PRACTICAL PLANNER NEWSLETTER
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More Info:

◦Seminars: Clients -- look for a postcard announcing a wine & cheese "get together" in our office Wednesday May 20, 4-7pm. You'll have an opportunity to informally discuss your concerns and questions about the current economic situation and its impact on your planning with our entire professional staff. 3 practical mini-seminars will be presented and a copy of our report on "Estate and Related Planning During Economic Turmoil" will also be distributed. Come in and tell us how we can better help you plan through the recession. Call for more info and to RSVP 201-845-8400.

Creative solutions that coordinate all your planning goals:
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PLANNING POTPOURRI

Ruff Decision. Divorce can become a dog fight, literally! Doreen claimed she and Eric had an oral agreement that Fido was hers. The trial judge, not a pet lover, held that pets are personalty but "lack the unique value essential to an award of specific performance." The Animal Legal Defense Fund submitted a brief *amicus curiae* urging the court to consider the best interests of the animal in making decisions. Fido was registered with the American Kennel Club as owned by both. On appeal the court considered the "special subjective value of personal property" and that specific performance is an appropriate remedy for personalty for which there is "strong sentimental attachment," and awarded Fido to Doreen. *Houseman v. Dare*, Sup. Ct NJ App. Div. Docket No. A-2415-07T2 3/10/09.

Rainy Day Fund Oversights. Everyone needs a reserve; a rainy year+ fund is optimal. Mom told you to have one, but many folks have overlooked this basic. Some people, even the press, had so focused on asset allocation concepts they neglected an allocation to emergency cash funds. Having cash/near cash investments is a critical component to an appropriate asset allocation model. Many investors are learning this the hard way. A cash reserve is essential for investors to be able to weather the market decline and retain investments intact for that hoped for recovery. The rich need emergency liquidity as much as anyone else, perhaps more so, because of the high cost of their lifestyles. Others relied on home equity lines and other borrowing capabilities in lieu of maintaining that emergency day fund. Those lines may not be available. When recovery occurs (Bill assured me it will) don't forget the basics.

The Issue with Issue. Jim (Father Knows Best) and Margaret Anderson are becoming the rare family model. CNN recently reported that: "Nearly 40 percent of babies born in the United States in 2007 were delivered by unwed mothers." So when your will leaves assets to "issue", who are issue? If your power of attorney permits gifts to "heirs," who are heirs? While most folks don't like to delve into these definitional issues of issue, failing to do so can lead to problems. How should a child born out of wedlock be treated under your documents? Do you have personal, religious, moral preferences? PP

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PRACTICAL PLANNER

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BROOKE ASTOR ESTATE: QUESTIONS & LESSONS

Summary: The estate of Brooke Astor is embroiled in a headline grabbing suit with her son, Anthony Marshall. Was she competent when she signed codicils amending her will? Did her Alzheimer's disease render her unable to comprehend what she signed? Was son Anthony as bad as the tabloids make out? The tabloid accounts leave many points unaddressed or explained inaccurately. Even if the tabloid accounts are completely off (no surprise) they make interesting cocktail party conversation.

Were Anthony's Perquisites Theft or Confirmation of Brooke's Intent. The tabloids make it sound like Anthony was bad. Maybe he was. Maybe increasing his compensation for managing his mother's affairs was inappropriate. Maybe it was a good tax plan! The income tax he would pay on compensation might be less than the estate tax had those funds been left in the estate. Hmmm, most folks do like to minimize taxes. That might have made excessive compensation a potential tax issue, but not an abuse of his position. Anthony paid salaries of some of his employees from his mother's funds. Was it abuse of his position or perhaps overly aggressive tax planning? Lots of rich folks aggressively try to find ways to diminish their taxable estates; perhaps the payments were taxable gifts, but no more than that. Were these payments authorized? If Anthony was agent under a broad power of attorney for his mother some or all of the payments might have been permitted. If the power of attorney gave Anthony the right to make unlimited gifts to himself or for his benefit, then all of the payments could arguably be permitted. Why would Brooke have given such broad discretion? Many wealthy taxpayers give trusted agents unlimited gift authority. Making large taxable gifts, if the donor survives for three years, can remove the gift tax paid from the gross estate creating a beneficial tax result. Well what about that retreat in Maine? Brooke no longer owned or used it, but continued to pay the expenses. Gee, so do lots of taxpayers. Mom and dad gave the kiddies the vacation home, but continue to cover the costs, against the advice of tax counsel. Those payments might constitute gifts to the kids, or be argued by the IRS as evidence of an incomplete gift of the vacation property thus pulling it back into the estate. Based on sketchy tabloid accounts, Anthony may have done what others do creating tax issues, but perhaps not with malicious intent. Tabloid accounts don't address much of this, but do leave an impression of wrong doing. "No Bias. No Bull." tabloids seem to have forgotten Sgt. Joe Friday's: "Just the facts ma'am."

