

**K a n e L a w L L C**  
**Promotional Information Memo**

**Date:** August 16, 2016

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**Re:** Initial Key Checklist Items for Your  
Asset Protection Purposes

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I am a tax lawyer in Atlanta with a focus on trust planning and litigation. The bulk of my work involves trust planning and disputes, litigation consulting, and expert witness work.

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The legal ethics rules require that I inform you this memo is not legal or tax advice you can rely on for your situation nor am I at this time acting as your lawyer. Rather, this memo is promotional information for you. It helps you begin initially thinking about asset protection for yourself and your family. I will be glad to talk with you further about this memo or your situation, at your request.

Most of us think about protecting our family and property only with insurance. Insurance is, of course, important and essential for protection. But it does not cover all risks.

By contrast, the asset protection I touch on in this memo deals with uninsured risks, such as old-age incapacity, predatory elderly remarriages, nursing home care, asset protection, divorce by our children, personal guarantees, bankruptcy.



**Also, the Costly Threat of Legal Fees.** My experience is that these uninsured risk problems arise frequently due simply to an absence of preventive planning. And, these problems end up substantially lining the financial pockets of we lawyers who are required to help clear up the problems. Especially, if litigation erupts.

A goal of keeping you later from having to hire and pay lawyers to clear up these kinds of problems should be a strong financial motivation to put adequate preventive planning in place.

**A. Guardian Provisions for Your Children in Your Last Will and Testament**

Click [here](#) for a link to my blog post on this universally important subject.

**B. And, Guardian/Conservator Provisions for Your Own Possible Incapacity**

Click [here](#) for a link to my blog post on this subject.

**C. A Written Joint-Property Agreement for Your Home**

Georgia law does not provide lawsuit or third-party creditor protection for your jointly-owned home (by contrast, for example, North Carolina does provide this protection for married couples who own their home jointly).

This exposure means a judgment holder or creditor – while both you and your spouse together own your jointly-owned home -- can step in, force your hand, and grab your one-half interest in your home to satisfy a lawsuit judgment or other claims against you. Your spouse cannot block this kind of reach.

However, a way to protect your jointly-owned home while both you and your spouse are alive is to sign and record a written joint-property agreement. You both sign this agreement and record it in your county real property records, cross-referencing the book and page number of your home ownership deed.

The joint agreement is an effective hurdle decreasing a third-party's grab at your home by including a right-of-first-refusal and buy-sell option between you and your spouse.

[There is a level of asset protection for a Georgia jointly-owned home for the surviving spouse, but this protection kicks in only when the first spouse dies and applies only if the home is jointly-owned when the first spouse dies *with a right of survivorship referenced in the property deed.*]

**D. Avoid Indemnification Clauses in Your Day-to-Day Casual Transactions**

For example, this deals with the apparently simple papers we all sign to let our children play in a jumpy house, ride horses, attend camp, when we reserve the neighborhood club house, etc.

What we -- often unknowingly -- are signing generally includes two key provisions. One is your agreement not to sue if your child is injured. This is called an "assumption of risk". I typically have no disagreement with this requirement.

But, I disagree with this second item. With this item you are "indemnifying" the other party for *that other party's* expenses, damages, legal expenses, etc., for any claim whatsoever as to the activity covered by the agreement you just signed.

*Example:* You reserve and use the neighborhood clubhouse for your child's birthday party. Another child – due to no fault whatsoever by

**Promotional Information Memo**  
**from James M. Kane, Attorney**  
**August 16, 2016**  
**Page 4**

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you – falls and breaks her arm. That child’s parents sue the neighborhood association as owners of the club- house.

If you have indemnified the association in the above example, then you essentially become its insurer. You may be called upon to pay whatever expense and damages the association has to pay. You covered the association’s exposure. You indemnified the association.

The point I am making?

Simply use an ink pen and line out the word “to indemnify and” or whatever other reference in the document hooks you for the indemnification. Place your initials in the margin near the line-thru, and draw a small circle around your initials. Then, in normal fashion return the signed agreement to the other party.

I have done this dozens of times with not one single kick-back or question. I sleep better at night.

The New York Times wrote a very effective piece about this same topic in 2012. Click [here](#) for a link to the piece.

**E. Don’t Make Your “Estate” the Beneficiary of Life Insurance**

Georgia law has a specific law that protects your life insurance death proceeds and cash surrender values generally from judgments or third-party claims. This is excellent asset protection. The law is under Section 33-25-11 of the Georgia statutes.

But, you lose this protection if your estate is the beneficiary of the life insurance. This can result at your death in the insurance proceeds being used to pay third-party claims, etc. This means ideally you need to make sure your estate is not the beneficiary, either intentionally or by default.

**F. Using Trusts in Your Estate Planning Documents**

The majority of people, when commenting about their own estate planning, will say something along the line of "I just want it to be simple." Unfortunately, simplicity is an easy route, but typically does not provide adequate tax savings options nor does it provide asset protection for your family.

The broadest range of tax savings options (especially at the first-to-die spouse's death) and effective asset protection requires using trusts in your estate planning. This is compared to your property otherwise merely passing to your family outright. With this trust design your property is governed by a written trust document at the time of your incapacity or death. You spell out the trust provisions in your estate planning documents.

A trust is a written set of instructions for how you want your property to be managed and handled for you and your family members. A trust is not a separate entity, such as a corporation, partnership, or LLC. But, is it a written document.

You describe within the trust document how the relationship between the trustee and the beneficiaries works for this oversight and management of the trust property. You name the trustees (including you in many cases). As a technical matter the trustee holds legal title to the trust property for the sole benefit of your trust beneficiaries.

You and your family members can be the trustees, which is typical. And, later if greater asset protection is needed the trustee can be changed to a fully-independent trustee with the effect of triggering a much stronger level of asset protection for the trust assets.

I recommend for virtually all my clients that they use trusts for the above tax savings features and asset protection.

**G. Medicaid Nursing Home Planning**

Most people have the impression that governmental-paid Medicaid nursing home care is just for the poorest of the poor. This is a limited view.

More broadly, you do not have to be poor in order to benefit from government-paid Medicaid nursing home care.

Families not in this poor category, especially with children still in the home, need to keep this Medicaid planning on the checklist. The laws allowing Medicaid-paid nursing home care include favorable provisions that can help prevent impoverishment of the other spouse and children.

That is, these favorable Medicaid laws help a spouse qualify for government-paid Medicaid nursing home care without the other at-home spouse and children having first to spend down virtually all of the family's assets before Medicaid begins paying for the nursing home care.

This planning, as with most planning, is based on a family's particular situation.

And, in general terms, the most effective Medicaid planning needs to be in place at least five years before the need for nursing home care arises. Medicaid planning without the five-year lead time still exists, but is more limited and not as effective. This is due to a five-year rule under the Medicaid laws.

**H. Divorce in the Event of Mental Incapacity**

This is an optional Medicaid / nursing home planning provision. It is set forth in each spouse's financial power of attorney. It applies in the event one spouse becomes mentally incapacitated and potentially

**Promotional Information Memo**  
**from James M. Kane, Attorney**  
**August 16, 2016**  
**Page 7**

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needs to qualify at some point thereafter for Medicaid nursing home care. This divorce may help prevent the other spouse from having to spend-down the couple's combined assets in order for the incapacitated spouse to qualify for Medicaid.

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