

# Pathways

a trust and estate newsletter from Downey Brand LLP

Fall 2008

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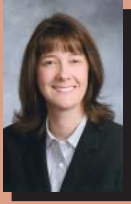
## ASK AN EXPERT

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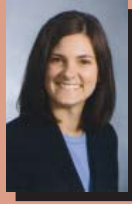
# ASK AN EXPERT



Gina Lera



Jeff Galvin



Kelly Tiberini

## Q: When does a trustee have to go to court?

A revocable living trust aims to avoid the time and expense associated with probate (court supervised estate administration), while also protecting the privacy interests of the parties. However, when the person who created the trust (settlor) dies or becomes incapacitated, it is sometimes necessary or desirable for the successor trustee to seek guidance or authority from the court. The trustee may want the court to approve accountings or investment plans, or clarify that assets of the decedent should have been titled in the trust. The trustee may seek instructions from the court on a proposed transaction, such as the sale of an asset or obtain clarification or modification of trust terms where circumstances have changed since the trust was created or amended. Sometimes, despite careful drafting of the trust documents, the trustee cannot avoid becoming involved in a dispute over the terms of the trust or in a claim of misconduct. Litigation relating to trusts has grown over the last decade. Although a trustee usually ends up in court only when a dispute of some sort exists, the court forum can be useful at the election of the trustee to eliminate “second guessing” by beneficiaries and to protect the trustee from potential claims. — *Gina Lera and Jeff Galvin*

## Q: If I'm in my 20s or 30s, do I need an estate plan?

Yes. Although it is tough to ponder mortality, devising a simple estate plan can provide precious guidance to your family in the event the unthinkable happens. A simple will directing the disposition of your assets is a must. You should also have an advance health care directive and a durable power of attorney for asset management, which become important if you are incapacitated and can't make medical and financial decisions for yourself. If you have children, having an estate plan is more urgent. Who would you want to take care of your children if both you and your spouse are gone? Having a plan in place that addresses these issues will save your family some heartache at a difficult time, and will make sure that your wishes are carried out. —*Kelly Tiberini*

*The general information in this newsletter may or may not be appropriate for your particular situation. Before taking any action based on this newsletter, you should consult with your estate planning attorney.*



Benjamin Franklin famously said that “in this world nothing can be said to be certain, except death and taxes.” Yet even the tax on decedent's estates is up for grabs these days.

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act, which changed the landscape of the estate tax through 2010. The law scheduled the estate tax's reduction – through a gradual exemption increase and tax rate decrease – and ultimate repeal. The law, however, stopped short of permanently repealing the estate tax. In fact, the actual repeal is only effective for one year: 2010.

In 2011, the estate tax will be reinstated, with an exemption level of \$1 million and a maximum tax rate of 55%.

While most estate planners expect Congress to do something, few expect a permanent estate tax repeal. Neither candidate for President advocates such a repeal. Some people do not favor large individual wealth concentrations. Certain charities and industry groups benefit from an estate tax. In short, some form of the estate tax is almost surely here for the long haul. The congressional negotiations will focus on the exemption level and maximum tax rate. Those of moderate wealth care most about the exemption level; the very wealthy care most about the maximum tax rate.

This past summer, Congress considered two bills. The House bill would have set the exemption at \$2 million (its 2008 amount), while the Senate bill would have set the exemption at \$3.5 million (its 2009 amount) with a 45% maximum tax rate. Whether either bill, or an alternative, will pass before 2010 is not clear. It is very likely that the new Congress will negotiate a deal to prevent even a temporary estate tax lapse and to provide more long-term certainty.

—*Sil Reggiardo*



# Time to Update Your Estate Plan?



If you are like most people, you have better things to do than re-read your estate planning documents every year or two. Nevertheless, you owe it to yourself and your family to review your estate

plan every several years, at least, to be sure that your plan will still do the job.

If you last revised your estate planning documents three or more years ago, your documents may have become inadequate, regardless of how well drafted they were at the time. Here are a few of the factors that can render the best-drafted planning documents obsolete:

## **Changes in Family Circumstances**

The factor that is most likely to render your documents obsolete is not changes in the law, but changes in life – that is, in the life of your family. Examples of such changes are:

*Your relationships with designated fiduciaries change.* The person whom you trusted just a few years ago has become a more marginal person in your world, and other people have entered your “circle of trust.”

