



Setting Up A Trust In Your Will Could Save Thousands For Your Family

by Jay N. Chamness

As the saying goes, nothing is certain but death and taxes. While the first cannot be avoided, the latter can be substantially reduced or even eliminated with proper estate planning. Many have heard of the “death tax,” officially known as the federal estate tax, which can be significant on estates having a value above the exclusion amount. The maximum federal estate tax rate for 2007 is 45%. In addition to the federal estate tax, there is also a Tennessee inheritance tax which ranges between 5.5 – 9.5% depending on the value of the taxable estate.



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The federal government, however, provides relief from this onerous tax in a couple of different ways. First, there is an exclusion based upon the amount of the taxable estate. For 2007 and 2008, this exclusion provides that the first \$2,000,000 of the estate value will pass free from federal estate tax. The amount increases to \$3,500,000 in 2009, then is unlimited in 2010, before being reinstated in 2011 in the reduced amount of \$1,000,000. The exemption for the Tennessee inheritance tax is currently \$1,000,000 and is not scheduled to be changed in the near future.

Many believe that the federal exclusion provides them sufficient protection from the federal estate tax because they do not have \$2,000,000 worth of assets. In many instances this is true, however it is important to distinguish between a person’s “probate” estate and his “taxable” estate, the latter of which is used in determining value for purposes of the federal estate tax. The taxable estate includes the value of all property owned by the decedent at the time of death, which

encompasses such items as life insurance, revocable trusts and bank accounts held jointly or individually. Even though this property may pass directly to a named beneficiary and is not included within the assets to be distributed in the “probate” estate, it is included in the gross value for purposes of federal and state taxation. Thus, many times a life insurance policy can push the taxable estate beyond the exclusion amount.

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The second form of relief provided from these estate taxes is the marital deduction to both the federal estate tax and the Tennessee inheritance tax. Under this, property of a decedent can pass free of any taxation if it passes to only the surviving spouse. Then what’s the

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Featured Attorney

C. Bennett Harrison, Jr.

This year marks Ben Harrison's thirtieth year in the practice of law. He has practiced at Cornelius & Collins since 1983 and became a partner in 1985. Ben obtained his Bachelor of Arts degree from Vanderbilt University in 1974 and his law degree from Southern Methodist University in 1977.

The focus of Ben's practice is in non-domestic civil litigation, commercial litigation, professional liability, entertainment litigation, and bankruptcy. He represents healthcare professionals and hospitals in medical malpractice cases. He also handles credentialing issues between doctors and hospitals, as well as commercial disputes arising out of the practice of medicine. He represents numerous other professionals in professional liability cases, including attorneys, accountants, engineers, and contractors.

Ben is also certified under Tennessee Supreme Court Rule 31 as a General Civil Mediator. His extensive experience in civil litigation has made him adept at resolving disputes in a wide variety of legal areas. Ben also serves as a hearing officer for the Tennessee Board of Professional Responsibility.

When he is not practicing law, Ben enjoys playing golf, hiking and fishing. He resides in Kingston Springs, Tennessee.



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fuss, you ask? The fuss is that when the surviving spouse dies, his or her estate could be facing significant taxation. One of the goals in many estate plans for married individuals is to take advantage of both the exclusion based on value and the marital deduction to preserve as many assets as possible for the heirs and beneficiaries of the estate.

For a married couple, one means commonly used to accomplish this goal is a will using a credit shelter trust. A credit shelter trust is a trust established in the wills of each spouse in the applicable exclusion amount. Each person names the spouse as a beneficiary of the trust, and often names the other spouse as co-trustee. The surviving spouse would typically receive the income from the trust, and would also be allowed to use the trust principal for reasonable needs for health, maintenance, education or support. The amount going to the trust is not taxed because it falls within the exclusion based upon value. The remaining estate assets are conveyed to the surviving spouse under the will, and pass free of taxation because of the marital deduction. When the surviving spouse dies, the value of her estate has been effectively reduced by the amount placed into the credit shelter trust when her spouse passed away, which results in a significant tax savings. The amount in the credit shelter trust is not considered part of the estate of the surviving spouse due to the fact that her interest in the trust ends at death. Trust assets then go to pre-agreed and/or designated children or other beneficiaries.

