ESTATE PLANNING FOR MARRIED INDIVIDUALS WITH CHILDREN FROM A PRIOR MARRIAGE

Effectively drafting estate plans for married individuals with children from a prior marriage can be a challenge. Failure to properly plan can cause divisive family disputes. There are many variables to be considered and competing interests that need to be balanced when preparing an appropriate plan. A common concern is that the spouses want to take care of each other during their lives, but also want their children from a prior marriage to receive some inheritance. There are generally two techniques to address this concern: 1) an immediate division of assets between the surviving spouse and the children from the prior marriage, or 2) the creation of a trust upon death where the surviving spouse has an interest in the trust for his or her lifetime, and the children receive the remainder upon the death of the surviving spouse. Often a combination of these two techniques is employed.

The advantage to an immediate division of assets is simplicity and certainty. The client identifies which assets are to be distributed to the surviving spouse and which assets are to be distributed to their children. The assets may be divided equally or on some percentage basis among the children and the surviving spouse. Most often, certain assets may be distributed to the spouse and certain assets may be distributed to the children. For example, the surviving spouse may receive the residence and a 401(k) retirement account, and the children from the prior marriage may receive the proceeds of a life insurance policy and an investment account. A drawback to this technique is that there may not be enough assets to provide a lifetime benefit for the surviving spouse. Also, it is important to monitor the basket of assets that is to go to the spouse and children as the asset values will change. The residence may increase in value where the investment account may be used and have a reduced value.

The use of a trust provides more flexibility, allows for the maximum assets for the surviving spouse, and allows for the assets to be divided over time. The surviving spouse receives distributions from the trust assets (either a fixed amount, all of the income, or based upon his or her need) for his or her lifetime. The children from the prior marriage then receive the assets remaining upon the death of the surviving spouse. A key to trust planning such as this is to effectively manage the investment to make the asset last for the life of the surviving spouse, and still provide some assets for the children. Also, a trustee needs to be selected that manages the trust for the benefit of all beneficiaries. A drawback to this technique is that the children from the prior marriage would not receive an inheritance until the death of the surviving spouse.

There are many, many other legal and tax issues that must be considered in this planning. Certain assets have significant tax advantages if given to the surviving spouse, and other

assets cannot be given to anyone but the surviving spouse without consent. Also, in Wisconsin, the rules of Marital Property need to be considered in all estate plans for married people. Estate planning for married couples with children from a prior marriage requires careful, thoughtful planning. The two general techniques summarized in this article are often used in tandem to provide an effective comprehensive plan. The key is to establish a comprehensive plan to avoid significant divisive disputes upon the death of a spouse.

ATTORNEY CHAD RICHTER PRESENTS AT LEE HECHT HARRISON SEMINAR

Attorney Chad J. Richter will be giving a presentation on Monday, April 12th at Lee Hecht Harrison located at 10000 Innovation Drive, Suite 100, in Milwaukee. The seminar is for displaced senior executives interested in getting into their own venture by purchasing a business or franchise, and discusses the various issues they may encounter along the way. Chad will be presenting with a group of panelists, in other professional services areas, and will focus on some of the key legal issues one faces when purchasing a business or franchise.

ATTORNEY DEAN LAING AND LAURA NOW CONTRIBUTE ARTICLE TO THE ABA HEALTH LAW LITIGATION NEWSLETTER

The article, published in the American Bar Association, Section of Litigation, Committee on Health Law Litigation's Winter 2010 Health Law Litigation Newsletter, discusses the common law development of a radiologist's duty to directly communicate his or her findings to a treating physician, and how the American College of Radiology's attempt to provide guidance to radiologists by establishing communication guidelines may not have had the effect that the ACR intended.

While the duty to directly communicate radiological findings has been firmly recognized by the courts for a number of years, courts have not been as consistent in articulating when that duty is triggered. The ACR originally set forth its recommendations to radiologists by creating its Standard for Communication-Diagnostic Radiology in September of 1991 which required radiologists to directly communicate their findings to treating physicians under certain

circumstances. Since that time, this standard has undergone a number of revisions and is currently recognized as the ACR Practice Guideline for Communication of Diagnostic Imaging Findings. This Practice Guideline continues to provide guidance to radiologists regarding when direct communication with a treating physician may be necessary. More importantly, however, this Practice Guideline has increasingly been recognized and relied on by medical journal articles and the courts as evidence of a standard of care for the communication of radiological findings, despite the ACR's explicit statement that its standards are not to be used to establish a legal standard of care.

