Pathways

a trust and estate newsletter from Downey Brand LLP

Fall 2009

Inside this issue:

ASK AN EXPERT

Why do I need a power of attorney for health care?

DOWNEY | BRAND
ATTORNEYS LLP

ASK AN EXPERT

Q. Why do I need a power of attorney for health care?

You may recall the case of Terry Schiavo whose cardiac arrest left her brain dead and set off a legal battle between her husband and parents over the removal of her feeding tube. Although our courts recognize a competent person's right to refuse medical care, the ability to withdraw life sustaining treatment may be limited where the individual has not left written instructions regarding his or her wishes.

Accordingly, a key document you will execute as part of your estate plan is a power of attorney for health care decisions. This document is also commonly known as an advance health care directive or living will.

In the power of attorney, you will communicate your choices regarding medical care and designate someone to make decisions for you when you are unable to give informed consent. By expressing your wishes, you will minimize the likelihood of disputes.

Here are additional considerations regarding powers of attorney for health care:

- You may need to update your power of attorney since some older documents may have expiration dates.
- You may want to include a waiver of privacy restrictions under the Health Insurance Portability and Accountability Act so that your agent can obtain your health care information when making decisions for you.
- You should describe your wishes regarding organ donation and the disposition of remains (burial or cremation) if you feel strongly about these issues.
- A new California law creating a Physician's Order Regarding Life Sustaining Treatment was enacted in 2008. This law allows you and your doctor to execute a form stating your preferences on life sustaining treatment. You may not need to execute this form if you already have a power of attorney for health care, but in any event your instructions in the two documents should be consistent.
- Speak openly with your named agent, family and friends about your wishes, especially if you know that a member of your family may hold ideological views different than your own.

–Gina Lera

The general information in this newsletter may or may not be appropriate for your particular situation. Before taking any action based on this newsletter, you should consult with your estate planning attorney.

New California Laws

Despite the budget battle at the California State Capitol, the Legislature managed to pass several bills relevant to elder care and wealth transfers this year. Two consumer protection bills will draw significant attention:

Assembly Bill 215 (Feuer and Smyth) - Effective January 1, 2011, long-term health care facilities that accept Medicare or Medicaid will be required to post their star rating from the federal Center for Medicare and Medicaid in a visible and public location. These ratings, which take into account health inspections, staffing and quality measures, are currently available at www.medicare.gov/NHCompare/home.asp, but patients and family members are often unaware of the ratings or do not have Internet access. This bi-partisan bill had broad support.

Assembly Bill 329 (Feuer) - This bill (one of several involving lending practices) resulted in the Reverse Mortgage Elder Protection Act of 2009. Reverse mortgages can be useful for some elders who have significant home equity but need more retirement income. The reverse mortage industry, however, has seen fraud and abuse. An area of particular concern involves using reverse mortgage proceeds to fund the purchase of annuities that include high sales commissions and might not be an appropriate investment for the elder. The new legislation requires disclosures designed to protect elders from these practices.

Some other relevant legislation includes SB 237 (Calderon), imposing additional protective requirements on real estate appraisals; SB 98 (Calderon), restricting potentially abusive uses of life insurance contracts and viatical (lifetime) insurance policy settlements; and AB 1163 (Tran), dealing with the attorney-client privilege as it applies to decedents' estates.

The Legislative Counsel's Office publishes the text and history of all bills at http://www.leginfo.ca.gov/. Downey Brand's wealth transfer group attorneys also would be happy to answer questions that may pertain to your situation. *– Sil Reggiardo*

A Historical Perspective on Estate Taxes

As we watch and wait for Congress to take action on the estate tax, a look backwards will help put our current situation in perspective.

The federal estate tax exemption was $60,000 from 1942 to 1976. Then, during the fall presidential campaign between Gerald Ford and Jimmy Carter, Congress increased the estate tax exemption to $120,000. While that exemption seems ridiculously low by today's standard, it was before most of the inflationary events that have occurred in the last 30 years. It should be noted that property passing to a spouse above such amount, even from community property, was subjected to tax. The rates were lower, but there were many more estates that had tax obligations than is true today.

