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Estate Planning, Trusts, Probate, Elder Law

Thoughts from Jim...

My Recent Personal Experience with Advanced Health Care Directives

My family said goodbye last month to my dad who celebrated his 94th birthday last June and had lived a full life. He spent his final weeks at home with hospice care surrounded by the people he loved.

He manifested signs of dementia during his final years, but we were able make the decisions necessary for his medical care because he had an advance health care directive, which set forth his wishes for end of life care.

People hoping to avoid a prolonged dying process, or wanting to prevent family confusion and turmoil, should execute an advance directive. Because a stroke or auto accident can lead to unexpected severe impairment, it's never too early to have a plan in place.

The first step is to draw up an Advanced Directive for Health Care. This is known in some states as a living will. You can specify your preferences on a wide range of options – resuscitation, hydration, drugs, intubation, etc. – requesting that you want everything to be done, or limiting specific medical interventions.

The second step is to appoint a health care agent, someone you know well and trust; to whom you designate to make medical decisions for you by way of your health care directive. That person will use your advance directive as guidance to make decisions that you yourself cannot make due to incapacity.

Your health care agent should be someone who knows you well and someone who will be willing to carry out your wishes, even in the face of family conflict. Your agent in California will also be the person responsible for implementing your wishes for disposition of your body after your death.

Once your advance directive is in order, be sure to give a copy to your doctors, your agent, your attorney, and your family. Be sure to communicate with your relatives and health care providers about your concerns and wishes.

All who knew my dad miss him and grieve his loss. Still as a family, we are comforted that he lived and died just as he wanted without unnecessary trips to the hospital's emergency room, or unwanted medical intervention, at a time when he just wanted peace. •

FAST FACTS

35% of American adults have a will .... **Only 24% of American adults under the age of 35 have signed at least one estate planning document** .... 29% of American adults have an advance directive for healthcare that establishes their preferences on end of life medical procedures.

Harris Interactive for Lawyers.com

Estate Planning Provides Peace of Mind
-Jim Perry

IN THIS ISSUE

PROBATE
California has made changes to the way it looks at "no contest" clauses in wills.

GIFTING
Practical advice on giving monetary gifts to your grandchildren.

ESTATE TAXES
Congress still hasn't made any headway in combating the confusion after the elimination of the "death tax."

BENEFITS
New law allows you to roll over your 401(k) into the IRA of a non-spouse.

AND MORE!

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Q&A

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Probate

I heard the law changed in California. Are "no-contest" clauses still honored by California courts?

As of January 1, 2010, California courts are giving no-contest clauses greater scrutiny.

This means that no-contest clauses included in wills or revocable trusts which became irrevocable on or after January 1, 2001 will remain enforceable, but heirs hoping to make a good faith challenge to the instrument will not be immediately disinherited as they risked under the previous laws.

A no-contest clause includes language in an estate planning instrument that warns heirs from challenging any provisions in the will at the risk of being disinherited in the process.

Good faith probable cause challenges may be based on allegations including, but not limited to forgery, incapacity, duress, fraud, undue influence, or revocation.

Gifting

I have saved for my retirement and would like to share some of my wealth with my grandchildren. What do I need to know?

Many grandparents come to me saying they would love to give their grandkids a substantial gift for their college funds and future nest eggs, but they don't know quite how to do it, and they have fears that their grandchildren will be saddled with the taxes.

The first step is to determine how much you can comfortably give away.

Continued on P. 3

New law extends retirement benefits to non-spouses

From the National Association of Elder Law Attorneys

Recent legislation has added an important choice for non-spouse beneficiaries of a company's defined contribution retirement plan, such as a 401(k) or profit-sharing plan.

For the first time, heirs who are not the plan participant's spouse will be able to rollover the participant's account into an IRA (surviving spouses have always been able to do this). This roll over extension was a provision of the Pension Protection Act of 2006 (PPA), which permits a non-spouse beneficiary of a participant in a qualified plan, 403(b) arrangement, or governmental 457(b) plan to make a direct rollover of the deceased participant's plan balance to an inherited IRA, effective for distributions after December 31, 2006.

Non-spouses have always been permitted as beneficiaries of retirement plans, but the distribution flexibility has been limited to either a lump-sum payment or installments from the original plan.

By adding the flexibility of a direct rollover to an IRA, the beneficiary can now spread the income tax on that benefit over his or her life expectancy and control the investment account through an IRA. Prior to the new rules, the entire distribution would have been taxed immediately if the benefit was distributed in a lump sum, or over the participant's life expectancy if paid in installments.

Under the new plan, a niece or nephew, domestic partner or friend who inherits a 401k account can instruct 401k plan administrators to do a direct rollover of the to an IRA the beneficiary sets up solely to receive the distribution. They then can spread the distribution over a period years, allowing the funds to build up tax deferred, with taxes only paid on the annual distribution amount. They would always have the option of accelerating the distributions if they need cash.

Establishing an inherited IRA is a huge estate planning opportunity in light of other federal laws, which deny same-sex partners spousal status for federal tax purposes. •

In the news...

CELEBRITY ESTATES

MICHAEL JACKSON

Michael Jackson's estranged father, Joe Jackson recently asked the probate court handling the King of Pop's affairs for an allowance to cover personal expenses totally more than $15,000/month.

