Di Monte & Lizak, LLC
Newsletter
Volume 18 • Number 1 • April 2005

Tales From the Front – Six Degrees of Separation

By: Eugene A. Di Monte

A women whose husband recently died hired D&L when the executors of her husband's estate filed an action to evict her from the home she and he lived in while they were married. Did she have the right to stay in the home or would she be evicted? D&L agreed to represent her.

Determining the widow's rights to her husband's estate was complicated by at least two factors:

1. Sixteen years ago, when the couple wed, they entered into a marital agreement which provided that in the event they separated, the wife would be entitled to receive a certain amount of his sizeable estate, and that the amount would increase the longer the couple were married before separating. Another section of the agreement stated that if the husband died before his wife, she was entitled to a mere fraction of his estate and would have no rights to the home she and he had lived in during their marriage.

2. Several months prior to dying, the husband filed for divorce, a divorce that was pending at the time of his death.

Which provision of the marital agreement would control the disposition of the husband's estate?

The executors argued that since the husband predeceased our client, she was not entitled to the marital residence or to more than a small amount of money. D&L argued that because the couple separated prior to the husband's death, the property division should be controlled by the provision concerning the couple's separation and not the provision that became effective upon the husband's death.

As counsel for the surviving spouse, Gene Di Monte, Riccardo Di Monte, Lin Hanson, Jeff McDonald and Paul Greco called on their negotiation and analytical skills, used their expertise in several areas of law including estate, tax, property, marital and civil practice, and developed a litigation strategy which proved to be effective. As an added note of interest, the law of Italy became an issue because part of the real estate owned by the decedent was in Italy. Quite fortuitously, a recent graduate from an Italian law school was interning in our office and she was able to contribute concretely to the benefit of our client.

D&L persuaded counsel for the estate that the separation formula was a real threat which could result in a jury awarding our client much more than the estate anticipated. A settlement agreement was reached that reflected a property division significantly more favorable to our client than what she would have received if the executors had prevailed. Because of the marital deduction and other tax benefits to the estate, we structured the settlement in a manner that reduced the amount of federal estate taxes to be paid by the estate, thus saving the estate and its beneficiaries more than 50% of the cost of the settlement. This was a "win-win" settlement for everyone.

Powers of Attorney

By: Linscott R. Hanson

In our July 2004 issue, I wrote about health-related documents - Health Care Powers of Attorney, Living Wills and Do Not Resuscitate Orders. This article focuses on another kind of Power of Attorney, one that deals with your property, rather than your health.

Americans are living longer. The life expectancy of a male American age 60 is to age 86. This means that half of the 60 year olds will die before age 86, and the other half will live longer than to age 86.

Not all of us will be fortunate to retain our physical and mental capacity "right to the end." Some of us are going to need care givers and caretakers before we finish. If and when that time comes, it is important to have trustworthy, capable people in place, with the authority to make decisions and manage investments.

I've written frequently about the use of living trusts in estate planning, and I've tried to emphasize the living as well as the tax and post-mortem benefits of such trusts. In preparing your trust, you have the right to select the successor trustee, the person or trust company who will be managing your property to take care of you in the event of incapacity. You can, of course, name more than one trustee, whether together (co-trustees) or in succession (successor trustees).

Power of Attorney - Continued from Page 1

To the extent you place your property, stocks, bonds, cash and bank accounts, real estate, etc. in your living trust, it will be available for the named successor trustee to manage, and use, for your care in the event you are incapacitated.

Property not placed in your trust can also be managed, and used for your care by a court-appointed guardian, or by the agent you designate in a properly prepared and executed Durable Power of Attorney for Property.

Some property simply can't, or shouldn't be placed in a trust. Increasingly one of the most valuable assets held by a typical American family is a "qualified" retirement account, such as a 401(k) plan, profit-sharing, or pension account. Transferring such an account into a living trust will be treated for tax purposes as a distribution of the account, triggering full and immediate recognition of income, with the attendant income tax to pay. The same would result in the case of a spousal "rollover" account, hence the living trust is NOT the way to manage this property.

Guardians are appointed by the probate court in the county of your residence. Any person over 18, who has not been convicted of a felony, and who is found by the court to be capable of providing an active and suitable program of guardianship, may be appointed a guardian. Guardians must be represented by attorneys. They must post a surety bond with the court, and they must present a formal accounting of their administration of the ward's property at least annually. Additionally, their investment and other decisions must be approved in advance by the court. All of this is expensive, time consuming and inflexible.

Enter the Durable Power of Attorney. In Illinois, you may grant a durable power of attorney to an individual of your choice, also naming successor agents if your first choice is not able or willing to act when needed.

This power of attorney is called durable because it survives your incapacity whereas an old-fashioned power of attorney did not, and was immediately revoked if you became incapacitated.

With a durable power, the agent is appointed by you, not the court. The agent need not post a surety bond, need not account to the court, and may act relatively independently. Obviously this is a lot of power, with little or no built in checks and balances. It is most important to select your agent carefully, and review the decision at regular intervals.