To illustrate how this would work, let's assume a married couple has \$4,000,000 in combined assets (equally distributed between the two of them) and they also have a child. They have simple wills leaving all assets to the surviving spouse and, if there is no surviving spouse, to their child. The husband dies first, and his \$2,000,000 in estate assets passes to his wife free from taxation because of the marital deduction. Wife then dies and her entire estate, consisting of \$4,000,000 (her \$2,000,000 plus her husband's \$2,000,000), passes to their child. However, only \$2,000,000 passes free from taxation, and the estate is facing federal taxation on the remaining \$2,000,000. The federal tax on this amount will be about \$900,000.

Now let's take the same example, but assume that the couple had the foresight to set up a credit shelter trust in their wills and maintain separate but equal estates. On the death of the husband, \$2,000,000 goes into this trust instead of to his wife outright. This conveyance to the trust is not subject to federal taxation because of the exclusion amount of \$2,000,000 and the trust provision ending the wife's interest in the trust at the time of her death. Throughout her lifetime, wife has the benefit of the trust proceeds because she is the beneficiary of the trust. Upon her death, the value of her estate is now \$2,000,000, which passes, depending on the terms of her will, to her child or to a trust for the benefit of her child free from federal taxation. This couple has effectively avoided the federal estate tax of approximately \$900,000 and has preserved this money for the benefit of their surviving child. Let's hope the child uses it wisely, but if there is a need or an interest in extending the trust for the child to a future date, that can be easily done.

This is an example given for illustration of the potential tax savings which can result from some simple estate planning. Obviously, many

of us do not have estates worth \$4,000,000. However, remember that the Tennessee inheritance tax begins at estates valued at \$1,000,000 and is inclusive of all assets and life insurance owned by the decedent. Although the Tennessee rate is much lower than the federal rate, a credit shelter trust can still result in thousands of dollars in savings by eliminating or reducing the amount taxable under the Tennessee inheritance tax laws.

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Recovery of Attorney's Fees Under the Tennessee Consumer Protection Act: It's a Two-Way Street

by Ben M. Rose

There has been an increase in the last several years of lawsuits being filed against businesses under the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, et seq. ("the Act") The Act creates a private right of action for "[a]ny person who suffers from an ascertainable loss of money or property, real, personal or mixed . . . as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful" under the Act.

Moreover, even in the context of a simple violation of the Act, it is widely known by Plaintiff's attorneys that their fees can be recovered. It is less widely known that the Act also provides for the possibility of recovering a Defendant's attorney's fees, although such an award is more difficult to obtain.

The Act can be an effective arrow in the quiver of a Plaintiff's attorney because it provides for several different remedies. For example, while the Act provides for recovery of compensatory damages, in certain instances the Act also provides for recovery of treble damages. Moreover, even in the context of a simple violation of the Act, it is widely known by Plaintiff's attorneys that their fees can be recovered.

It is less widely known that the Act also provides for the possibility of recovering a Defendant's attorney's fees, although such an award is more difficult to obtain. Section 47-18-109(e)(2) of the Act provides as follows:

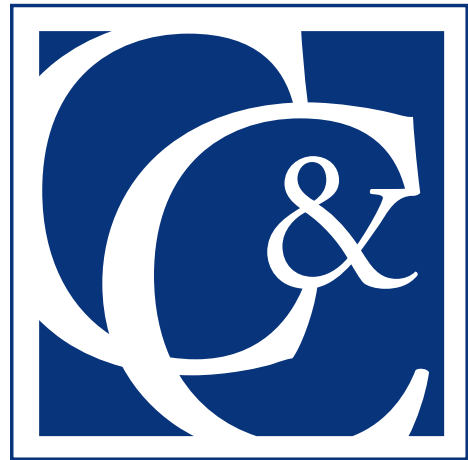
In any private action commenced under this section, upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs.

Unfortunately, this provision has rarely been invoked by the courts. One of the more recent cases in this area involved the purchase of a residence. The plaintiff purchaser alleged that the defendant real estate agents for the seller misrepresented the amount of square footage for the home. As a result, the plaintiff purchaser filed a lawsuit under the Act; however, the purchaser relied only on the Act's "bait and switch" provisions. The defendants moved for summary judgment and an award of attorney's fees under Section 47-18-109(e)(2).

