The Guttenberg Press

Preserving Your Assets ... Planning Your Future

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Dear Friend,

As I write this letter, Sandy and I are off to Palm Springs, California to visit our new grandson. Amanda, Liz and Erin are holding down the fort as we close out a wonderful year. Erin's new daughter is truly adorable.

In this issue, we address the "Financial Power of Attorney," a document that is so "powerful" and so important on so many levels, but whose consequences need to be considered. I also draw your attention to the discussion of "alternate valuation" - which can lower one's estate tax liability in a volatile stock and real estate market (which we are now seeing).

Just to report, the move to our new offices went rather smoothly and we are enjoying our new "digs." We hope you have an opportunity to come by and visit.

Just a note about 2008: It's an election year and so we're unlikely to see any significant estate tax legislation. But the political landscape is bound to influence the type of an estate tax after 2009. I would give little hope for repeal.

Happy holidays to you and your family,

Aryeh

Financial Power of Attorney : A "Must" ... for Incapacity and Estate Tax Planning

Everyone with property or an income should sign a durable general power of attorney for finances, sometimes called a financial power of attorney. We'll refer to it here as a "financial POA." The financial POA, like the living will and health care power of attorney, is an integral part of an estate plan and will help you provide for the possibility of future incapacity or incompetence. While the living will and health care POA provide for matters relating to your health and medical decision-making, the financial POA provides for your financial affairs.

As we will explain below, the financial power of attorney also provides enhanced strategies for reducing Maryland and federal estate taxes.

Why Sign a Power of Attorney?

On a Basic Level: Taking Care of Your Finances in Event of Incapacity: Making a financial POA ensures that someone you trust (usually called your "agent" or "attorney-in-fact") will be on hand to manage the many practical, financial tasks that will arise if you become incapacitated and are unable to make decisions for yourself. For example, bills must be paid, bank deposits must be made, and someone must handle insurance and benefits paperwork. Many other matters may need attention as well, from handling property repairs to managing investments or a small business. In most cases, a financial POA is the best way to take care of tasks like these.

More Advanced Level: For Estate Tax Planning (Federal and State) and Reduction: A financial POA is an absolute necessity for empowering the agent to make gifts to reduce federal and state estate taxes. This will be discussed later (see p. 2).

Avoiding Guardianship Proceedings: If you don't have a financial POA and you become incapacitated, your relatives or other loved ones will have to go to court to name a guardian to manage your financial affairs. Guardianship proceedings can be expensive and embarrassing. Your loved ones must ask the court to rule that you cannot take care of your own affairs -- a public airing of a very private matter. And if relatives fight over who is to be the guardian, the proceedings will surely become even more disagreeable, sometimes downright nasty, and certainly costly.

If You Think You Don't Need One: Erroneous Assumptions: Many are under the erroneous assumption that you don't need a financial durable power of attorney for finances if you're married or if you've put most of your property into a living trust or you hold it in joint tenancy. But the truth is that in all of these situations, a financial POA can make life much easier for your family if you become incapacitated.

If you are married, your spouse does have some authority over property you own together -- for example, to pay bills from a joint bank account or

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Your Agent and Your Agent's Job: A Position of Trust, Power (and Sometimes Temptation)

Whom Should You Name as Your Agent?

Deciding which type of power of attorney may be straightforward, depending on the circumstances. However, finding a trusted person to manage your financial affairs may not be as easy. The "agent" can be a family member or friend whom you trust to manage financial affairs with the same due diligence as you would yourself. The person you choose as an agent will have the same authority over your property that you have. It is always advisable to appoint a successor agent. For example, a husband gives his wife power of attorney upon finding out that he has Alzheimer's disease. The wife subsequently becomes incapacitated and is unable to care for her affairs, as well as that of her husband's. Having a successor agent would allow the husband's power to stay in force without possible legal proceedings over his affairs.

Powers and Duties

Commonly, people give their agent broad power to handle all of their finances. But you can give your agent as much or as little power as you wish. Remember, the key is to ensure that your agent is someone whom you trust and who will act in a fiduciary capacity. The agent is required to act in your best interests, maintain accurate records, keep your property separate from his or hers, and avoid conflicts of interest.

The Recent Indictment of Brooke Astor's Son

There is an inherent risk that an agent could abuse your POA which is why you must carefully choose your agent and must carefully consider whether to give such agent a power to make gifts. This abuse was highlighted most recently in the media involving the indictment of the late Brooke Astor's son for abusing a power of attorney that the philanthropist's wife gave to him. According to the indictment, the son, Anthony Marshall, used the power of attorney to "unjustly enrich himself" while his mother had diminished mental capacity, including taking works of art from her home and increasing his salary related to real estate that the family no longer used. See Wall Street Journal (November 28, 2007), *"How to Ensure Relatives Don't Rip You Off: Case of Astor's Son Highlights Risks of Powers of Attorney."* (Please call or email us for a copy of this article.)

The Figgins Case: Do you Trust Your Child with a Gift-Giving Power?