*Your children become eligible to serve as fiduciaries.* The last time you looked at your plan your children were teenagers whose futures were unclear; now they are adults who can be trusted to oversee your affairs when you cannot.

*Conflict precludes family member fiduciaries.* Family conflict – or the prospect of conflict – may make it hazardous to designate *any* particular family member, no matter how trustworthy, as a successor trustee or other fiduciary. You may want to designate a third party as fiduciary.

*Your children prove to be more (or less) able to manage money.* You may have specified in your trust that your children will receive outright distribution of their shares when they reach age 25, and you now find that one or more of your children will not be able to properly manage money at that age. Or, conversely, you may have specified that your children will receive outright distribution at age 35, and you now find that they are responsible enough to manage their inheritance at a younger age.

*Your children face unusual obstacles.* A child may have developed marital problems, may be devoted to a financially

irresponsible spouse, may have developed a disability or a substance abuse problem, or may otherwise be in a poor position to manage an outright gift. You may wish to have the share of such a child held in trust, rather than distributed outright.

## **Increase in Estate Tax Exemption**

The amount you can transfer at death in an otherwise taxable gift (that is, a gift to someone other than a spouse or charity) is now \$2 million. As recently as 2001, the estate tax exemption amount stood at just \$675,000. Next year the exemption amount is due to increase to \$3.5 million. Married couples typically divide their joint trust estate at the first death according to a formula that is tied to the estate tax exemption amount in effect at the time the first spouse dies. An amount equal to the then-applicable exemption typically passes to an irrevocable trust for the lifetime benefit of the surviving spouse. However, part or all of the exemption amount may also pass to children or to other non-spouse beneficiaries. You may wish to review your trust in light of these increases in the estate tax exemption amount in order to confirm that all of your beneficiaries will still receive appropriate amounts.

## **Aging Powers of Attorney**

If your general or health care power of attorney was executed five or more years ago, your agent may discover that others are reluctant to honor it when it is presented, not because the document is deficient but simply because it has become “stale.” In the case of health care powers of attorney (now referred to as “advance health care directives”), California law has changed fairly recently. This has triggered the use of new forms.

## **Need for Greater Flexibility**

Increasingly, estate planning attorneys and their clients have recognized the need to build greater flexibility into estate planning documents – and into trusts, in particular. We simply cannot anticipate all of the future changes in tax law, in California probate law, in the nature and value of your assets, and in your family circumstances that might have a substantial impact on your estate plan. You may wish to include provisions in your trust that will make it more flexible and responsive to future changes that cannot now be anticipated.

Jim  
Deeringer



Jim  
Willett



# GIFTS TO MINORS

Many benefits come from making lifetime gifts to minor children rather than testamentary bequests. Donors who comply with gift tax limitations can witness the child's enjoyment of the gift and reduce the value of their taxable estate, thereby decreasing the amount of their estate tax liability.

With the benefits come special concerns. First, although minor children can technically own property, they legally cannot manage it. Thus, any gifts to a child must be structured so that a custodian or trustee is in place to manage the assets during minority so court involvement is not necessary. Second, once a minor turns 18, he or she has complete control of all assets owned outright. Many parents have concerns about whether their children, as they enter adulthood, will be able to avoid the temptation to spend in the present. Thus, outright gifts, other than in nominal amounts, are often not advisable.

In order to make a gift to a minor while addressing both of the above-mentioned concerns, the donor might

choose to create a custodian account under the California Uniform Transfers to Minors Act. A gift to such an account, the simplest alternative to an outright gift, puts the property in the hands of the designated custodian who holds and manages the property until the minor reaches the age stated by the donor upon transfer: either 18, 19, 20, or 21.

Alternatively, the donor may make a gift to a trust for the benefit of the minor child. This approach, while more complex, allows the donor more flexibility and control over the ultimate disposition of the assets. Depending on the form of the trust chosen, a gift in trust can be gift tax free and can prevent the minor child from having full and complete control of the assets until he or she reaches any age the donor chooses.



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**We're Moving**  
as of October 27, 2008



**Our New Address:**  
621 Capitol Mall, 18th Floor  
Sacramento, CA 95814

**Our phone numbers will stay the same:**  
(916) 444-1000 phone  
(916) 444-2100 fax

**Our other office locations remain the same:**  
Stockton – Roseville – Reno