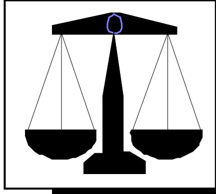

The Law Office of
LYNNETTE ARIATHURAI
a Professional Corporation

**REPORT FROM COUNSEL**

**WINTER 2011/2012 ISSUE**

## ORGANIZE YOUR ESTATE PLANNING DOCUMENTS

If, like so many, you are prone to disorder in the keeping of important documents, assuming that you keep them at all, you may be well past due for a makeover of your estate plan and your end-of-life instructions. It is not just a matter of maintaining tidiness for its own sake: a lot of money and time could be saved by making your estate plan organized and accessible and then keeping it that way.

Yes, it is easier said than done, but consider a quick fact if you doubt the importance of this undertaking: According to some sources that study such things, state treasurers now hold over $32 billion (not million) dollars in unclaimed bank accounts and other such assets.

Then there is the prevalent problem of some large insurance companies failing to pay out unclaimed life insurance policies to beneficiaries, claiming that under the insurance contracts they are obligated to do so only when the beneficiaries come forward. When the beneficiaries are not even aware of the existence of the policies, obviously they do not come forward, and years of premiums may have been paid for nothing.

The take-away lesson is that it is just as important to keep estate planning documents well organized and in a safe place, known to and accessible by your heirs, as it is to properly execute the documents in the first place. Any virtue can become a vice if taken to extremes, so this does not mean holding on to every scrap of paper that could conceivably be of interest to those you leave behind. Nonetheless, to possibly save your heirs a significant amount of money, time, and stress, at least the essential documents should be kept together, such as with your attorney, in a safe-deposit box, and/or at home in a fireproof safe that someone can access when the time

comes. Instructions on how to dispose of your estate will not mean much if you have not left instructions on how to find the controlling documents.

Essential Documents to Organize

So what are these essential documents that you should have well organized and accessible? Individual circumstances vary, but the first document for most people is an original will. Dying without a will means leaving the determination up to the state as to how your assets will be distributed, and if there is some writing, but not an original document, probate proceedings could become needlessly contentious and drawn out.

In addition to a will (and any trust documents), what follows is a nonexhaustive, but reasonably comprehensive, list of other important documents, the existence and location of which should be known to your heirs:

- Marriage license—A surviving spouse is likely to need it to prove that he or she was married to the deceased before being able to claim anything based on the marriage;
- Divorce papers;
- Durable health-care power of attorney (for health-care decisions if you are incapacitated), a living will, any do-not-resuscitate order, and an authorization to release health-care information;
- Durable financial power of attorney (for financial decisions if you are incapacitated);
- Documentation of ownership of property, including housing, land, cemetery plots, vehicles, stocks, bonds, etc.;
- Proof of loans made and debts owed;
- List of bank and brokerage accounts, with account numbers, and any safe-deposit boxes with the location of corresponding keys;
- Tax returns for the most recent three years;
- Life insurance policies and 401(k), pension, annuity, and IRA documents; and
- List of user names and passwords for Internet accounts.

With a little bit of foresight and planning, you can greatly reduce the administrative burden on your family and heirs after you pass.

## TOMATO: FRUIT OR VEGGIE?

The very identity of the tomato is and has for a long time been a point of contention. On the one hand, botanical purists point out that the tomato should be considered a fruit, given that it is the fruit of a vine. On the other hand, as part of our diets, the tomato "acts" like a vegetable.

Over a century ago, no less than the U.S. Supreme Court took up the subject, ruling in a short opinion that the tomato should be treated as a vegetable. The issue arose over a protest mounted in court by importers of tomatoes from the West Indies against a tariff that had been imposed on the tomatoes. The tariff could be imposed on vegetables but not on fruits.

The Supreme Court case boiled down to competing experts for both sides, as well as competing dictionary definitions. In the end, since the terms "vegetable" and "fruit" were found not to have any specialized meanings in the context of trade and commerce, the Court decided to treat tomatoes as most people did at the time when they ate them, that is, as vegetables.

In short, the Court determined that whichever way the tomato may have been characterized by botanists, it usually was used and treated as part of the meal itself (or "repast," in the Court's words) and not, like most fruits, as a dessert. Thus, the plaintiff importers could not avoid the challenged tariff.

## NATURAL GAS EXPLORATION NOT ALLOWED IN THE SUBURBS

An oil and gas company was enthusiastic enough about the prospects for finding and bringing up natural gas on a particular piece of property that in addition to securing a lease from the property owner for exploration and drilling, it agreed to pay him a signing bonus of nearly $100,000. As you read this, you are likely to be picturing a scene from the Great Plains or a prairie in Texas, but think again. The property subject to the lease was in a residential subdivision in the northeast, complete with an array of typical restrictive covenants and a property owners association (POA) eager to enforce them.