Keeping this trend in mind, whether relying on established case law or the guidelines established by the ACR, radiologists should be especially diligent in communicating directly with a treating physician when the circumstances surrounding the radiologist's findings mandate immediate communication.

A full copy of the A Radiologist's Duty to Communicate with the Treating Physician can be found here.

THE UNEXPECTED REAL ESTATE BROKER COMMISSION

Many older home owners decide to downsize and move into smaller quarters. They then become not only buyers of a new property, but also sellers of the old homestead. While looking at smaller homes or condominiums, they may meet the seller's real estate broker who has a listing contract on the property they are considering. That broker might offer his or her services to sell the potential purchaser's home. The broker will ask for a listing contract on the old home to be sold. Since most buyers need the equity in the existing home to close the deal, the sale of the home, which should be defined as a closing, not just an accepted offer to purchase, is almost always a condition to buying the new property. This is a fairly normal situation, but there is one problem which lurks in the background.

For any number of reasons, the purchaser may not close on the new property and may then decide to remain in the home. That does not end the matter; however, because the existing home is still subject to the listing contract signed earlier in the transaction. If the broker procures a qualified buyer who submits an offer meeting the price requirements under the listing contract, the broker has earned his or her commission. The home need not be sold, but the listing contract requires the payment of the "earned commission" upon procurement of such a buyer. What started out as a cost saving transaction becomes an unexpected expense; one which could have been eliminated.

In order to avoid this situation, the purchaser/seller should include a provision in the standard Wisconsin listing contract which provides that, if the purchase of the new property fails to close for any reason, the home owner has the right to terminate the listing contract on the existing home and take it off the market. There are issues relating to individuals who have been shown the home before the listing contract is terminated and who subsequently submit an offer, but that instance can also be addressed to negate a commission being earned. In any event, once the listing contract is over, there will be no more open houses nor additional potential buyers who could trigger the payment of a commission notwithstanding the fact that the home is not sold.

Because a broker will, in all likelihood, resist such terms being added to the standard form, people in the market to both buy and sell would be well advised to seek the advice of an experienced real estate attorney in negotiating the terms of the listing contract.

CLARIFYING THE TAX TREATMENT OF GIFTS TO GRANTOR TRUSTS IN 2010 – NOTICE 2010-19

Back in 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act (EGTRRA). While many provisions of EGTRRA have been acutely focused on by planners since that time, one provision has received little attention until recently. Under Section 511(e) of EGTRRA, Section 2511(c) of the Internal Revenue Code was added and provides that for transfers between December 31, 2009 and January 1, 2011, except as provided in the regulations, a transfer in trust shall be treated as a transfer of property by gift unless the trust is a grantor trust.

As 2010 approached, planners began to wring their hands over what this provision means: (1) does it make incomplete gifts to non-grantor trusts complete; (2) does it make completed gifts to grantor trusts incomplete or (3) both? In Notice 2010-19, the IRS confirmed that it is the former, but not the latter. So planners can breathe easier knowing that completed gifts to grantor trusts are still an effective planning technique in 2010.

WISCONSIN INCREASES THE HOMESTEAD

EXEMPTION AVAILABLE TO ALL RESIDENTS

Under Wisconsin law, a person's "homestead" is the dwelling and so much of the land surrounding it necessary for use as a home, not exceeding 40 acres. An individual resident is generally entitled to exempt his or her homestead from execution of a judgment, from the lien of a judgment, and from liability for his or her personal debts up to the amount designated by the Wisconsin Statutes.

Formerly, this amount equaled $40,000.00 per resident. On December 1, 2009, however, the Wisconsin Legislature increased the exemption to which each resident is entitled to $75,000.00. Additionally, the Legislature lifted its limitation of a $40,000.00 homestead exemption per household (the "Marriage Penalty"), now allowing spouses to pool their exemptions and collectively claim a $150,000.00 exemption. Unchanged are certain exceptions unaffected by the homestead exemption such as mortgages, laborers', mechanics', and purchase money liens and taxes recorded against the homestead property.

