GIFTING CLAUSES IN DURABLE POWERS OF ATTORNEY

In a durable power of attorney, the principal appoints someone to oversee his financial affairs, including in the event he becomes incompetent as a result of injury or illness. A broad durable power of attorney may authorize the agent to take any action as fully and effectually in all respects as the principal could do if personally present. However, even the most broadly stated power of attorney does not authorize the agent to make gifts on behalf of the principal unless the power of attorney expressly grants the agent such power. The law requires that gifting powers be expressly stated in the durable power of attorney in order to reduce the risk that the agent will engage in financial abuse of the principal.

Gifts are an important estate planning tool, as making gifts during life often results in significant tax savings at the principal's death. Therefore, it is advantageous for an agent under a durable power of attorney to be authorized to make gifts for estate planning purposes. Generally, it is best if the scope of an agent's power to make gifts on behalf of the principal is limited, so as to reduce the potential for abuse.

If the durable power of attorney states in general language that the agent is authorized to make gifts, without express limitations, by law the agent is authorized to make a gift up to the amount of the annual federal gift tax exclusion, or twice that amount if the principal's spouse consents to a split gift, as defined by the tax code. Further, such general language authorizes the agent to make a gift of the principal's property if the agent determines doing so is consistent with the principal's objectives, if known, or if unknown, with the principal's best interest, based on all applicable factors, including: (i) the value and nature of the principal's property; (ii) the foreseeable obligations and need for maintenance of the principal; (iii) the minimization of all taxes; (iv) the principal's eligibility for any benefit, program or assistance; and (v) the principal's personal history of making such gifts.

A durable power of attorney may expressly provide that the agent is only authorized to make gifts to specified classes of persons, such as the principal's descendants. Such a provision may be advisable if the agent is someone other than the principal's spouse or family member, in order to reduce the risk that the agent will make gifts to himself or third parties he wishes to benefit, contrary to the principal's desires or best interest.

A durable power of attorney may also expressly require that the agent make gifts only in a manner which continues the principal's previously established pattern of gift-making for estate planning purposes. Such a provision helps ensure that the agent will make gifts which align with the principal's desires and objectives.

Further, a durable power of attorney may expressly provide that the aggregate of all gifts to any one recipient in any one year shall not exceed the amount of the annual federal gift tax exclusion. Such a provision provides the agent with the flexibility to maximize tax-free annual gifts for estate planning purposes, and reduces the risk that the agent will deplete the principal's estate.

It is also possible for the principal to expressly authorize the agent to make any gifts that the agent believes will benefit the principal or the principal's estate, including gifts to the agent himself. Such a provision grants the agent the broadest authority to make gifts on behalf of the principal, but it also provides the greatest potential for abuse. Therefore, it is crucial that a principal granting such broad authority trust the agent unconditionally.

In drafting a durable power of attorney as part of a comprehensive estate plan, it is important to consider what gifting powers should be granted in light of the principal's personal and financial situation. While gifting powers are useful for estate planning purposes, it is also important to limit gifts to those the principal might have made, and minimize the risk for financial abuse.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil, Cannon, Hollman, DeJong & Laing S.C. at 414-276-5000.

WISCONSIN… KEEP MANUFACTURING

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Federal tax law allows a special manufacturing deduction, which provides incentives to keep jobs and manufacturing activity in the United States. The State of Wisconsin has disallowed this special deduction for state tax purposes over the past several years; however, with the passage of the 2011 Wisconsin Budget, an income tax credit has been included in this State's budget to encourage and strengthen manufacturing in Wisconsin.

This credit is available to individuals and certain entities for taxable years commencing on or after January 1, 2013, for manufacturing and agricultural activities in the State of Wisconsin. The credit will be phased in over a 4 year period beginning next year, and when fully phased in, the credit will be equal to 7.5% of a company's qualified production activities income. Thus, the credit will effectively eliminate the rate of tax on Wisconsin manufacturing income.

Some of the differences in the new Wisconsin credit from the federal deduction include:

- The Wisconsin credit is only available for income from manufacturing and agricultural activities.
- The Wisconsin credit is not allowed for construction income or other activities that qualify for the federal deduction.
- Further, the Wisconsin credit only applies for manufacturing and agricultural income allocable to Wisconsin and is not applicable to income allocated to other states.