It will also be important to consider what authority you will or will not give your agent. Will he or she have the authority to make gifts, whether or not motivated by tax savings, from your property? Is it important that all your children be treated equally? Are there special needs to be addressed? Will this include gifts to the agent him/herself? His/her children? What about carrying on existing gift programs such as tuition gifts? Will the agent be authorized to spend your money to care for persons (like your spouse) other than you? Will the agent be compensated for his/her service? Should your agent have authority to start or continue contributions to an IRA or Roth IRA? What about property you own jointly with your spouse or someone else? Should your agent have the authority to "break" these joint tenancies? What about changing beneficiaries on life insurance, IRAs, or 401(k) plans?

Sexual Orientation - A New Protected Class Under the Illinois Human Rights Act

By: Margherita M. Albarello

Effective January 1, 2006, it will be a violation of the Illinois Human Right Act, 775 ILCS 5/1-101 et seq., to discriminate against anyone because of his/her "sexual orientation" in connection with employment, real estate transactions, access to financial credit and public accommodations. "Sexual orientation" means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity (living a lifestyle other than your birth gender). It does not include a physical or sexual attraction to a minor by any adult.

What should an employer do as a result of this change?

1. Review your current employment policies and make sure they include sexual orientation as a protected class. If you do not have a policy or require revisions, contact your Di Monte & Lizak attorney.

2. Educate your management and supervisors that sexual orientation is a protected category and that they must take any complaints of sexual orientation harassment seriously. This means conducting a prompt and thorough investigation and taking corrective action, as necessary.

3. Educate your employees that you have changed your anti-harassment policy to include sexual orientation harassment. You can do this by publishing your revised policy or by employee training sessions.

If you have any questions on this topic, please call or email Margherita M. Albarello (847-698-9600 or malbarello@dimonteandlizak.com).

Power of Attorney - Continued from Page 2

The list could go on and on. Only you know your own program(s), but you should start with the premise that everything that you want done or continued will need to be authorized in writing in the Power of Attorney, so please discuss your special concerns with your Di Monte & Lizak attorney.

Also please discuss these same issues with your agent. As I mentioned with regard to the health care agent, this discussion should occur not just once, but as part of an ongoing process. You should consider committing your thoughts to writing in the form of a letter expressing your wishes, hopes and fears. If you use a computer, it is easy to review and revise these letters as time passes and your own feelings change.

There is a statutory form for the power of attorney, but it has all sorts of blanks to fill or complete, adding or limiting the agent's power(s). If your agent will be dealing with your real estate, the power of attorney form needs to be notarized, and will be recorded with the County recorder when used, thereby becoming a very public record. Once again, although we are dealing with a printed form, this is not just a fill in the blanks operation, it needs to be carefully planned and thought out. It requires discussion with your family or non-family agent, and your attorney.

Please feel free to contact any of the attorneys at DiMonte & Lizak, LLC, at (847) 698-9600 to discuss further the preparation of a Durable Power of Attorney for Property, or other issues of estate planning. If you wish, you can email me with questions at lhanson27@aol.com.

Is Your Health Care Practice ADA Compliant?

Your health care practice is a "public accommodation" under the Americans with Disabilities Act. This is true even if your private health care office is located in a private home. This means you must not only remove architectural barriers so the disabled person can "get through the door." You also must provide auxiliary aids and services at your own expense which allow the patient to use your services. For short and straightforward communications with speech or hearing-impaired patients, such as when administering a simple blood test, using a pen and note pad or taking turns at a computer terminal are adequate ways to communicate effectively. Sign language interpreters may be required in situations when they are necessary for the treater to communicate effectively with a patient. For example, when a doctor needs to discuss with a deaf patient a complex matter like cancer treatment options and the patient is someone who communicates through sign language, a physician may be obligated to locate a qualified sign language interpreter and absorb the fee in her overhead.

D&L Talks!

- Alan Stefaniak, re-elected on April 5 to a 2d term as Village President of Kildeer, was interviewed on "My Kind of Town" (radio station WJJG AM) about the Village and news about town.

- Alan shared his expert knowledge and experience in zoning and land use law as a featured speaker at two March seminars, one entitled "Roadway Issues In Urban Development" and one regarding Illinois land use law where he discussed vested rights, moratoria, zoning, planned unit developments, and municipal liability.

- Lin Hanson was a featured speaker in March at the University of Illinois College of Law on protecting the rights of minority owners of limited liability companies. Lin discussed protecting minority owners through advance planning and careful drafting of contract provisions. Lin's views also were published in the March 2005 edition of the Illinois Bar Journal.

- Julia Jensen addressed the Park Entrepreneurs Group in March on the subject of "Being More Effective In Collecting Accounts Receivable."

For more information on these topics or a copy of written material, contact or email your D&L attorney.

Di Monte & Lizak, LLC

216 Higgins Road
Park Ridge, IL 60068

Di Monte & Lizak, LLC

216 Higgins Road
Park Ridge, IL 60068

(847) 698-9600
(847) 698-9624 (fax)

www.dimonteandlizak.com

To order additional copies of this publication, please contact MaryLeslie Naker at (847) 698-9600 or mnaker@dimonteandlizak.com.