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BEAN KINNEY & KORMAN PC
ATTORNEYS

Trusts and Estates Newsletter

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Virginia Uniform Power of Attorney Act

by Jonathan C. Kinney, Esquire

Effective July 1, 2010, Virginia adopted the Uniform Power of Attorney Act, joining a handful of other states that have adopted the Uniform Act in some form or fashion. Some of the highlights of the Act are:

Any power of attorney executed in Virginia after July 1, 2010 is deemed durable unless it expressly states otherwise.

A power of attorney is not required to be acknowledged before a Notary Public but the party's signature is deemed to be genuine if acknowledged before a Notary Public.

Any power of attorney that is presented for recording with the Circuit Court must be acknowledged before a Notary Public or Deputy Clerk.

Virginia will recognize powers of attorneys created outside of Virginia provided the power of attorney was valid in the state of creation.

Photocopies and electronically transmitted copies will have the same force and effect as the original.

The Default Rules

The power of attorney is effective immediately. A principal can create a "springing" power of attorney, i.e. a power of attorney which becomes effective upon the occurrence of a specific event, by the inclusion of clear language defining the triggering event.

A co-agent may exercise their authority independently of the other co-agent.

An agent is entitled to reasonable compensation and to reimbursement of expenses reasonably incurred.

Cooperation with an agent under an Advance Medical Directive or Durable Medical Power of Attorney is implied.

Preservation of the principal's estate plan unless preserving the estate is not consistent with the principal's best interest based on all relevant factors.

The power of attorney should specifically state the principal's wishes as to lifetime gifts.

The Act establishes certain duties to be followed by agents unless modified in the power of attorney. These duties include:

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Loyalty to principal;

Avoidance of conflicts of interest;

Competence, care and diligence in acting;

and

Maintenance of records.

The Act protects third parties who act in good faith in accepting an acknowledged power of attorney without actual knowledge that the power of attorney is forged, void, invalid or terminated.

Generally, a third party (such as a financial institution) must either accept an acknowledged power of attorney or request a certification, translation or opinion of counsel within seven (7) business days of presentment of the power of attorney. Upon receipt of the certification, translation or opinion of counsel, the third party must accept the power of attorney within five (5) business days after receipt of the requested document. However, if a written contract exists between the principal and the third party (such as a financial institution), the third party can refuse to accept a power of attorney if contractual language clearly sets out the right of the third party not to accept a power of attorney or if it establishes different requirements for acceptance of a power of attorney.

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Augmented Estates

by Jonathan C. Kinney, Esquire

Join me on a short history of the law of trusts and estates in Virginia. Prior to the complex planning vehicles we are so familiar with, such as revocable trusts and financial accounts involving beneficiary designations, Virginia's system for guaranteeing an inheritance to a spouse was fairly straightforward. If a spouse was excluded from a person's Last Will and Testament, he or she had the ability to 'renounce' it and force the estate to pass according to the laws of intestacy. This meant that he or she would stand to inherit at least one-third of the probate estate, which was better than nothing.

With the arrival of more complex estate planning strategies, such as trusts, IRAs, assets held with right of survivorship and assets bearing beneficiary designations, the notion of the probate estate (which includes only those assets held in the sole name of the decedent at the time of death), has been severely eroded. Now the probate estate does not necessarily represent the full value of a decedent's property, and as a result the legal doctrine of renunciation is not sufficient to capture all of a decedent's assets.

This is where the concept of the augmented estate has come into play and replaced renunciation as a way for a surviving spouse to make a more meaningful claim against the estate of their deceased husband or wife. Under this more modern system, a surviving spouse may make a claim for a statutory share of either one-half or one-third of the deceased spouse's augmented estate. The augmented estate is the probate estate added to certain non-probate assets, i.e. a bigger picture look at a decedent's assets.

In simple terms, the "augmented estate" includes all real estate owned by the decedent, less certain allowances, exemptions, funeral costs, and expenses and debts of the estate. The value of trust assets, insurance policies, retirement and annuity benefits, employee benefits is considered and the value of any transfers made during the marriage to third parties for less than adequate consideration and those transfers made to the spouse both before and during the marriage is also considered. The surviving spouse is entitled to one-third of the resulting total, with a credit received for any amounts already received as a result of survivorship or beneficiary designations.

The rules for making an augmented estate claim are fairly straightforward:

- The claim must be signed and acknowledged by the surviving spouse.

- The claim should be filed with the Circuit Court and with the executor or administrator of the estate.

