The Law Office of
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REPORT FROM COUNSEL

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TAKE THE TIME TO UPDATE YOUR WILL

By some accounts, 70% of adult Americans do not have a will. If you have at least gone to the trouble of making a will, consider yourself ahead of the curve and pat yourself on the back. Then come back to earth and understand that your work is not completely done. A will is not a static instrument. To serve its purposes, it must keep current with life changes, including an individual's financial circumstances, and with some external factors, such as tax laws. With the help of a professional, you should periodically review your will, staying alert to new or different circumstances that might call for updates.

Marriage, Divorce, and Remarriage

Obviously, a marriage usually brings a new beneficiary into the picture, and a divorce may remove one. Some of the changes in a will prompted by a change in marital status may not be so apparent. For example, when a widow or widower remarries, the will may need to be updated to show how children from the previous marriage and the new spouse are to be provided for.

Additions and Subtractions

A new child is a new beneficiary, but a will can and should cover more than just the distribution of property to heirs. Parents can name a guardian, and even an alternate guardian, to care for their children in the event that something happens to both parents. Absent such a provision in a will, a court will appoint a guardian.

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The death of an executor, guardian, beneficiary, or trustee creates a gap in how the will is supposed to operate. Fill in the gaps by making necessary changes, such as naming a new individual or, in the case of a deceased beneficiary, simply removing him or her from the will.

Changing Fortunes

If you enjoy an unexpected windfall, you may still want the larger pie divided up as before. But it is likely that some changes in your will are called for. If the increase in the potential estate is large enough, it might trigger the need for planning to avoid or minimize estate taxes. A reversal of fortune could also suggest some changes. For example, you may have to revise downward that fixed sum you were planning to leave to a favorite charity.

Moving Out of State

You will not have to start from scratch if you move to another state, because all of the states recognize a will that was properly created in another state. Nonetheless, legal advice should be sought in the new state because changes in the law from state to state could require some tinkering with the will. There may be more than tinkering involved if you move to or from a community property state.

Changes in Tax Laws

The government's intentions can change even if your intentions have not. Some of the changes benefit individuals with wills, but you can take full advantage of them only if you are aware of them. The big item here is changes to the federal estate tax exemption, which is the amount an estate can reach before it is subject to a (hefty) estate tax. In recent years the exemption has headed up, but there are no guarantees about what Congress will do with the exemption going forward.

You Change Your Mind

If you decide you want to change beneficiaries, a guardian, an executor, or anything else in a will, you can do so. For example, you want to make sure that the beneficiaries in your will are the same as the beneficiaries you have named in your insurance policies and retirement accounts. Otherwise, the beneficiaries actually named in those documents, not the beneficiaries

under the will, will get the money from the policies and accounts. Bear in mind that no amount of talking about your new intentions will make them happen. The changes must be indicated in a properly executed will.

You should keep the finished (at least until the next update) product in a safe place. When "they" say "keep this with your important papers," think of your will. Your family should know where to find the executed will. An unsigned copy of your will in its latest form is a good starting point for the next periodic review.

Letter of Instruction

Even the best-drafted will is not likely to cover everything needed for a smooth disposition of your estate. To supplement the will, consider executing a letter of instruction. It generally is not legally binding, but it can go a long way to expedite the process and provide information not to be found in the will.

Some items appropriate for a letter of instruction include a list of bank, brokerage, and mutual fund accounts; directions on where to find important documents or personal property; user names, PIN numbers, and passwords necessary for access to electronic records; and contact information for legal and financial advisors. Be sure to list any life insurance policies, as beneficiaries will collect on those policies outside of the will. Any advance plans for the funeral and burial also should be mentioned in the letter of instruction.

TAXES ON GAMBLING WINNINGS

Hitting the jackpot while gambling may feel a lot more like manna from heaven than remuneration for a good day's work, but as far as the government is concerned, those winnings might as well be wages as the results of wagering.

In short, the proceeds are ordinary income on which the winner owes income tax. By "gambling," the federal income tax code means coming out ahead in a wide range of betting settings, such as casinos, racetracks, and lotteries. Not only that, but income tax will be imposed

where someone wins a prize instead of cash, in which case the provider of the prize will put a fair market value on the item won and report that to the IRS.