An individual, estate, trust, partnership, limited liability company, or corporation can claim the credit if the claimant owns or rents and uses in Wisconsin real property and improvements assessed as property under Wisconsin Statute § 70.32(2)(a)4, or owns or rents and uses in Wisconsin real and personal manufacturing property assessed under Wisconsin Statute § 70.995.

The credit can be taken against the entity's corporate income tax liability and for partnerships, LLCs or S corporations, against the personal tax liability of the entity's partners, members or shareholders in proportion to his or her ownership interests. It is important to note that any credit that is claimed is considered income and must be reported as income on the claimant's Wisconsin franchise or income tax return in the taxable year immediately after the taxable year in which the credit is computed. Further, a taxpayer may carry forward any unused credits against income or franchise taxes due for up to 15 years.

This tax credit is new and the benefits can be significant. If you have any questions about this tax credit, or if you need assistance in determining whether you can benefit from this credit, please contact us.

LONG-TERM PLANNING TERMS

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

A discussion of long-term care planning will inevitably include a discussion of one or more of the following:

Countable Assets: Assets which are available to a Medicaid applicant and not exempt. A person's eligibility for Medicaid depends upon the amount of his or her countable assets. A single person can only have $2,000 in countable assets to be eligible for Medicaid. Depending on the circumstances, married individuals may be allowed substantially more countable assets through "spousal impoverishment protections." Certain assets, such as a person's home, are exempt from countable assets even though they may be available to the person. Other assets, such as real property listed for sale or life estate interests in property are considered to be "unavailable" to the owner, and are not countable assets for Medicaid purposes.

Divestments: A major component of long-term care planning is for the transmission of family assets to younger generations without the disqualification of the older generation for Medicaid benefits. In general, an individual cannot become qualified for Medicaid by giving away assets. To prevent individuals from qualifying for Medicaid by giving away their assets, Medicaid laws impose penalties for the divestment of assets. A "divestment" is the transfer of assets in exchange for nothing or an insufficient amount of assets or services during the "look back period." A divestment can be made, among other ways, by making a gift of cash or property, by paying a relative too much for services rendered, by foregoing an inheritance, or by not exercising a right to an asset. The normal penalty for a divestment during the look back period is the imposition of a period of time during which the divesting individual is ineligible for certain Medicaid benefits, including nursing home care and home and certain community-based care benefits. This period of ineligibility is referred to as the "ineligibility period." Because of these divestment penalties, care must be taken to transfer or shelter assets in a manner that does not disqualify the transferor from these Medicaid benefits.

Ineligibility Period: An ineligibility period is the duration of time in which an individual is disqualified for certain Medicaid benefits because he or she made a divestment of assets within the "look back period." Specifically, during an ineligibility period, the effected individual may be disqualified from Medicaid assistance for the cost of nursing home care, home health and personal care services, private duty nursing services, and certain other home and community-based services. The number of days of an "ineligibility period" is determined by dividing the value of the assets divested by the statewide average daily cost to a private pay patient in a nursing home (e.g., $209.17 in 2009); the quotient is the number of days of the ineligibility period. For example a gift (divestment) of $20,000 may result in an ineligibility period of 96 days ($20,000/$209.17=$95.61). Recently enacted legislation has changed the starting date of an ineligibility period from the day in which the divestment was made to the date in which the individual is eligible for and would otherwise be qualified to receive Medicaid except for the divestment. Because of this change, a divestment in year one could cause an ineligibility period to begin in year five when the effected individual is in a nursing home and without money to continue paying.

Long-Term Care Insurance: Long-Term Care Insurance is an option for privately paying for the costs of long-term care, which includes the cost of intermediate or skilled nursing care provided at a nursing home, an assisted living facility, or in the home. This insurance can be used to shelter other assets of the insured from the high costs of long-term care or to increase an individual's ability to receive in home care. Such insurance is often referred to as "stay at home insurance" because it can pay for care at home by a family member or an unrelated caregiver. Before benefits from a long-term care policy can be paid the insured must suffer from at least one of the following: a medical necessity requiring long-term care services (e.g., a stroke which leaves the individual partially paralyzed); cognitive impairments that necessitate supervisions (e.g., Alzheimer's dementia); or an inability to perform one or more of the "activities of daily living," such as the ability to dress oneself, to feed oneself, or to bathe or shower, get in and out of bed, or use the toilet without assistance. Long-term care policies normally do not cover all of the costs of long-term care. They generally cover a fixed, daily, benefit rate expressed as either a fixed per-diem dollar benefit for the insured (e.g., $125 a day that the insured qualifies for benefits) or a percentage of the incurred daily rate. Benefit payments may be increased over time if inflation protection is purchased. Long-term care policies are generally expensive, and they involve many complicated variations in coverage. There are tax benefits to long-term care policies such as limited deductions for premiums and exemption for benefits. Because of the expense and complications of long-term care insurance such policies should not be purchased without the assistance of a trusted professional and a review of the history of the company underwriting the policy. While the annual premiums on long-term policies may be expensive, they rarely exceed the cost of a single month in a nursing home. Statistically speaking, moreover, the potential need for a long-term care insurance benefit is 120 times more likely than automobile insurance and 600 times more likely than fire insurance. Considering the cost of long-term care, long-term care insurance may be the best investment you ever make.

