

# WILLS, TRUSTS AND ESTATES NEWSLETTER

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## In This Issue

Asset Protection Trusts in Virginia.....Page 1

Geriatric Care Managers: A Helping Hand When You (Or Your Loved One) Needs One.....Page 2



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## ASSET PROTECTION TRUSTS IN VIRGINIA

BY JONATHAN C. KINNEY, ESQUIRE & LAUREN K. KEENAN, ESQUIRE



As of July 1, 2012, residents of Virginia can now avail themselves of domestic asset protection trusts or qualified self-settled spendthrift trusts ("QSSST"), as they are commonly referred to. The Virginia Assembly amended and reenacted an existing section of the Virginia Code and added new sections 55-545.03:2 and 55-545.03:3 to allow for this new means of asset protection. In doing so, Virginia joins 12 other states that already permit such trusts.



The QSSST is an irrevocable, self-settled spendthrift trust created by a settlor where the settlor may retain beneficial interests which are generally not subject to seizure by a creditor. A spendthrift trust is a trust with a clause preventing spending down of assets or unwise borrowing against the assets by the beneficiary of the trust. In essence, it protects the beneficiary from themselves and shields them from some creditors. To receive the protection from

creditors, a QSSST must be an irrevocable trust. Irrevocable generally means that once a trust has been created it cannot be amended or revoked by the settlor except in very unusual circumstances. In the case of the new Virginia statute, the term irrevocable means something very specific.

A QSSST may be particularly compelling for individuals working in professions that have a high probability of lawsuits, such as building contractors, doctors or even attorneys. It offers protection against future creditors and present creditors after a five-year transitional period. During the five-year transitional period, future creditors may still bring claims against assets transferred into a QSSST. This transitional period is longer in the Virginia statute than what is provided for by most other states' statutes.

Under the new Virginia statute, once the five-year transitional period has lapsed, future creditors will not be able to receive a judgment against the assets in the QSSST, unless they can prove that the trust was created with the intent to delay, hinder or defraud the creditors, under Virginia's Fraudulent Conveyances laws. Simply setting up a QSSST is not evidence of such intent. If a creditor can prove

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a fraudulent transfer, the trust may be set aside and attorney fees can be awarded to the creditor who proves such fraudulent intent. The ideal time to set up a QSSST is before any legal claims are filed or when debts owed have not become unreasonable.

There are very specific requirements that must be met for a QSSST to be valid. If any of the factors are not met, the trust will not qualify as a QSSST and the creditor protection will fail. The statute is new and quite lengthy. The requirements, briefly, are as follows:

- 1) Trust must be irrevocable, as defined by Section 55-454.03:03 of the statute;
- 2) The trust must be created during the settlor's life (an inter vivos trust);
- 3) The trust must name at least one beneficiary other than the settlor;
- 4) Discretionary benefits only based upon ascertainable standards or 5 and 5 powers;
- 5) Must name at least one qualified independent trustee as defined by the statute;
- 6) Must have some Virginia property interest;
- 7) Must be governed by Virginia law;
- 8) Must include spendthrift trust provision; and
- 9) The Settlor may not retain a veto right as to any of the distributions from the trust.

If you think an asset protection trust may be beneficial to you, you should contact an estate planning attorney to discuss the pros and cons and the statutory requirements in greater detail. While it remains to be seen how popular this new trust vehicle might become

in the Commonwealth, one thing is certain, this is one more tool that Virginians now have at their disposal to protect their wealth from business litigation claims and resulting collection actions.

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## **GERIATRIC CARE MANAGERS: A HELPING HAND WHEN YOU (OR YOUR LOVED ONE) NEEDS ONE**

BY LAUREN K. KEENAN, ESQUIRE

As an adult child with parents aging far away from where you live, you probably often worry about your parent's safety, wonder if they are getting the care they need and are okay to live alone. Perhaps, if you have siblings, you find yourselves disagreeing over the type of care your parents should receive. There is no question that living afar from parents as they age is stressful. You simply can't be there as often as you might like to assist them with basic needs. These concerns are amplified when your aging, once-self-sufficient parents begin to exhibit symptoms of dementia or other loss of capacity.