The trial court reasoned that the "bait and switch" provision did not apply and granted defendants summary judgment. The trial court also awarded defendants their attorney's fees. On appeal, the appellate court reduced the amount of attorney's fees, but refused to reverse the award entirely. It stated:

[T]he provision for attorney fees found in Tenn. Code Ann. § 47-18-109(e)(2) is designed to discourage consumers from using the Act to file frivolous or baseless claims. It is not intended to punish plaintiffs who can demonstrate wrongful acts on the part of defendants, but who are unable to prevail on their claims for other reasons . . . We therefore do not interpret the statutory term 'without legal or factual merit' to mean without sufficient merit to prevail, but rather as so utterly lacking in an adequate factual predicate or legal ground as to make the filing of such a claim highly unlikely to succeed.

As suits under the Act increase in frequency, it is also likely that more courts will award attorney's fees to deserving Defendants. Plaintiff's attorneys should keep in mind that such an award under the Act is a two-way street.



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What You Don't Know About Your Corporate Health Can Hurt You

by Ben M. Rose

It has been a long hot summer. With the coming of fall, it has been my standard practice to perform a routine inspection of items like my lawn equipment, automobiles, and residence to ensure they have been properly maintained and are in good working order. If something needs to be fixed, I do so in order to maintain peace of mind for the remainder of the year.

Although we typically don't think of maintaining corporate entities in the same manner, you should know that good corporate health is one key to keeping peace of mind in the business world. Most people already know that a business should be formally incorporated through creation of a corporate entity with the Secretary of State in order to reduce risk. If you don't know this important fact, contact your lawyer and have an entity created. This is important.

Creation of a corporate entity places a wall -- or, to use the legal jargon, a "veil" -- between the owner of the business and potential creditors. For example, when a creditor files a lawsuit against the corporation, the general rule is that only assets of the business are at risk. However, this general rule is not foolproof. Failure to properly maintain the corporation could result in the veil being "pierced" and a creditor reaching the assets of a business owner.

The law in Tennessee provides that a corporation may be disregarded or pierced upon a showing that the entity is a "sham" or a "dummy" or "where necessary to accomplish justice." Whether to pierce depends on the special circumstances of each case, and the trial court is provided with great discretion by appellate courts when making these determinations. Tennessee courts most often use the so-called *Allen* test when deciding whether to pierce the corporate veil.

The *Allen* test includes several factors that courts consider with no one factor being determinative. The factors include the following:

Whether there was a failure to collect paid in capital to the corporation, whether the entity was grossly undercapitalized, whether any stock was actually issued, whether the stock in the entity is owned by one individual, use of the same office or business location by the shareholder/business, employment of the same employees or attorneys by the shareholder/business, use of the corporate entity as an instrumentality or business conduit for an individual or another corporate entity, diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, use of the entity as a subterfuge in illegal transactions, formation and use of the corporation to transfer to it the existing liability of another, and failure to maintain an arms length relationship among related entities.

In addition, failure to maintain corporate formalities -- such as maintaining a corporate minute book -- is an important factor that courts consider together with the *Allen* factors.

Creation of a corporate entity places a wall -- or, to use the legal jargon, a "veil" -- between the owner of the business and potential creditors. For example, when a creditor files a lawsuit against the corporation, the general rule is that only assets of the business are at risk. However, this general rule is not foolproof. Failure to properly maintain the corporation could result in the veil being "pierced" and a creditor reaching the assets of a business owner.



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It is important to note that the courts in most jurisdictions require evidence of fraud or what is often referred to in the cases as "skulduggery" prior to piercing the corporate veil. In my opinion, Tennessee law does not require such a showing. The leading cases in Tennessee provide that the corporate wall is disregarded in such cases or "where necessary to accomplish justice." Thus, it is possible to pierce the corporate veil in Tennessee without evidence of fraud.

How can you maintain your corporate health? Among other things, be sure to capitalize your entity and guard against undercapitalizing the business. If you have an incorporated entity, maintain your corporate minute book and other records. Document meetings of the shareholders and maintain

corporate resolutions pertaining to corporate decisions. If the entity issues stock, be sure to formally issue the stock and maintain records in this regard. Keep the business and its owner separate in banking and employment matters.