BROOKE ASTOR

Anthony Marshall was convicted on 14 charges in his elder abuse scheme to steal millions from his mother, the New York socialite and philanthropist Brooke Astor.

BRITTANY MURPHY

It was revealed that the actress intentionally left her husband, Simon Monjack out of her will. Monjack has said he will honor Murphy's wishes, and the entirety of her estate - estimated to be $7.25 million - will go to her mother.

Make an honest assessment of your financial health and your long-term goals. You don't want to compromise your needs or your retirement by spreading your finances too thin.

Next, know the facts about giving.

In January of this year, the law changed to allow individuals to give up to $13,000 per year, per beneficiary tax-free. This $13,000 is excluded from the giver's lifetime monetary giving allowance. And, the sooner you put that money to work, the better.

Nearly 85 percent of monetary gifts from grandparents to grandchildren will go towards their college education. Prepaid tuition savings vehicles – like 529s – can help in those efforts. The downside, though, is that capital gains from these accounts not used to pay for education will be subject to taxes and penalties.

Grandparents also have the option of opening a Uniform Gifts to Minors Act account. The first $850 contributed to this account is tax-free. The account is automatically put in the hands of their grandchild upon the state's age of majority.

However, any money removed from a UGMA account will be taxed as capital gains, and the funds may count against him or her when it comes time to calculate financial aid eligibility for college.

Wills

My parents don't speak any English. They would like to prepare a will, though. Is it possible for them to execute a valid will in California if it is written in a different language?

Where the would-be testator speaks a different language, a translator will be called in, either by me or by the client, and together, we'll hash out the details and make sure the will is drafted to specification in accordance with California laws.

The requirements to execute a will in California are the same for everyone, regardless of language, literacy, or physical disability. Your will is valid even if you can't read the words on the paper. The same goes for your living trust document.

In the deciding case on this issue, the court ruled that a California resident who spoke Italian and very little English still had a valid will because the testator's friend had translated as the lawyer read the document during execution proceedings, and because the testator indicated that he understood what was in the will.

The policy behind this is to encourage people to make arrangements for the orderly distribution of their property to their intended beneficiaries either by their last will, or through a revocable living trust.

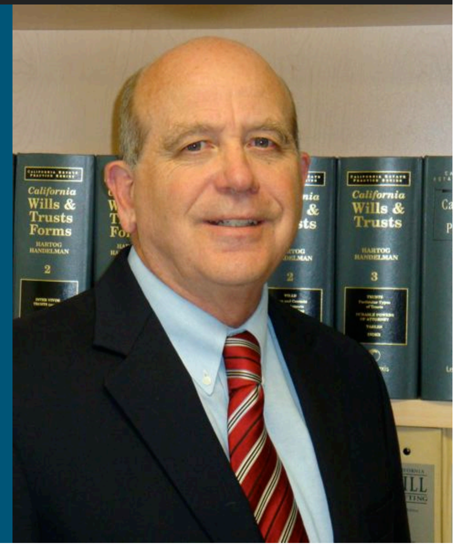
Continued on P. 4

THANK YOU
FOR YOUR REFERRALS

Thank you to all my clients, and the many financial advisors, accountants, and attorneys who have referred family members and clients to me. Word of mouth is my largest source of new clients.

If you need a referral from me for a financial planner, a professional trustee, a care manager, a Certified Public Accountant, or a realtor, please feel free to call me. I work with a number of highly competent professionals in many fields, and I am happy to give you several names and phones numbers.

James D. Perry
Attorney and Counselor at Law



Failure to have a valid will or living trust in place could result in your property going to legal heirs that you would just as soon disinherit.

Our lives and relationships are complex, and they deserve the extra effort that comes with drafting a will, or a living trust – even if it's done in a non-native language.

Ultimately, my job is to make sure I draft the document to the client's wishes, and to ensure that he or she is fully aware of and satisfied with the content whatever his or her native tongue.

The desire to protect our assets and provide for our loved ones is universal. Don't let a language barrier stop your from carrying out your last wishes for your estate. •

Death of the Death Tax

Estate planning lawyers waiting on Congress for answers

There are a lot of things to look forward to in 2010, but those of us in estate planning and probate law were hoping for one last act of 2009 – Congressional action on the Death Tax.

The Death Tax officially died at midnight, December 31, 2009 meaning that any taxpayer dying in 2010 will not have to pay taxes on his or her estate. It will resurrect itself on January 1, 2011 at Clinton-era levels exempting only the first $1 million with a 55 percent tax rate.

Despite the appealing zero percent tax rate against estates, the hidden danger lies in recent changes to the capital gains tax laws. Heirs face heavy capital gains taxes on the sales of any inherited assets, which may potentially be more costly overall than the death tax.

President Barack Obama and members of Congress have indicated that they want to freeze the levy at 2009 levels ($3.5 million exemption, 45 percent tax) instead of letting it expire.

The House voted in December to put this plan into law. The Senate, though, declined to act until a more permanent solution was found.

It's expected now that the Senate will take action (when, we're not sure) and apply any new tax law retroactively. That move may face legal challenges and it still doesn't help those looking to put into place a responsible estate plan.

Without government action, it is difficult for estate planning lawyers to properly advise clients.

Until this is resolved, all eyes are on The Hill. •

For more information and articles from my Estate Planning Blog, go to:
PerryEstatePlanning.com