Abuse of a gift-giving power was also highlighted in the 2007 Maryland case of *Figgins v. Cochrane*, which declared that a child misused a parent's power by making gifts to herself. This was so even though the gift-giving power was specified. The key points of that case are that (1) the gift giving power must be used in accordance with its intent and (2) the agent who is in a confidential relationship with the principal (such as a child acting for a sick parent) must act reasonably in using the power.

Note: In our new 2008 supplement to our Maryland book on estate planning, we discuss *Figgins* and provide strategies designed to balance the gift giving power with protection for an incapacitated principal. Please call if you wish to discuss.

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sell stock in a joint brokerage account. There are significant limits, however, on your spouse's right to sell property owned by both of you. Because an incapacitated spouse can't consent to such a sale, the other spouse's hands are tied. When it comes to property that belongs only to you, your spouse has no legal authority without a durable power of attorney.

A revocable living trust isn't a complete substitute for a financial POA, but it can be helpful if you become incapable of taking care of your financial affairs. That's because the person who will distribute trust property after you become incapacitated (called the successor trustee) has no authority over property not held in the trust. Few people transfer all their property to a living trust. A financial POA ensures that someone will be on hand to take care of other property, as well as day-to-day financial tasks.

When Does a Durable General Power of Attorney Take Effect?

The power of attorney can be drafted so that it goes into effect as soon as you sign it. (Many spouses have active financial POAs for each other in case something happens to one of them -- or for when one spouse is out of town, and this is recommended for most married couples.) You should specify that you want your power of attorney to be "durable" so that it continues if you later become incapacitated.

Or, you can specify that the power of attorney does not go into effect unless a physician (or medical team) certifies that you have become incapacitated. This is called a "springing" durable power of attorney. It allows you to keep control over your affairs unless and until you become incapacitated, when it springs into effect.

"Gift Giving Power" is Key to Estate Tax Reduction

As we reiterate to our clients, it is possible to reduce both federal and the Maryland estate tax by making gifts of assets prior to death. And, for this, a carefully drafted financial POA is essential. Deathbed gifts are a key planning strategy for avoiding the tax. For example, a person with a $2 million estate can make a deathbed gift of $1 million and totally eliminate the Maryland estate tax which would otherwise have been $99,600! And the large gift would not be subject to federal tax due to the $1 million lifetime gift tax exemption. In addition, there are a host of planning techniques for reducing federal estate tax for those who are incapacitated or near death. This includes the use of annual exclusion gifts to family members.

If you are incapacitated, then <u>it is your agent</u> who will need to effect the estate tax strategies pursuant to a valid financial POA. But here is the trap and key point: <u>In Maryland and many other states, your attorney-in-fact cannot make gifts unless the power to make gifts is specifically authorized.</u> (The leading Maryland case on this point, *King v. Bankard*, concluded that a broad catch-all general power to "convey, grant, bargain and/or sell" did not include the power to make gifts.) The failure to include a gifting provision would stunt the ability to make gifts of the principal's assets since the agent would have no such authority to make gifts and the IRS would claim that no completed gift transfer was made.

As with all estate planning documents, a financial POA should be reviewed and updated periodically so that it reflects your needs and desires. You'll likely need to revoke and draft a new power of attorney should you divorce or your financial circumstances change significantly. Third-party financial institutions also prefer seeing current and updated powers of attorney, (and some require indemnification language). And, of major importance, it is critical to ensure that your power has the inherent capability to serve as a tax reduction vehicle to reduce federal and state estate taxes at the proper time.

529 COLLEGE SAVINGS PLANS: 2 COMMON QUESTIONS..AND 1 TIP

Since being introduced in 1996, the relative simplicity, flexibility, high contribution limits and significant tax benefits of 529 plans have made them the college savings vehicle of choice for millions of Americans. Setting up the plan does not typically involve attorneys but we have found that all of us need guidance regarding some basic features and important nuances of 529 plans. In past newsletters, we have discussed the basics of the plans. Here are 2 common questions that we have been asked by clients– and 1 tip based on our experience. The answers may not be so obvious.

The Questions

Question #1: Let's say my beneficiary does not wish to pursue college but instead wants to use the assets for non-educational purposes upon turning 18 or 21. What do I do then? Do I have to distribute it to the beneficiary at age 21? Can I change beneficiaries?

Answer: While it is true that the control and ownership of custodial accounts often used for college savings automatically transfer to the beneficiary once he or she reaches the age of 21 (in Maryland, under the Uniform Transfers to Minors Act), this is not the case with 529 plans. Instead the account owner– in most cases, a parent or grandparent– retains control of the assets and determines the amount and timing of distributions. But what can a parent or grandparent do if the child designated on the account elects not to pursue higher education or is simply unable to attend college for any circumstance?

Here, there are 2 basic choices:

•Choice#1 (optimum choice): The account owner (e.g., parent or grandparent) has the option of changing beneficiaries at any time! Doing so carries no consequences provided the new beneficiary is a member of the previous beneficiary's family. And in the 529 world, "family" is broadly defined to include parents, siblings, aunts and uncles, cousins, nieces and nephews.

