Your Family Estate Matters

Nicholas A. Giuditta, III, Attorney at Law

Member,
National Academy of
Elder Law Attorneys, Inc.

476 South Avenue East
Cranford, NJ 07016
(908) 709-1999

A Complimentary Quarterly Publication of News Affecting Our Clients & Friends JUNE 2006

Estate Plans – Shouldn't a Necessity be a Priority?

Maybe no one actually looks forward to creating his estate plan because it's an acknowledgement of demise, but for many, the consequences of not having a plan may be even more unattractive.

Not only does an estate plan allow you to name the beneficiaries of your estate and possibly prevent a family feud, if you have minor children, an estate plan also allows you (rather than a court) to appoint a guardian to care for them.

A 2005 survey conducted by FindLaw showed 55% of participants did not have a will. Of adults older than 54, 28% did not have a will, 54% of those age 35 to 54 did not have a will, and 82% of young adults under 35 (many of whom have children) did not have a will.

Estate taxes are also typically a consideration in developing an estate plan. Although no definitive resolution has been reached by Congress regarding the "death tax," many forget state estate or inheritance taxes should also be a consideration.

Source: Lansing State Journal, 5-22-06

This publication is designed to keep our clients and friends informed of recent events or news items that might affect them or be of interest. This newsletter is for informational purposes only and is not intended to be a source of legal advice. Please contact me should you need legal guidance about your specific situation.

Nicholas A. Giuditta, III, Esq.

No Income Limit for Conversion to Roth IRA

As Congress debates the tax bill, one provision likely to be approved is a temporary repeal of the income requirement for converting a traditional IRA to a Roth IRA.

Currently, in order to convert, your income must not exceed $100,000. If the bill passes, there will be no income limitation.

The Bush administration contends repealing the income limitation will generate much-needed tax revenue. The Joint Committee on Taxation agrees – at least in the short term. The Committee anticipates the temporary repeal would generate approximately $5 billion during the first four years. However, it also estimates "it would cost more than $9 billion over the subsequent six years."

Converting to a Roth IRA is appealing because with a Roth IRA, you are not taxed on withdrawals (although you are taxed on contributions). Traditional IRAs allow you a tax deduction up front when you contribute, but you must pay income tax on withdrawals. In a nutshell, "a regular IRA gives you a tax break today, a Roth gives you one in the future." The downside to converting is you are required to pay tax on the conversion amount.

Source: San Francisco Chronicle, 5-4-06

Also in this Issue...

Splitting Your Business Equitably - 2

Life Estate Interest and the DRA - 2

Beware of Wolves in Sheep's Clothing - 2

Grassley Submits Proposal to Waive Part D Penalties - 3

A GRAT May Be an Appropriate Estate Planning Tool - 3

Too Soon to Think About 2007 Taxes? - 3

Corpus of Testamentary Trust Not Countable in Determining Medicaid Eligibility - 3

Splitting Your Business Equitably

What's equitable? If you have five kids and only three of them work in the family business, how can your estate plan tackle an equitable inheritance?

There are basically two approaches:

- The "fair" approach recognizes family members outside the day-to-day workings of the business probably don't have the knowledge necessary to make informed decisions about management of the company, so they may be given non-voting shares of company stock (or comparable assets). This approach may cause resentment among family members and ultimately undermine the success of the business.
- The "equal" approach maintains that each family member should receive the same share of assets regardless of whether or not they are involved in the business. This approach risks uninformed, uninvolved family members making decisions about the business which may ultimately lead to its demise.

There are proponents for each method, but experts agree discussions about the appropriate plan for your family's business should start well in advance of actually needing to make such a decision, which is usually when the head of the family and business has died and emotions are running high.

You might get a head start on making some difficult decisions by holding annual "family council" meetings which should include all family members and should cover such topics as the history of the business, how it earns profits, and what's entailed in managing the business.