You might also consider creating a limited liability company for your business. Generally, LLCs withstand piercing challenges better than traditional incorporated entities. This is because an LLC has few requirements for maintaining corporate formalities, such as a minute book. Also, LLCs do not issue stock. Your lawyer may provide you with additional suggestions in this regard to help preserve your peace of mind.

Tennessee's Workplace Smoking Ban

by J.K. Simms

In speaking with various clients, it is evident that many employers are not aware of a new law that will take effect October 1, 2007. The Non-Smoker Protection Act prohibits smoking in all enclosed public places in the State of Tennessee with a few exceptions. The following are exempt from the smoking ban provisions under the new law: private homes; private residences and private motor vehicles unless used for child care or day care; non-enclosed areas of public places such as open-air patios; venues such as bars and clubs that restrict access to persons who are 21 years of age or older at all times; private clubs; smoking rooms in hotels and motels; tobacco manufacturers, importers and wholesalers; retail tobacco stores that prohibit access by minors; nursing homes and long-term care facilities, which are subject to policies and procedures established by those facilities; and commercial vehicles when the vehicle is occupied only by the operator. Unless your business falls within one of these exempt categories, the Act applies.

Employers covered under the Act should post "no-smoking" signs at all entrances to their facilities. Additionally, the Act requires that all existing and prospective employees be notified that smoking is prohibited. This could be accomplished, for example, by posting the notice on a job application, or by posting a sign where job applications are submitted. Finally, the employer should inform anyone seen smoking on the premises that smoking is prohibited.

The Act will be enforced by the Tennessee Department of Health and the Tennessee Department of Labor and Workforce Development. Any individual who violates the new law as well as any business that knowingly fails to comply with the requirements of this Act can be fined. If an individual knowingly smokes in an area where smoking is prohibited, he or she is subject to a civil penalty of \$50.00. If a business knowingly fails to comply with the requirements of this Act, for a first violation in a 12-month period, the employer will be given a written warning. For a second violation in a 12-month period, the employer is subject to a civil penalty of \$100.00. For a third and every subsequent violation in a 12-month period, the employer is subject to a civil penalty of \$500.00.

Contact us if you would like more information on this Act or if you would like to discuss action you should take to comply with the new law.



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The New Construction Lien Framework in Tennessee

by J. Cole Dowsley, Jr.

The construction lien law provides a framework for contractors and others involved with construction projects to file liens against property for unpaid services and materials. This year, a new construction lien law went into effect in Tennessee. Whether you are a property owner facing a lien dispute or a contractor, engineer, or supplier with unpaid services or materials, it is crucial to understand your rights under the new construction lien law. The following highlights a few of the important changes in the lien law.

The new law provides that a lien secures the contract price, which includes the entire amount agreed to between the parties and encompasses profit and overhead. If the contract does not contain a price certain, the "contract price" means the reasonable value for the work, labor, services, and equipment.

The new law also creates two categories of lien holders: prime contractors and remote contractors. Whether a lien holder is a prime contractor or remote contractor depends on the relationship with the owner of the property. A "prime contractor" is one who has a direct contract with the owner or the owner's agent. On the other hand, a "remote contractor" is anyone who provides work, labor, services, or equipment under a contract with someone other than the owner. These distinctions are important because certain time frames and cut off periods hinge on the lien holder's status.

The new law allows an owner to prevent remote contractors from filing liens by recording with the register of deeds a payment bond in favor of the remote contractor in an amount equal to one hundred percent of the prime contractor's price.

As with the prior law, the new lien law contains certain technical aspects, such as specific time periods for filing Notice of Lien Claims, Notice of Nonpayment, and filing suit. These procedures and time periods are the meat of the lien law and were modified under the new law to comply with prior judicial decisions. An owner's or contractor's lien rights can be affected by failure to comply with the procedures set forth in the lien law and it is, of course, important to have an understanding of these deadlines under the new law.

In sum, with the new construction lien law, the legislature has created an updated and more practical lien law in keeping with the fundamental goals of the prior law.