Look Back Period: The look back period refers to the period of time immediately preceding an individual's application for Medicaid during which the individual's finances are examined to determine if he or she has made a "divestment." Prior to 2009, the look back period varied in Wisconsin depending on the recipient of the divestment (e.g., the recipient of the gift). For a gift to an individual, the look back period was 36 months, while for a gift to a trust, the look back period was sixty months. Starting in 2009, Wisconsin changed the look back period to sixty months for all gifts. Accordingly, individuals applying for Medicaid in Wisconsin after 2008 should be prepared to disclose gifts made within five years prior to their application for Medicaid. Therefore, elderly individuals should exercise care before making a substantial gift if they contemplate the need for institutional Medicaid benefits in the following five years.

Medicare Eligibility: Medicare is a federally subsidized health care insurance program that pays certain costs for hospitalization and other institutionalized care, physician charges, and certain prescription drugs. Medicare, however, provides only limited coverage for long-term care costs. It covers only a portion of the costs of "skilled nursing or rehabilitation care" when certain technical requirements are met, and then for only a limited duration of 100 days. An individual who is 65 or older and who qualifies for social security benefits or whose spouse qualifies for social security benefits is eligibility for Medicare. An individual under the age of 65 can also qualify for Medicare eligibility if he or she has received social security disability benefits for at least 25 months or if he or she suffers from certain chronic disease, such as ALS or end-stage renal disease. Unlike Medicaid, Medicare is an entitlement; it has no income or resource limitations for eligibility.

Medicaid Eligibility: Medicaid is a federal and state funded program that provides funds for, among other things, skilled and custodial nursing home care. For example, Medicaid may cover the cost of physician services, inpatient and outpatient hospital services, dental services, nursing home services, prescription drug services, mental health services, and physical therapy services. While Medicare covers only skilled care and only for a limited duration, Medicaid covers unlimited skilled care in a nursing home as well as two levels of intermediate care. Unlike Medicare, Medicaid is not an entitlement. There are very strict asset and income limitations to eligibility for Medicaid. The amount of income and assets an individual may have and still qualify depends upon the type of Medicaid coverage an individual receives and whether or not the individual receiving benefits has a spouse who is not receiving benefits. For example, a single individual seeking nursing home care can have no more than $2,000 of "countable assets" to qualify for Medicaid. The resource limits for married individuals are not quite so limited. They can take advantage of the spousal impoverishment rules which permit a healthy spouse to retain certain assets.

Spousal Impoverishment Protections: In the long-term care context, "spousal impoverishment protections" refers to certain asset and income protections provided to a spouse remaining at home, when his or her spouse is otherwise eligible for Medicaid. Essentially, while a single person must spend his or her "countable assets" down to $2,000, the spousal impoverishment protections permit a spouse remaining at home to retain a significant share of the couple's marital assets, regardless of title, while allowing the other spouse to qualify for Medicaid. Specifically, spousal impoverishment rules permit a couple with total countable assets of $219,120 or more to retain up to $111,560 of countable assets and still qualify for Medicaid; while spouses with total countable assets of between $50,001 to $100,000 may retain up to $52,000. Spousal impoverishment rules also permit an institutionalized spouse to transfer monthly income of up to $2,739, depending on the circumstances, to the spouse remaining at home. Certain technical rules must be followed in order to take advantage of these protections.