Another recommendation is to have a plan in place for satisfying both voting and non-voting shareholders. The plan might include a provision for reinvesting a certain percentage of profits and allotting a certain amount for distributions to shareholders. Also included should be a compensation arrangement for a family member who wants to sell his shares of stock.

Source: The Wall Street Journal, 5-8-06

Life Estate Interest and the DRA

If your elderly, ailing mother purchases a life estate in your home, can the value of the life estate make her ineligible for qualifying for Medicaid?

First things first, what is a life estate? A life estate "gives individuals not considered owners of a property certain rights to that property, including the right to live there." The one who purchases the life estate interest is called the "life tenant" and has the right to live in the residence for the duration of her life without paying rent.

According to Certified Elder Law Attorney, Robert J. Kurre, who practices in Great Neck, New York, under the Deficit Reduction Act of 2005 (the constitutionality of which is currently being questioned), if your mother purchases a life estate interest in your home for fair market value and resides there for at least one year, her life estate will not affect her eligibility for qualifying for Medicaid. Consequently, the purchase of a life estate may be an appropriate vehicle for protecting her assets since "a life estate has no value for purposes of determining an individual's eligibility for Medicaid." However, if you should sell your residence during your mother's lifetime, she would be entitled to some of the sales proceeds which would be considered a "countable" resource and may affect her qualifying for Medicaid. Additionally, certain taxes may apply.

As is frequently the case, there may be many factors to consider, so it is wise to seek the counsel of a qualified estate planning professional to determine how laws may impact your specific situation.

Source: www.Newsday.com, 4-29-06

Beware of Wolves in Sheep's Clothing

The attorneys general of Pennsylvania and California have recently filed lawsuits against "living trust mills" that have bilked numerous seniors out of their savings.

The scam works as follows: Employees of the trust mills offer a free consultation regarding creating or modifying a living trust touting the benefits of a living trust which include being able to avoid probate and estate taxes. In gathering information to create the living trust, employees gain knowledge about their mark's assets. When the employee returns to the victim's home to present the living trust, they then pitch an annuity or other high-commission product that may not be suitable for the senior.

The lawsuits contend the trust mills engaged in the unauthorized practice of law and defrauded seniors by not disclosing the negatives of the purchased annuities. The shortcomings of some annuities (especially for seniors) include the inability of the annuity holder to exceed specified withdrawal amounts without penalty until maturity, which maybe be as long as 15 years, which may exceed the annuity holder's life expectancy.

Source: www.DailyItem.com, 4-28-06 & www.ConsumerAffairs.com, 2-23-06

Grassley Submits Proposal to Waive Part D Penalties

The deadline for enrolling in Medicare Part D was May 15, 2006. Currently, legislation imposes a penalty of 1% for each month after the deadline a beneficiary enrolls. Senate Finance Committee Chairman Charles Grassley (R-IA) and 17 co-sponsors have submitted a proposal (the Medicare Late Enrollment Assistance Act – S 2810) to waive penalties. In addition, the proposal would provide supplemental funding to state programs designed to inform seniors about Part D and assist them in making a selection.

According to Senator Bill Nelson (D-FL), "This Medicare prescription drug program is confusing for too many seniors. This bill will give seniors more time to sign up, without facing stiff financial penalties."

The Bush administration had previously opposed a deadline extension taking the position a deadline was required to push seniors to make a decision. However, White House Press Secretary Tony Snow recently stated the administration would "take a careful look" at the proposed legislation.

Source: www.health.cch.com, 5-24-06

A GRAT May Be an Appropriate Estate Planning Tool

Typically, one of the goals of an effective estate plan is to gift as many of your assets as possible while incurring minimal taxes. Estate planning professionals have many tools at their disposal for accomplishing this goal, one of which is the grantor-retained annuity trust (GRAT).

