem, since an attorney’s services are required to prepare the deed and do the transfer, said Kim M. Smith, an Islandia-based elder law attorney.

As Hyl noted, real estate is often the only asset that is in the trust at trust signing.

Trusts can also be funded with a variety of assets, including brokerage and life insurance accounts, bank accounts and annuities, but excluding individual retirement plans, Smith said.

“The client should sit with an attorney to calculate how much money should be left outside the trust,” Tully said, noting that the irrevocable nature of the trust means the assets cannot be transferred back to the individual’s name.

“You need to have a pool of money for everyday spending, or if you need a new roof or oil burner, or in case you require nursing home care within the five-year look-back period.”