•Choice #2: The owner can elect not to designate a new beneficiary and instead choose to liquidate the account or withdraw money for purposes unrelated to higher education (for either the beneficiary or for the owner). However, the earnings portion of those withdrawals will be subject to a 10% federal tax penalty as well as state and federal income tax. Typically, if one is not sure who to name as a substitute beneficiary but doesn't wish to face the penalties and taxes associated with non-higher education withdrawals, one may defer withdrawals of assets in anticipation of designating a new beneficiary in the future.

We find that the above options are somewhat reassuring to investors who want to make sure that the assets they've earmarked for college are used strictly for that purpose.

Question #2: How do 529 plans work as a method of making tax-free gifts?

Answer: We have found 529 plans to be quite an effective and efficient vehicle for gifting. For instance, a parent can contribute up to $12,000 annually ($24,000 per married couple) for each beneficiary with no gift tax consequence. And if that parent or grandparent wishes to put more assets to work more quickly, they can accelerate 5 years' worth of giving by investing up to $60,000 ($120,000 per couple) per beneficiary in a single year. We have found this frontloading to be a popular and efficient practice.

The Tip

When you set up a 529 plan, you have to designate an "account holder" who can make investment decisions and pull money out of the plan. Few people bother designating a successor account holder and the consequences can be both inefficient and costly. If you set up a 529 plan and die, ownership of your account (*i.e.,* the interest of the account holder) may pass on your death to the executor of your estate. That may not be an attractive alternative since the account can be subject to creditor claims of the estate. From your estate, the account will pass by bequest or operation of law. Not what you had planned.

Our tip: Designate a successor account owner and avoid the complexity, administrative costs and worse. Give thought to who should succeed you as the person managing the funds for the benefit of the beneficiary named. Remember that being an account owner comes with a great deal of control as to the ability to liquidate the account, make withdrawals and change beneficiaries.

STOCK MARKET AND REAL ESTATE SLUMP MAY CUT ESTATE TAXES DRAMATICALLY IN SOME ESTATES: THE REINVIGORATED CONCEPT OF "ALTERNATE VALUATION"

One estate tax provision that hasn't been very useful over the last few years has finally proved to be a major saver. Here's the deal: When one inherits stocks, real estate or other property, the value for tax purposes is typically its value as of the date of the decedent's death. But under certain circumstances, one may use market values six months later for estate tax purposes. This is known as the "alternate valuation date."

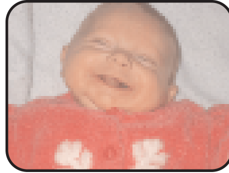
Because of recent corrections in the stock market and a downturn in the real estate market (some of which was precipitated by the "subprime loan mess"), choosing that alternate date could mean large estate tax savings. For example, consider a decedent who died on August 1, 2007. On the date of death, decedent had a $10 million estate which included, among other assets, a stock portfolio worth $6 million and a residence worth $1.5M million. If on February 1, 2008 (6 months later), the same stock portfolio is worth $4 million and the residence is worth $1 million, the total estate net worth as of that date would be $7.5 million.

Using the February 1, 2008 alternate valuation date, the tax savings is this example would be approximately $1,250,000 (assuming a combined federal and state estate tax rate of 50%). But there are some catches. The most important one is the "good as to one, good as to all" rule. The same valuation date must be used for all assets. Thus, not only the stock portfolio and the real estate, but all of decedent's assets must be valued on February 1, 2008- the alternate valuation date. And, all assets must be reappraised.

The rules are intricate but due to the high estate tax rates (exacerbated by the Maryland's newly decoupled estate tax), it is vital that we have one eye on the fluctuations in the stock and real estate markets. It may be worth the effort of reappraising the estate assets a second time– for significant estate tax savings.

Things We've Been Up to Lately

Aryeh was elected by his peers as a Fellow of the American College of Trust and Estate Counsel (ACTEC), a prestigious national organization of trust and estate attorneys. Aryeh will be formally inducted at ACTEC's annual meeting in Boca Raton, Florida on March 5, 2008.

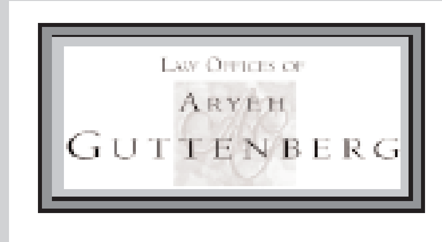


Congratulations to our practice administrator, Erin Stickles, and her husband Brad, on the birth of a daughter, Madalyn Olivia, born on September 30, 2007.

Amanda authored *"Advanced Estate Planning Institute 2007- in Review,"* a summary of MICPEL's annual seminar. Amanda's article was published in the Fall, 2007 issue of the Estates and Trusts Newsletter of the Maryland Bar. A copy of Amanda's article will be available soon on our website.

Aryeh served as Chairman of a gala musical event for Shaare Zedek Medical Center on October 28, 2007 at the Meyerhoff Symphony Hall. The event helped raise seed funds for the new Children's Hospital. Thank you, as always, to all supporters for your kind and generous participation.

This just in .... Congratulations to Sandy and Aryeh on the birth of a grandson, born to their children Dina and Shaye Guttenberg, in Palm Springs, California on December 4, 2007. (We'll find out the name at the *Bris*.)



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