Document a Pattern. From what can be gleaned from the tabloid accounts, there were 3 codicils signed. The defense will argue that if Brooke's first codicil, signed a mere three weeks before the second of the three, was not challenged, why should the second one be in question? If she was competent for the first, why but three weeks later, should she have been incompetent for the second? While the details of this argument are unclear from the tabloid accounts (aren't most things?) there is an important lesson. If there are health questions that could affect your competency, establish and document a consistent pattern. While this can be done with wills (see below) there are other steps that can also be taken. For example, did Brooke name her son as agent under her durable power of attorney? What scope of powers was he given? If she granted her son a broad general power of attorney, that would certainly indicate a level of trust in him consistent

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CHECKLIST: POWER ATTORNEY

Summary: A power of attorney is one of the most important documents you can sign. A power is vital to protecting your interests when you are disabled. It can be your primary dispositive document by authorizing an agent to make unlimited gifts and modify beneficiary designations. It can also be a source of elder financial abuse by someone (e.g., a caretaker) using it as a weapon to steal your assets. New York, after 8 years of study has revised its laws governing powers. Chapter 644, 1/27/09. 8 years demonstrates the seriousness and risks of what too many people view as a simple, "standard" document. The new rules are effective 9/1/09. For all you folks that continue to ignore the many articles (HIPAA, prudent investor act, etc.) imploring you to update your plan and documents, and to meet all your advisers annually, here's another major change to ignore at your peril. For a background on powers see Practical Planner July 2006 in the newsletter archive on www.shenkmanlaw.com.

√ Expect More Cost, Time and Complexity. The modifications to NY's power of attorney law are laudable.

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...BROOKE ASTOR ESTATE: QUESTIONS & LESSONS

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with the modifications of her will. If, for example, she had initially named her attorney as her agent, but then named her son, that pattern could indicate trust and confidence in her son.

Create a Succession of Wills. Worried about a possible will challenge? Create a succession of wills. Legally, if your February 2009 will is overturned based on a successful challenge of your competency, then the will you signed prior to that one, say your September 2008 will, becomes the governing document. So, if you sign a will now, revise it in six months and sign a new 2nd will. Then revisit it again a few months after that and sign a 3rd will. A challenge to your third will reinstates the second. A challenge to the second, reinstates the first. If each will reflects a step along a continuum (e.g., each increasing bequests to your son, and a reducing charitable bequests), the sequence lends credibility to your actions. If the 7% unitrust payment to Anthony (see below) would have reduced the trust so that was a logical step on the continuum to an outright bequest.

Careful with Codicils. Codicils, or amendments to an existing will, are often not preferred since a codicil highlights the modification from the prior will and can potentially introduce inconsistencies between codicils and the will they modify. Signing a new will is better. One notable exception, which may have applied in the Astor case, is that if your competency is in question, the Codicil merely amends the prior will, it doesn't revoke it. If you're proven to have been of questionable competency when you signed the codicil, than only the modifications effected by the codicil are in question, not the prior will.

Basic Math: 7% Unitrust Belies Tabloids. Brooke wanted to leave her estate to charity say the tabloids. So, instead of giving her assets outright to Anthony, she put them in trust. Anthony was to get 7% of the value of the trust every year (a unitrust). The tabloids concluded that Anthony tried to defeat Brooke's intent to leave her estate to charity. Who's doing the math? If you read the studies you'd know that you really might want to payout only 3-4% a year if the inflation adjusted value of a trust should stay intact. If Anthony gets 7% of the trust, it was a declining asset (much principal would be distributed to Anthony under the 7% payout). Brooke died in 2007 at age 105. Anthony was in his early 80s which could mean a 20+ year life expectancy. Factor into the analysis the huge drop in asset values in 2008-9, but continue the 7% payout. The tabloids don't even mention whether Anthony had any principal invasion rights. Monte Carlo simulations on these facts would show high odds that only a part of the estate would ever be distributed to charity under what the tabloids describe was Brooke's plan. If true, Brooke probably never intended that most of her estate be distributed to charity.

Competency. Was Brooke competent? If not, than any document she signed during the time in question will be ineffectual. Did she make large charitable gifts or sign other significant legal documents other than a codicil? If so have they been challenged too? The tabloids are silent as to this. The degree of competency to sign a will (testamentary capacity) is less than that required to execute a contract. Many people mistakenly believe competency is purely a medical concept. But competency is really a legal determination. The tabloids made hay out of the fact that a list of famous socialites would testify as to Brooke's condition. In a competency determination, the weight of famous folks pales to that of a qualified lawyer. The circumstances of the specific matter weigh on how competency in that situation should be assessed. Anthony was her only natural heir. He appears to have been managing her affairs. A 7% unitrust with a potential 20+ year time frame could have paid out a majority of Brooke's estate to Anthony. These circumstances, if correct, might suggest a lower threshold for assessing Brooke's competency. Attorneys are to consider the degree of physical, financial or other harm to the client when assessing competency. Based on the above, how much harm was there?