WISCONSIN'S CONCEALED CARRY LAW EFFECTIVE NOVEMBER 1, 2011

Please be advised that Wisconsin's Concealed Carry Law goes into effect on November 1, 2011. In just a few days, your employees and visitors, provided they receive a license, will be able to carry concealed weapons into your businesses and in your company vehicles unless you properly elect otherwise according to the new laws. As employers, you should be prepared to update your employee handbooks, enact new policies, and post the proper signs to accurately reflect your company's policies and to properly minimize the amount of risk you, your business, and your employees are exposed to. A detailed description of the new laws and how they affect employers is available on our website at this link.

If you have any questions about Wisconsin's new Concealed Carry Law, please contact either Joseph E. Gumina or J.B. Koenings at O'Neil, Cannon, Hollman, DeJong & Laing S.C. at 414-276-5000. Either Attorney Gumina or Attorney Koenings can help advise you on the implications of this new law as well as assist you with the drafting of the necessary policies and procedures to best protect your business from liability.

NLRB POSTING DEADLINE EXTENDED UNTIL JANUARY 31, 2012

The NLRB has delayed the deadline for employers to post a new controversial notice to their employees informing them of their rights, including the right to organize, under the National Labor Relations Act ("NLRA"). Previously, the deadline for posting this notice was November 15, 2011, but amidst employer confusion, the National Labor Relations Board ("NLRB") pushed the deadline back to January 31, 2012.

All private employers, including labor unions, must post the prescribed NLRB notice. The only employers exempt from this new rule are agricultural employers, those employers covered under the Railway Labor Act (such as railroads and airlines) and the U.S. Postal Service. It is important to note that this new rule affects all non-exempt employers whether or not that employer's workforce is unionized.

In addition to the above exempt employers, certain small businesses are also exempt from this rule. Such exemptions are based on a small business' annual sales volume by industry, ranging from $50,000 to $1,000,000 in annual sales volume. Do not assume you are exempt from this rule based on the size of your business until you verify the exact NLRB exemption limits for your specific industry.

Under this new rule, all employers covered by the new rule will be required to post an 11×17 inch notice in a conspicuous place where all such employee notices are customarily posted. If your employees work at multiple locations, notice must be posted at each location. For instances where your employees work at a different company, you are required to post notice there as well—if that company will allow it.

A sample notice is available at no cost from the NLRB through its website, either by downloading and printing it or ordering it by mail. Translated versions are also available and must be posted at workplaces where at least 20% of employees are not proficient in English. Additionally, if an employer customarily posts notices to employees regarding personnel rules or policies on an internet or intranet site, that employer will be required to post the NLRB notice on those sites in addition to the physical posting of the notice in the workplace. There are no reporting or record-keeping requirements under this new rule.

Failure to post notice in accordance with this new rule may be treated as an unfair labor practice under the NLRA and would expose an employer to a potential NLRB investigation. Penalties could range from the NLRB merely requiring that proper signage be posted; an extension of the normal 6 month statute of limitations for filing a charge involving other unfair labor practices; or even to the filing of an unfair labor practice charge against the employer.

If you have any questions about the new NLRB posting requirements, or if you need assistance in determining if your small business is exempt, please contact either Joseph E. Gumina or J.B. Koenings at O'Neil, Cannon, Hollman, DeJong & Laing S.C. at 414-276-5000.

AN EMPLOYER'S GUIDE TO WISCONSIN'S CONCEALED CARRY LAW

On July 8, 2011, Governor Walker signed 2011 Senate Bill 93 into law as 2011 Wisconsin Act 35. More commonly referred to as the "Concealed Carry Law," this new law will be codified as Wisconsin Statute § 175.60. While the Concealed Carry Law will not be effective until November 1, 2011, Wisconsin businesses should understand the full scope of the law now and be fully prepared for its final implementation in November.

Read full article here.

IRS REVOKES TAX EXEMPT STATUS FOR 275,000 CHARITIES DUE TO LACK OF COMPLIANCE

The Pension Protection Act (PPA), passed by Congress in 2006, requires most tax exempt organizations to file an annual information return or notice with the IRS. Failure to file the required return or notice for three consecutive years results in automatic revocation of the organization's tax-exempt status. The IRS has provided a list of organizations whose tax-exempt status has been revoked for failing to meet the filing requirements for 2007, 2008, and 2009. Most tax-exempt organizations file their returns or notices and are unaffected by the automatic revocation. Those organizations whose tax-exempt status is automatically revoked may reinstate their status by following the process outlined on the IRS website.