There was also a California inheritance tax for property passing to spouses (and others), again at relatively low rates. The exemption amount was quite modest and it was common to have state inheritance tax payable for property passing to a spouse even when it was all community property. The state inheritance tax was repealed in its entirety by a constitutional amendment in 1982.

The federal law enacted in 1976 increased the amount of the marital deduction (that is, property that could pass to a spouse free of tax) in increments over the next several years. The total amount that could pass to a spouse free of tax was $425,000 for persons who died in the year 1980.

The next major change in estate tax occurred in 1981, after President Reagan was elected. The 1981 act had a continuing series of adjustments in the amount of property that could pass free of tax, and, perhaps more important, an unlimited marital deduction where property could pass in any amount to a surviving spouse without tax. (That is still the law.) Various amounts of property could pass to someone other than a spouse without tax, with the exemption amount increasing to $675,000 in 2000.

The latest big change occurred in 2001, when Congress passed the tax bill discussed below. Even though it now seems unlikely that the estate tax will go away, the overall tax burden is likely to remain substantially less than it has been in recent generations.

–Jim Willett

Will Congress Fix the Estate Tax – and When?

The estate tax regime inaugurated by the 2001 Tax Act continues to play out in stages, with the exemption having risen to $3.5 million for decedents dying in 2009. Under current law, the exemption will be unlimited for decedents dying next year, but for those dying in 2011 or thereafter, the exemption will drop back down to just $1 million (and the top marginal rate will revert from its current 45% back up to 55%, where it was in 2001). Effective tax planning is difficult under these shifting rules, and most observers believe that Congress will revise the estate tax law soon in a manner that avoids both the 2010 and the 2011 phases of the current law.

Three bills have been introduced this year to revise the estate tax law. All of them call for the exemption amount to remain at a level of at least $3.5 million for the foreseeable future, and all of them call for the top marginal rate to be 45% or lower. That is the good news. Unfortunately, Congress is distracted at the moment by health care reform, the financial crisis, and other pressing matters, and estate tax reform is not the highest priority. Therefore, many now believe that Congress will do nothing more this year than extend the current law – that is, the law in effect for 2009 – for one additional year (through 2010) in order to buy more time to enact a more comprehensive reform bill.

The three bills now pending contain, among them, assorted provisions that would have a dramatic impact on estate and gift taxes, such as portability of estate tax exemptions between spouses, reunification of the estate and gift tax exemptions, and elimination of valuation discounts for transfers of interests in family-owned entities such as limited partnerships. However, we will likely have to wait another year to see whether any of these provisions becomes law. Clearly, 2010 will be an interesting year!

–Jim Deeringer

Charitable Remainder Trusts: Another Way to Give

With the holiday season upon us, you may be planning to make a gift to your favorite charitable organization. While the most common way people give to charities is by making outright gifts of cash or property, there are multiple alternatives that may be right for you depending on your financial situation and estate planning goals.

For example, you could establish a charitable remainder trust (CRT) and donate property to the trust rather than directly to a charity. The CRT would then sell the property and provide you with an income stream for a stated term: either your lifetime or a set number of years. The retained income stream is either a fixed annuity amount or a percentage of the fair market value of the trust assets. After the stated term, the trust terminates and the remaining assets are then distributed to the designated charity.

A CRT would be perfect for you if you own a marketable, low-basis, highly appreciated asset which you would like to liquidate to create a better income stream but have been reluctant to do so because of capital gain costs. If you donate that asset to a CRT, the trust can then sell the asset without realizing any taxable gain because it is tax-exempt, and provide you with a greater income stream from the sales proceeds than the asset itself did. By setting up a CRT, you retain a fixed income stream during life while receiving a current income tax deduction and benefiting your favorite charity in the long term.

Please note that while the charitable deduction for gift tax purposes is unlimited, the deduction for income tax purposes is limited and is often based on your adjusted gross income. To ensure your charitable deduction qualifies as an income tax deduction, please be sure to consult with your tax adviser.

–Kelly Tiberini

DOWNEY | BRAND
ATTORNEYS LLP

621 Capitol Mall, 18th floor
Sacramento, CA 95814

To find prior editions of Pathways, check out the Trust & Estate Practice page on our website at: www.downeybrand.com/practice/estate.php.