NOT ALL CONDOMINIUMS ARE CREATED EQUAL

Many people fail to see the benefit of consulting with an attorney before making a residential condominium purchase. The real estate attorneys in our firm have been called upon to suggest revisions to declarations and plats for residential condominium projects which were established incorrectly under Chapter 703 of the Wisconsin Statutes. This failure to meet the strict requirements of the law raises serious questions concerning whether a project is, indeed, a condominium under the legal definition.

The expenses that can be incurred by unit owners to correct an ineffective declaration or plat under the Condominium Act can be significant. The problems we have seen in the past could be identified in an initial document review. Armed with that information, a prospective buyer might decide not to purchase a unit in a condominium with such problems.

As many Baby Boomers downsize from their homes to condominiums, they should consider having an experienced real estate lawyer review the condominium documents to make sure there are no problems of this sort hidden in the disclosure materials they receive before they buy.

THINK YOU KNOW HOW FAR YOU HAVE TO GO FOR YOUR EMPLOYEES? THINK AGAIN.

Two recent decisions have surprised both employers and legal analysts evaluating what measures employers must take under the law.

In one case, the Seventh Circuit Court of Appeals concluded, in *Ekstrand v. School District of Somerset,* that a teacher suffering from "seasonal affected disorder" has a "disability" under the American with Disabilities Act and that a school district had to accommodate that disability by moving the teacher to a room with natural light. The appellate court reversed the lower court's dismissal of the teacher's failure-to-accommodate claim, concluding that, after the teacher had informed the district that natural light was the "key" to improvement in her seasonal affective disorder, the school district was obligated to provide her with a room allowing natural light unless it would impose an undue hardship on the district to do so.

Elsewhere, the Indiana Court of Appeals recently determined, in PS2, LLC v. Childers, that an obese worker who suffered a back injury on the job was entitled to workers' compensation not only for the cost of the back surgery to remedy the injury, but also for the $20,000 to $25,000 cost of lap-band surgery to reduce the employee's weight in order to promote the success of the back surgery. Despite the fact that the employee was obese (340 pounds) before the accident, the court upheld the state workers' compensation boards' decision to require the weight-loss surgery because the obesity was a "pre-existing medical/health condition" that "combine[d] with the accident at work to create a single injury" for which the employee was "entitled to treatment."

These cases are just two recent examples of continuing developments providing that, what may seem to be reasonable limits of how far employers must go to cover costs or provide reasonable accommodations to their employees related to their jobs, may not actually encompass the expansive obligations of employers under the law.

HEALTH CARE REFORM PASSES; BUSINESSES NEED TO START PLANNING FOR IMPLEMENTATION

The Patient Protection and Affordable Care Act has been signed into law, and with certain modifications to be added through the House Reconciliation Act, health care reform is certain

to have a substantial impact on American businesses in the years to come. Among other things, the reform includes over $400 billion in revenue raisers and new taxes on employers and individuals as well as a laundry list of new reporting requirements. More forms and red tape are in the cards for all of us. Here is a list of a few such changes:

- Starting in 2014, individuals not otherwise eligible for health insurance under a government program shall be required either to maintain minimum essential coverage or to pay an annual penalty;
- Grants for premium assistance tax credits and other benefits to guarantee that certain low income individuals do not have to spend more than a specific percentage of their income on medical insurance premiums;
- Businesses that employ 50 or more workers will have to either provide “minimum essential coverage” to the workers or pay an annual penalty of up to $2,000 per uninsured employee (the first 30 workers are not included in the penalty calculation);
- Businesses may also face the imposition of penalties for waiting periods in excess of 90 days for employee insurance coverage;
- Businesses of less than 25 employees and average annual wages of less than $40,000 may be eligible for a sliding-scale small employer tax credit of between 35-50 percent to help offset the cost of employer-provided coverage;
- Restrictions on cafeteria plans are relaxed to encourage small employers to offer tax-free benefits to employees, including those related to health insurance coverage;
- Starting in 2013, higher-income taxpayers will face an increase in their Medicare payroll tax of 0.9 percent upon earned income in excess of $200,000 for single individuals and $250,000 for families, and 3.8 percent upon unearned income from interest, dividends, rents and certain passive activities in excess of $200,000 for single individuals and $250,000 for joint filers;
- Also starting in 2013, new spending restrictions, contribution limits and nonqualified distribution penalties are imposed upon Qualified Health Savings Accounts (HSAs); the threshold for the medical expense deduction is increased from 7.5 percent to 10 percent of adjusted gross income for individuals under 65 years of age; and the deduction for employers who maintain prescription drug coverage is eliminated for employees who are eligible for Medicare Part D; and
- Starting in 2018, group insurers face a 40% surtax on high-end employer-sponsored health plans in which annual premium payments exceed an inflation adjusted $10,200 for individual coverage and $27,500 for family coverage.