If you live alone and don't have family nearby, or you're married and rely solely on your spouse, you might be worried about your own care as you age or after your spouse passes away. Who is going to "check in" on you? Will you be able to access the resources you'll need to continue to operate your day-to-day life as an independent adult?

As an estate planning attorney, I deal with these questions on a regular basis and until recently, there weren't a

lot of options I could provide to my clients. Recently, I learned about Geriatric Care Managers or “GCMs.” A GCM is a degreed, licensed and certified specialist who can assist seniors and disabled individuals and their families in meeting long-term care needs. Most GCMs are trained in a profession such as social work, nursing, gerontology or elder law. In order to be licensed, GCMs are required to maintain a professional license in their underlying specialty and pass a certification exam. You can find a certified NAPGCM caregiver online at [www.caremanager.org](http://www.caremanager.org), which maintains a national listing of licensed GCMs.

Depending on the needs of the individual, a GCM can offer minor assistance with urgent needs, such as finding a contractor on short-notice to repair a leaky faucet or toilet, or pick up a much-needed medication and deliver it to the person’s home. A GCM can also assume a more hands-on role in an individual’s life by coordinating their home health care, medical equipment delivery, transportation and accompaniment to doctor’s visits, as well as note-taking during doctor’s appointments, arranging for deliveries of groceries and assistance with personal grooming. In addition, a GCM can help to provide a social outlet for the elderly and ensure that they are able to get out of the house and socialize with other seniors, or for a senior who can’t leave their residence, the GCM can visit with them in their hospital room or assisted living facility.

Ms. Buckley Anne Kuhn Fricker, JD., GCM and CSA, a Northern Virginia area GCM and founder of Buckley’s For Seniors, LLC, tells a story of a gentlemen she worked with who had lived in an assisted living facility with his wife for many years. The husband suffered from dementia and his wife, who was very sharp, made sure they both received the care they needed. They had always liked living there and were always well dressed and well kempt whenever their adult children came to visit (which was as often as they could but not regularly). One day the wife was injured during a fall and had to have an extended

stay in the hospital away from her husband. After some time, the family hired Buckley as a GCM to check-in on their father. She was shocked to find he had been moved from his prime room near the front of the home to the back of the facility. His appearance had also changed dramatically, as he was no longer well groomed or cared for. He was badly in need of a haircut and a shave, and seemed to have been neglected in his wife’s absence. This story illustrates the positive impact that a GCM can have on yours or a loved one’s quality of life. The family could not be there to check-in on their parents and as is the case for so many adult children living busy lives far away from their aging parents, the assisted living facility assumed that no one was around to notice what level of care they were providing (or failing to provide). Buckley was able to be an advocate for the family and get their father the services he needed and was entitled to.

There is a fee associated with this kind of service. Typically, a GCM will charge by the hour for their time. The average rate in the Northern Virginia area is around \$150/hour. It is important to do your homework on the agency you use. You should look for one that has W-2 employees and not contractors for increased accountability. Any GMC that is a contractor is likely not covered by the company’s liability insurance.

If you think a GCM may be a good idea for you or a loved one, then the best way to ensure that you’ll be able to avail yourself of their services when you may need them is to include specific provisions in your (or your loved one’s) estate plan related to GCM care. A person should work with a licensed estate planning attorney before the care is needed to develop their care plan, which should provide for involvement by a GCM, if needed. An attorney can then draft the necessary estate planning documents, incorporating the care plan into the estate plan. If you or your loved one already has an estate plan, it is advisable to review the plan and consider any amendments that may be necessary.

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In anticipation of care by a GCM, a Power of Attorney should authorize the individual's agent or attorney-in-fact to grant a GCM access to medical records by authorizing the agent to sign a HIPAA release form. Your trust should authorize or direct that a Fiduciary retain a GCM to implement the care plan, which should be more specifically detailed in the trust. Like most things related to your estate, in order to avail yourself of the full benefits a GCM can offer, proper planning is critical.

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