To be accurate, the parcels in the subdivision were on the large side, ranging from 2 to 100 acres, and the leased parcel was about 66 acres. Still, it is a head-scratcher to comprehend how the company, which by all accounts was sophisticated and even knew about the restrictive covenants from the outset, thought it could actually turn part of a leafy subdivision into a site for extracting natural gas. The company's explanation was that the restrictive covenants were loosely worded

enough to allow for natural gas exploration. That explanation carried no weight with the trial court, which ruled in favor of the POA that the lot could not be used for that activity.

It is true that restrictive covenants generally must be construed most strictly against those seeking to enforce them. But that principle does not allow the plain language in a document to be ignored. One of the subdivision covenants said that properties in the subdivision could be used only for single-family homes or for agricultural and/or recreational use. No oil or gas exploration was contemplated in that covenant.

The other relevant covenant stated that there could be no commercial fishing enterprises, boat-launching facilities, or any other commercial uses. The oil and gas company apparently had pinned its hopes on a court's reading these covenants as prohibiting only fishing and boat-launching activities on the 70-acre lake in the subdivision, but the clear language about "any other commercial uses" would have to have been ignored to get that result. The court declined to do so.

To add insult to injury, the court also refused to allow the oil and gas company to recover the large signing bonus that it had paid to the subdivision resident. The bonus had been paid under the lease, which described the bonus as nonrefundable. And the lot owner, who also knew about the restrictive covenants, had included a disclaimer in the lease about what uses were restricted on his property. The bonus was subject to the company's "approval of title," and there was no dispute that a company representative responsible for approving leases had been aware of the covenants but forged ahead anyway.

In the end, the POA won in having the covenants enforced, and the lot owner was an even bigger winner, getting a handsome sum essentially for nothing, as his lot was not subjected to natural gas exploration. As for the oil and gas company, it learned an expensive lesson: If you are hoping to make your fortune with a gusher in suburbia, learn all you can about applicable restrictive covenants, heed them, and go elsewhere.

**"FREEZE" YOUR CREDIT TO HELP PREVENT IDENTITY THEFT**

By now, most people are familiar with the threat of identity theft and the uses to which the thieves might put your stolen identity. This includes using your personal information to charge goods and services on a new bogus credit card.

There are the usual preventive measures you can take, such as keeping personal information close to your vest, using passwords, and shredding financial documents you no longer need. You can

also get regular credit reports from the three major credit bureaus—Equifax, Experian, and Trans-Union—and/or sign up for a credit monitoring service. These latter actions certainly have some value, but they may only go so far as to help you discover that the "horse is already out of the barn" rather than help you to prevent the theft in the first place.

Another theft prevention approach that may be less familiar to most consumers is the credit freeze (sometimes called a "security freeze"). Although the term sounds as if you are left out in the cold as far as your credit is concerned, when properly used it can give you the comfort of some additional financial security and leave would-be thieves out in the cold instead.

You can put into place a credit freeze by notifying the credit bureaus, providing certain personal information, and paying what should be a modest fee. When the freeze is in place, it stops all potential creditors from seeing your credit report and credit score unless you decide to "thaw out" your credit with the credit bureaus by using a personal identification number. Since any potential creditor considering a thief's application for credit will not be able to check the real consumer's credit report or score while the freeze is on, the creditor will not be able to extend credit, and this prevents the new bogus account from being created.

Credit freezes are not a fail-safe wall of protection against identity theft, but they do give you another defense in the fight. They also do not entail significant inconvenience or cost. Even with a freeze in place, you can use any of your existing sources of credit. A credit freeze especially makes sense if you have no plans to apply for new credit any time soon. But even if you wish to do so, for another reasonable fee you can lift the freeze temporarily for up to 30 days, during which time credit checks can be made in the usual manner by your potential creditors.

## THE IRS IS HERE TO HELP

To help struggling taxpayers who owe back taxes, the Internal Revenue Service (IRS) recently unveiled a series of new steps to help people get a "fresh start," to use the phrase invoked by the IRS Commissioner, with their tax liabilities. The general idea is to recognize the challenging economic environment the country faces while also keeping the tax revenue flowing in at acceptable levels. The focus is on changes to the tax lien system and other collection tools already used by the IRS that will make paying taxes a little easier on taxpayers.