Donations or charitable contributions made to any organization whose tax-exempt status has been automatically revoked, remain tax deductible so long as the donation or contribution was made prior to the publication of the organization's name on the list. After publication, however, organizations that do not reinstate their tax-exempt status may no longer receive tax-deductible contributions, and any donations or contributions they receive may be taxable.

Donors should check the IRS listing to ensure that their contributions will be tax deductible. To determine an organization's tax-exempt status or eligibility to receive tax-deductible contributions, donors should rely on the updated listing provided by the IRS, and should no longer rely on the previous listing in IRS Publication 78, nor the IRS determination letter issued to the organization before the date of automatic revocation. For an updated listing, click here.

COURT FINDS IRAS EXPOSED TO CREDITORS IN BANKRUPTCY

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

The general rule in a federal individual bankruptcy is that IRAs and other qualified retirement assets are protected and such assets are not subject to the claims of the individual's creditors. However, in the case of Ernest W. Willis v. Deborah Menotte, Red Reef, Inc. the US Court of Appeals found an exception to that rule. In the Willis case the debtor used his IRA in a way that technically disqualified it for income tax purposes in 1994 and 1997. However, the IRS never caught the technical violations and the statute of limitation ran as to the IRS' claims. In 2007 Mr. Willis filed for a Chapter 7 Bankruptcy, long after the technical violations occurred. Nonetheless, the Bankruptcy Court and the US Court of Appeals ruled that the statute of limitation that applies for tax purposes had no relevance for bankruptcy purposes and the debtors $1.5 million of IRA assets were exposed to creditors. The lesson that should be taken from this is that the statutory rules that create the tax and bankruptcy favored status of these IRAs and retirement accounts must be followed very carefully.

ATTORNEY CAPREZ REAPPOINTED AS CO-CHAIR

OF MILWAUKEE BAR ASSOCIATION HEALTH LAW SECTION

Attorney Timothy Caprez has recently been reappointed to serve a fourth consecutive term as Co-Chair of the Milwaukee Bar Association ("MBA") Health Law Section. Under his direction, the MBA Health Law Section has presented numerous seminars focused on educating attorneys, executives and medical professionals on continuing developments and emergent issues within the complex legal landscape of the health care industry.

The topics on which the MBA Health Law Section has presented such seminars during the course of Attorney Caprez's service as Co-Chair include:

- implications of recently-enacted health care reform laws;
- physician supervision issues;
- statutory, regulatory and credentialing requirements of physician assistants, nurse practitioners and clinical nurse specialists;
- hot topics for hospital in-house counsel;
- physician and facility lease arrangements;
- Stark and state law and regulations prohibiting self-referrals;
- medical staff credentialing and privileging;
- management of disruptive physicians;
- medical staff document analyses;
- Recovery Audit Contractors ("RACs");
- HIPAA and HITECH Act obligations on physician and facilities;
- impacts of the 2009 regulations promulgated under the Patient Safety and Quality Improvement Act of 2005;
- conflict and coordination of cultural and medicinal practices; and,
- implications of reporting requirements and physician apologies related to medical errors.

Such issues are among the many types of matters in which the O'Neil, Cannon, Hollman, DeJong & Laing S.C. health law practice provides counsel and representation to entities and individuals in nearly every sector of the health care industry, including provider health systems and networks, hospitals, clinics, long-term care and skilled nursing facilities, physician practice groups, medical suppliers, third-party insurers and individual health care professionals.

ELECTRONIC DATA AND ON-LINE INFORMATION IS OF INCREASING IMPORTANCE DURING ESTATE PLANNING

It has been estimated that over 90% of all business information today is created electronically. Use of social networking websites, such as Facebook, on-line photography accounts like Flicker, e-mail passwords and word processing files, is increasingly more common.

Various media commentators have addressed the need for individuals to consider their electronic data and on-line postings in conjunction with their estate planning. For example, the New York Times Magazine published a substantial article relating to this topic in its January 9, 2011 edition. Yet, because the rise of digital information is a relatively new phenomenon, many people have not yet fully considered or developed their plans for handling their electronic data and on-line profiles after death, or taken steps to minimize potential disputes about such items that could arise after death.

If you would like more information on this topic, please contact Carl Holborn at O'Neil, Cannon, Hollman, DeJong & Laing S.C. at 414-291-4704 or carl.holborn@www.wilaw.com.