The implementation of these taxes and reporting requirements are to be made between now and 2018, depending on the particular item. Each business should begin considering the reform’s impact on its own operations to soften the impending blow. Planning opportunities are sure to arise as the reform moves from Washington to Main Street.

A PARENT'S OBLIGATION TO PROVIDE HEALTH INSURANCE FOR MINOR CHILDREN IN FAMILY LAW MATTERS

Wisconsin law already required courts in family law matters to assign responsibility for providing health insurance for minor children. Recent changes to the Wisconsin Administrative Code clarify this obligation. These changes are contained in section DCF 150.05 of the Code.

In addition to ordering child support for a child, courts are required to specifically assign responsibility for and direct the manner of payment for the child's health expenses under section 767.513, Wis. Stats. Courts are also required to order responsibility for the payment of medical expenses that are not covered by insurance after considering each parent's ability to pay these medical expenses. The requirement under section 767.513 existed prior to the changes to the Code and, as a practical matter, courts already assign responsibility for the payment of uninsured expenses.

Courts may order either or both parents to enroll a child in a private health insurance plan that is accessible to the child and available at a reasonable cost. BadgerCare Plus is not considered a private health insurance plan. Courts may order the non-insuring parent to contribute to the cost to enroll the children in a private health insurance plan in an amount that does not exceed 5% of the non-insuring parent's monthly income available for child support. However, if a person other than a parent has enrolled a child in an accessible private health insurance plan that covers hospitalization and other medical costs without large out-of-pocket deductibles or copayments, courts may determine whether to order a parent to enroll the child in a private health insurance plan. Further, courts may not order a parent whose income is below 150% of the federal poverty level to enroll a child in a private health insurance plan or contribute to the cost of a private health insurance plan unless there is no cost to the parent.

A private health insurance plan is accessible to the child if the plan's service providers are located within a reasonable distance from the child's home, which generally means service providers located within 30 minutes or 30 miles of the child's residence, with a greater distance allowed in some rural areas. A private health insurance plan is available at a reasonable cost if the cost to enroll the child or children does not exceed 5% of the insuring parent's monthly income available for child support and would cover hospitalization and other medical costs without large out-of-pocket deductibles or copayments. The cost to enroll the child or children in a private health insurance plan is the cost to add the child or children to existing coverage or the difference between the cost of self-only coverage and the cost to that parent after adding the child or children.

The responsibility for a contribution to the cost of private health insurance may be in the form of an upward or downward adjustment to a payer's child support obligation. The court would order an upward adjustment to a payer's child support order if the child support recipient is the insuring parent and the payer is contributing to the cost. The court would order a downward adjustment to the payer's child support obligation if the payer is the insuring parent, the child support recipient is contributing to the cost, and the child support recipient's contribution is less than the payer's child support amount.

If there is no private health insurance plan available that is accessible to the child and available at a reasonable cost, courts may order enrollment in a private health insurance plan as a child support deviation, responsibility for a contribution to the cost of the other parent's premium for the BadgerCare Plus unless the parent's income is below 150% of the federal poverty level, which may also be an upward or downward adjustment to a payer's child support obligation, and enrollment in a private health insurance plan if a plan that is accessible to the child and available at a reasonable cost becomes available to the parent in the future.

Should you have any questions about family law matters, contact Gregory Mager.