Tax Lien Thresholds

The IRS will significantly increase the dollar thresholds for when liens are filed to a new dollar amount that will be in keeping with inflationary changes that have occurred since the number was last revised. Currently, liens are automatically filed at certain dollar levels for people with past-due balances.

A federal tax lien is no trivial matter. It gives the IRS a legal claim to a taxpayer's property for the amount of an unpaid tax debt, and it can establish priority rights against certain other creditors. Since a tax lien can also adversely affect a taxpayer's credit rating, taxpayers are well advised to arrange for the payment of taxes as quickly as possible.

Tax Lien Withdrawals

The IRS will make it easier for taxpayers to obtain lien withdrawals under certain circumstances, including the IRS's determination that the lien filing was premature or that the taxpayer has agreed to an installment payment plan. To facilitate the withdrawal process, the IRS will also streamline its internal procedures to allow collection personnel to withdraw the liens.

Direct Debit Installment Agreements and Liens

The IRS is making other important changes to liens when taxpayers enter into a Direct Debit Installment Agreement (DDIA). For taxpayers with unpaid assessments of $25,000 or less, the IRS will now allow lien withdrawals in a few different situations: for a taxpayer entering into a DDIA; for a taxpayer converting a regular Installment Agreement to a DDIA; for a taxpayer already on an existing DDIA, upon the taxpayer's request; and for a taxpayer demonstrating after a probationary period that direct debit payments will be honored.

Installment Agreements and Small Businesses

The IRS has made streamlined Installment Agreements available to more small businesses by raising the dollar limit to allow more small businesses to participate. Small businesses with $25,000 or less in unpaid taxes can participate. Previously, only small businesses with under $10,000 in tax liabilities could participate. Small businesses will have 24 months to pay.

Small businesses with an unpaid assessment balance greater than $25,000 may qualify for the streamlined Installment Agreement if they pay down the balance to $25,000 or less. But small businesses will need to enroll in a DDIA in order to participate.

Offers in Compromise

The IRS is also expanding a new streamlined Offer in Compromise (OIC) program to cover a larger group of taxpayers who can use the help. Taxpayers with annual incomes of up to $100,000 can participate. Participants must have a tax liability of less than $50,000, doubling the previous limit of $25,000 or less.

An OIC is an agreement between a taxpayer and the IRS that settles the taxpayer's tax liabilities for less than the full amount owed. As you might expect, it is something of a last resort. Generally, an OIC will not be agreed to by the IRS if the IRS believes, given the taxpayer's income and assets, that the liability can be paid in full as a lump sum or through a payment agreement.

## YET ANOTHER HAZARD ON THE GOLF COURSE

Hazards to a golfer's health and safety that come most readily to mind involve swinging clubs and golf balls in flight, usually on unintended flight paths. But the sport also has other dangers lurking, including the garden variety slip and fall. When James, a golfer, sued a golf resort recently over such a mishap, his claim was dismissed, essentially because the particular risk at issue in his case should have been apparent to him and, as such, it was up to him to avoid it.

On an overcast and rainy day, James was playing golf with three friends at a private golf course. It began to drizzle early in the round, and by the 14th hole, the rain was coming down hard. Approaching the 15th hole, James and his friends discussed stopping play but decided to press on.

As James walked toward the green with one of his companions, they used stairs made of bricks and wooden railroad ties. James was familiar with the golf course, having played there on prior occasions. Although he had never before used the stairs leading to the 15th green, he had seen them.

After his friend walked down without incident, James followed and slipped on one of the first steps, breaking his ankle. At the time, it was raining and James was looking down, talking, and holding his putter in his right hand. Without incident, the other two in the foursome had taken an entirely different route on the grass, avoiding the steps.

James's lawsuit did not fail for lack of effort, in that he enlisted an expert witness to buttress his theory that the resort's negligence had caused his injury because the stairs had not been made slip resistant in wet conditions. The argument never got off the first tee, as it were, because the expert relied upon building code requirements pertaining to making "floor surfaces" slip resistant and the federal court hearing the case ignored the entire line of reasoning as "irrelevant."

As the court saw it, it was obvious that such a building code requirement was never meant to apply to an outdoor golf course. For that matter, the stairs embedded in the ground at the 15th hole were not even part of a "building or structure" to which building codes apply.

Because of the court's dim view of the expert evidence offered, James was left exposed to the resort's contention, with which the court readily agreed, that James could not blame his unfortunate slip and fall on the resort or anyone else. In legal parlance, James had "assumed the risk" of walking on the wet stairs. The risk was obvious, inherent in the activity, and not so serious as to justify placing a greater precautionary burden on the resort operating the course. The court noted that this legal principle "facilitates free and vigorous participation in athletic activities."