Conclusion. The facts are unclear, but the media account is both full of holes, and lessons. PP

Clients please call our office about our May meeting (wine & cheese) so you can meet with all firm members and discuss your concerns about the economy and how it impacts your planning

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Review: Andrew Wolfe, CPA, JH Cohn LLP, Roseland, NJ.

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...CHECKLIST: NEW YORK POWER OF ATTORNEY

(Continued from page 1)

There is no question that too many people were misled by the ease or simplicity of signing perceived standard powers. The internet has exacerbated this problem exponentially. Unfortunately, protection comes at a price. Standard forms and lawyer prepared documents will be longer, more complex, take more time to sign, create more potential for execution errors (e.g., not checking all the boxes or signing a rider).

√ Sign New Forms. New forms are being created. Anyone that has signed old NY powers should consider signing new ones that comply with the new requirements. Old powers will remain valid but will be subject to some of the new rules, including those governing HIPAA, acceptance by third parties and the standard of care required of the agent. Even if old powers work-getting new documents will grease the wheels to have your power accepted.

√ Your Agent Must Sign. The agent, to use the power must sign the document. It's not valid without your signature as principal and the agents. Signatures must be notarized.

√ Evaluate Gift Powers. The authority of an agent to make gifts can be vital if you face an estate tax. With the federal estate tax exclusion now $3.5M, for the vast majority of Americans this is not an issue and the weighing of the risks of a broad gift provision, versus loss of estate tax planning benefits has changed. For most Americans, unless there is an heir in need of help, the risk of gift powers now might outweigh the possible benefits if estate tax is not an issue. However, in states, like NY, that assert an estate tax on all assets over $1M, the gift power may be the key to reducing or eliminating that tax. If a power doesn't expressly provide the authority to make gifts, the agent cannot do so. NY has made this much tougher and more complex. A "major gifts rider" must be attached to the statutory power of attorney, notarized and witnessed by two independent (i.e., cannot receive gifts) people. This can also be accomplished in a non-statutory power (i.e., lawyer created documents) meeting the same requirements. Agents must act in accordance with the principal's instructions, or if none, in the principal's best interests. These changes raise a raft of issues that are complicated and problematic. For example, you might authorize your agent to made decisions pertaining to your IRA. You'll have to sign a Gift Rider to permit beneficiary changes. Which powers are gift-like powers?

√ Authorize Medical Records. HIPAA – the Health Insurance Portability and Accountability Act (see Practical Planner July 2007) restricts access to your protected health information ("PHI"). Your financial agent needs access to some of that info to pay bills. The new law grants that. Good change, but will your records include more personal details than you want a financial agent to see? Financial agents still are precluded from making health care decisions.

√ Agent Acknowledges Responsibilities. The new law clarifies that the agent is a fiduciary. The agent is required to disclose to third parties that he is acting as an agent. He must sign the power for it to be valid, and acknowledge his responsibility and the liability accepted by signing on.

√ Appoint A Monitor. You can appoint someone to monitor your agent's actions. The monitor can request a copy of the power of attorney and documents of transactions of the

RECENT DEVELOPMENTS

Not Swiss Cheese. If you are keeping funds offshore and not reporting, the time has come to face the piper. While you may have heard of the UBS Swiss account issues, the risk to you if you're involved, is far greater. If you come clean with the new IRS amnesty program before the IRS knocks on your door, you may get immunity from both: prosecution for tax evasion (not paying tax on the unreported income), and false filing (not checking the box on your Form 1040 disclosing that you have a foreign account). Also, June 30 every year you're supposed to file Form TDF 90-22.1 with the Treasury Department reporting your offshore accounts. There are draconian penalties if you fail to do so-- up to 50% of the account (wow!). These penalties might be waived if you disclose. Voluntary disclosure might get you immunity from prosecution and the right to repatriate the funds. IRM 9.5.11.9. Not playing like a Boy Scout could trigger more problems. If you repatriate a large dollar amount from overseas without having fessed up, and the bank files a suspicious activity report (e.g., an aberrational deposit) with the IRS as it may be required to do, this will be sent to the IRS criminal investigation unit. If you make a voluntary disclosure you avoid all this. But just like those car commercials, "professional driver, closed road," hire a pro to guide you. Thanks to Lawrence S. Horn, Esq., Sills Cummis & Gross P.C., Newark, New Jersey.

Innocent Spouse Relief. Generally, a husband and wife that file a joint income tax return are jointly liable for all taxes, interest and penalties. An exception permits a spouse who did not know about the tax understatement to avoid liability if it would be inequitable to hold that spouse liable. The IRS had maintained that the claim for innocent spouse relief had to be brought within 2 years of the IRS beginning collection. Reg. 1.6015-5(b)(1). The court held the 2 year requirement was invalid. *Cathy Lantz*, 132 TC No. 8 (Tax Ct.). For those who failed to claim the benefits because of the 2 year period, the opportunity should be revisited. PP