There are many complexities associated with a GRAT (which is why the services of a professional should be secured), but the general idea is as follows: Your assets are transferred to an irrevocable trust. The trust pays you a specified amount of money each year for a set number of years. If you are still living at the expiration of the term of the trust, your beneficiaries will receive the remaining assets at a significantly lower tax rate (based on a system established by the IRS for calculating the value of the gift at the inception of the trust).

Consider this very simplistic example: If you transfer $1 million to a GRAT and receive an annuity payment of $40,000 each year for 15 years, $400,000 would remain for your beneficiaries. However, when IRS calculation rules (including interest rates, longevity, etc.) are applied, the actual amount on which you would have to pay taxes is notably less. Assuming the trust assets are earning interest (to which no taxes apply), your gift will be much larger than the taxable amount at the time of transfer to your beneficiaries.

The downside to a GRAT is, if you die before the term is complete, the assets will be considered part of your taxable estate. Also, since GRATs are irrevocable, you can't retrieve the assets or change payment amounts.

Source: Detroit Free Press, 5-15-06

Too Soon to Think About 2007 Taxes?

Although most people like to "forgetaboutit" once taxes are filed, experts suggest now is the time to make changes to better your tax situation for next year.

While your returns are fresh in your mind, evaluate what changes might make sense for you. For example, "If you ended up paying a lot of money this year or got a huge amount back, go to your human resources person and adjust your withholding," says Tony Trevino, co-owner of Certified Financial Planner in Modesto, California. If you received a huge refund, you are probably having too much deducted from your paycheck – that's money you could be investing in your 401(k) plan.

Trevino and Kate Rauber, Public Relations Manager for H&R Block, both endorse getting organized. Implement some type of system for keeping bank statements, receipts, and canceled checks. Even if you just store them in a shoe box, having them in a centralized location will make finding receipts for employer-mandated uniforms for work, medications, and other deductible items much easier. Plus, it will give you an accurate picture of just where your money is going.

Source: www.Modbee.com, 5-14-06

Corpus of Testamentary Trust Not Countable in Determining Medicaid Eligibility

On August 10, 1982 Herman Pohlmann executed his last will and testament under which two trusts were to be established – a family trust and a marital trust. The terms of the family trust indicated Herman's wife, Ruth, was to receive "all of the accumulative income from the individual funds and such portion of the principal as [the trustee] may, from time to time, deem appropriate for her health, education, support or maintenance." The family trust was funded but the marital trust was never funded.

On June 6, 2003, Merlyn Pohlmann, acting as attorney in fact for Ruth, applied

(Continued on Page 4)

Nicholas A. Giuditta, III
Attorney at Law
476 South Avenue East
Cranford, NJ 07016

to the Nebraska Department of Health & Human Services (NDHHS) for Medicaid benefits for Ruth, who was already residing in a nursing home.

NDHHS determined Ruth was ineligible for Medicaid because of the balance in her bank account and because they believed she had resources available to her from the testamentary family trust established by Herman's will.

Merlyn appealed the decision and a hearing officer upheld the ruling by the NDHHS. A petition for review was filed and the Lancaster County District Court also upheld the decision by NDHHS. To make its determination, the district court applied the "any circumstances" test of the code related to Medicaid eligibility which states "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual." The district court interpreted, because the trustee *could* provide funds from the trust for Ruth, the corpus was a countable resource, thus disqualifying Ruth to receive Medicaid.

The Nebraska Supreme Court, however, overturned the district court's interpretation reasoning the "any circumstances" test need not have been applied because the "other than by will" clause "specifically exempts testamentary trusts" from being considered as a countable resource. Additionally, the supreme court noted the family trust is a discretionary trust, and because the beneficiary cannot force distributions from the trust, the assets of the trust cannot be considered countable.

Source: Pohlmann v. NDHHS, No. S-04-1327, Filed 3-10-06

Would your group or organization like a seminar or workshop?

Attorney Nick Giuditta enjoys speaking to community groups on Elder Law, Estate Planning, and various other legal topics. If you would like to schedule a time for him to present to your organization, please call 908-709-1999.