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RELIEF FROM LIMITLESS HOSPITAL LIABILITY . . . APPARENTLY by Brian Holmes

Ever since the Tennessee Court of Appeals' 1992 decision in the case of *White v. Methodist Hospital South*, hospitals in Tennessee seemed to risk liability any time a non-employee provided medical care to a patient in the hospital. The theory of liability, known as "apparent agency", had no recognizable boundaries, at least as it was explained by the Court:

An increasing number of jurisdictions have held that in situations where a hospital offers a service, such as the care of an anesthesiologist, and the patient has no part in choosing the individual who will perform the service, a court may infer that the patient reasonably relied on the health care provider's apparent authority to act for the hospital.

True, this "reliance" element, requiring that the patient have "relied on [the physician's] apparent authority to his or her detriment" was but one of three applicable to an apparent agency claim. Without analyzing the other two, the Court noted that a patient must also show that the hospital "actually or negligently acquiesced" in the physician's exercise of authority and that the patient "had knowledge of the facts and a good faith belief that the [physician] possessed such authority." Nonetheless, the Court held that the patient had presented sufficient proof of the "reliance" element merely by showing that the hospital chose her anesthesiologist.



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Clearly, anytime a physician provides care in a hospital the hospital has "acquiesced" in such conduct and, in a great many cases, the hospital "chooses" the physician without any assistance from the patient. These facts, along with an affidavit from a plaintiff that he or she believed that the physician was working for the hospital, seemed to be sufficient under *White* to establish a hospital's liability. While recognizing that the hospital must "actually or negligently acquiesce" in the physician's "exercise of authority", the *White* opinion gave short shrift to the previously paramount focus in apparent agency cases on the conduct of the purported principal (the hospital), rather than the purported agent (the physician).

Fortunately, in June of this year, the Court of Appeals breathed new life into this requirement in two simultaneously issued decisions, one involving an emergency room physician and the other involving a radiologist. In each case, the hospital had presented the patient or a family member with a document upon admission stating that "those physi-

cians providing medical services are not agents or employees of the hospital". The documents went on to identify "emergency department physicians" and "radiologists". In each case, without the plaintiff having presented any evidence whatsoever, the trial court, following *White's* lead, refused to dismiss the plaintiff's apparent agency claim. In each case, the hospital sought an immediate appeal.

"This time around, the Court resurrected the notion that "apparent authority must be established through the acts of the principal rather than those of the agent."

Perhaps recognizing the unintended consequence of *White*, the Court of Appeals accepted each appeal, "waived further briefing and oral argument", and quickly issued its opinions. This time around, the Court resurrected the notion that "apparent authority must be established through the acts of the principal rather than those of the agent." The Court held that the admission documents the hospital presented "to disavow that the [physician] was an agent of the hospital were sufficient to preclude the plaintiff's claims based on apparent agency." Significantly, the Court found it irrelevant that the patient "did not sign the consent form or have any knowledge of the disclaimer", instead reaffirming that the critical issue was "whether [the hospital] held [the physician] out as its agent." The Court distinguished *White*, pointing out that the plaintiffs in that case had "actually presented proof . . . relevant to their apparent agency theory", while in the cases before it the plaintiffs could "point to no conduct by [the hospital] which 'clothed the agent with the appearance of authority'".

These recent decision should reassure Tennessee hospitals, most of which now routinely employ the type of documents found sufficient to "disavow" agency status. However, hospitals must not be too confident, as there remains some middle ground between *White* and the Court's more recent opinions. It is yet to be seen how the Court will decide a case in which an enterprising plaintiff presents the proof of apparent agency presented in *White*, and the careful hospital presents the admission documents dispositive in the decisions this year. Therefore, it is critical that such documents specifically identify each category of non-employee healthcare provider (physician's assistants, nurse anesthetists, etc.) practicing in the hospital. They should also make clear that, whenever possible, the patient may assist in choosing practitioners in the hospital. Hospitals should take further steps to analyze how their relationships with these practitioners "appear" to hospital patients. Whenever feasible, hospitals should attempt to distinguish non-employees from employees through attire, identification, and other means. In sum, a hospital should do as much as it can to make it clear to patients that non-employees working in the hospital are just that.