- During the term of the claim, the estate must pay interest at the rate of six percent (6%) of the net estate (excluding taxes), not distributed to the spouse.

- Once the claim is made, it is the duty of the party claiming the augmented estate to pursue the claim. The burden of proof is on persons seeking inclusion of assets and on persons seeking the exclusion of assets.

- For valuation purposes, the value of gifts is the value on the date of transfer unless an interest is retained by the decedent.

Since there is a relative scarcity of court decisions in the augmented estate area, there are a number of unanswered questions in this area. For example:

- What happens when a spouse who makes an augmented estate claim dies before final resolution of the claim?

- If a spouse is not competent, can another party make the claim on the spouse's behalf without Court order?

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• It is possible to settle an augmented estate claim without a Court determination?

• Are discounts for minority interest and lack of control applicable in the augmented estate situation?

• Is interest due on the full amount of the augmented estate claim or only the difference between what the spouse is owed under the Last Will and Testament and the amount of the augmented estate claim?

Interesting questions - while we have our opinions – we will print any responses to these questions if you wish to provide your opinion.

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POTENTIAL HALLOWE'EN TRICK

by Jonathan C. Kinney, Esquire

Congress has again failed to act on estate tax legislation this year. While this inaction was certainly positive for the beneficiaries of individuals who passed away in 2010, it creates a tremendous uncertainty going into 2011. What happens in 2011? Unless action is taken, the estate, gift and generation skipping tax rates are all scheduled to increase. The estate tax rate will be set at 55% and the "estate tax exemption" which had been set at $3.5 Million in 2009 will be reduced to $1 Million. It is uncertain whether Congress will be able to act after the 2010 election when a lame duck session of Congress will be meeting.

With the possibility that Congress will not take action, a number of existing estate plans will have to be reviewed and monitored. We are encouraging all our clients to be mindful of whether or not Congress enacts legislation during the November and early-December carry-over session. If Congress fails to act, you must review your estate plan. A number of plans were drafted in light of the then existing legislation. Most estate planning commentators felt Congress would act in some form or fashion before the beginning of 2010 but this did not happen. If Congress fails to act again in 2010, the result of this inaction could be catastrophic in some cases. If Congress continues to fail to act we are strongly recommending that all clients review their estate plans to see how their plans would work based on their current assets with a $1M "exemption" amount. Many plans will not work as intended with this exemption amount.

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The Role of the Trust Protector

by Jonathan C. Kinney, Esquire

Since approximately 20 states have modified or abolished the rule against perpetuities, the role of a trust protector is becoming more common in irrevocable trust documents. The trust protector is also sometimes called a special trustee or trust advisor. While the name is not that important, the role certainly can be.

The role of the trust protector is normally a dormant role with a required review of the actions of the trustees typically occurring every 5-10 years or as needed. For example, a trust protector can mediate between two different classes of beneficiaries such as income and residuary beneficiaries in the event of a dispute or disagreement. Alternatively the trust protector can be set up as the "decision-maker" rather than a mediator. The trust protector can be given the power to decant or terminate a trust. Trust protectors can also be given the right to settle disputes between the trustee and the beneficiaries.

In some states, the grantor may retain the ability to name a substitute trust protector in the future due to the death or resignation of a trust protector. However, generally speaking, the trust protector should be independent of the grantor and naming the grantor as a trust protector would not be appropriate as the grantor should not retain any decision-making power with respect to the trust. Similarly, grantor should not have the power to remove the trust protector but a third party can be named in the trust who can be given the power to remove the trust protector.

The trust protector should be compensated and permitted to hire attorneys and accountants. Since trusts can run for seven or more generations (depending on the state), flexibility must be stressed. For example, with changes in medical science, questions will arise that we have not currently dealt with (i.e., should human clones be treated as heirs and, if so, are they treated as descendants).

In preparing a trust with a trust protector, try to think back to where we were socially seven generations ago (approximately the 1860s during the American Civil War). Consider a trust as a "compass," a written guide of the grantor's intentions; not specific directions to invest in specific stocks (such as railroad and steel stocks which may have been a good investment after the Civil War or auto companies in the 1950s) but think generally about what the grantor wants done with trust funds, and what direction, if any, he/she wants to leave descendants. Is it important they work for a living? Have charitable intent? Be well-rounded? Raise a family? There is a real need to

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recognize that in 2160 societal norms will probably be totally different than they are now. Therefore, the trust compass should place a greater emphasis on indicating the general concepts and values that the trust is trying to promote.

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