As a method of ensuring compliance, gaming establishments are required to report to the IRS, on Form W-2G, certain winnings, such as $1,200 or more from a slot machine or $5,000 or more won in a poker tournament. Also, in many instances, 25% of winnings over $5,000 will be withheld and sent to the IRS, not unlike the treatment of wages from employment.

Gamblers who are not in the trade or business of gambling need to report any of their winnings as "other income" on their Form 1040s. In some cases, especially where people have won large sums of money in lotteries, they may decide to sell the rights to future payouts from the lottery so as to reap most of the benefits from their good fortune immediately rather than having to wait a period of years for annual payouts. Depending on the individual, this may be a prudent choice to make, but it probably should not be driven by income tax ramifications. The money received from such a sale of the right to future payments is taxed as ordinary income, notwithstanding arguments made by some in that position that such a sale should receive capital gain treatment under the tax laws.

But what of the gambler who doesn't strike it rich but, rather, in the end has mainly squandered his money in pursuit of quick wealth, typically winning some and losing some along the way? There is no tax benefit, strictly speaking, to gambling and losing. However, if the gambler keeps good records of his losses for a given tax year, he may be able to offset taxable winnings with his losses, thereby reducing his income tax bill.

To take this approach, the taxpayer must itemize deductions on Schedule A of Form 1040. The gambling losses can be claimed up to the amount of reported gambling winnings. The appeal of this strategy is slightly diminished by the fact that gambling winnings will increase adjusted gross income (AGI) and that a higher AGI may make it more difficult to claim other tax deductions and credits.

So, if you are a regular rail bird at the local track, you just have that gut feeling that using a lucky set of numbers will do the trick in the state lottery, or high-stakes bingo is your thing,

enjoy yourself, but understand from the outset that if you strike it rich, Uncle Sam will want his piece of that action. You can bet on it.

CAREFUL WHOM YOU ADD TO ACCOUNTS

Various types of bank accounts held in the name of a single individual or entity have the virtue of simplicity, and the added bonus that the accountholder does not have to wait to make decisions until after a consensus has been reached with others. But sometimes other considerations make it desirable to add someone else, usually a relative, to an account.

That is a perfectly reasonable step to take, but it is important to consider the ramifications, especially as it may affect federal deposit insurance for accounts insured by the Federal Deposit Insurance Corporation (FDIC). Of course, another overriding consideration having more to do with human nature than federal regulations is whether there is a trusting relationship between or among everyone whose name is on an account.

Joint Bank Accounts

Under FDIC rules, a joint account is a deposit account owned by two or more people who have equal rights to withdraw all of the deposits and to close an account. Married couples, assuming they want to share the funds in the account, like the convenience of such a joint account so that either person can write checks on the account and pay bills from it. At an FDIC-insured institution, each co-owner is insured for up to $250,000 for his or her share in all joint accounts in that institution. But if all persons on the account do not have equal withdrawal rights, the account will not necessarily be FDIC insured up to the same amount as for a true joint account under FDIC rules.

If the goal is to give someone limited access to a bank account when needed but not to grant ownership rights to the account, an alternative is to grant that person a power of attorney. Powers of attorney, which typically authorize someone to represent or act on another's behalf in financial matters, can be crafted to permit the desired amount of access to bank accounts.

Safe-Deposit Boxes

The various states and banking institutions have their own rules and procedures for access to safe-deposit boxes. Since granting a second person access to a safe-deposit box amounts to giving that person the right to empty the box without the need for anyone else's approval, this is a step that should be taken only with care and forethought.

Credit Card Accounts

There are two different ways to give a second person the ability to use a credit card. Making that person a co-owner means that he or she will be financially responsible for all of the debt incurred with the credit card, regardless of which co-owner authorized a particular charge. In the alternative, an authorized user of the card may or may not be financially responsible for the debt, depending on the cardholder agreement. The card owner can put restrictions on authorized users, such as how much debt the authorized user can incur with the card.

Cosigning Loans

Succinctly put, a cosignor on a loan has agreed that the creditor can look to him or her for satisfaction of the debt if the debtor does not pay the debt. This obligation may well extend to any late fees and collection costs made necessary by the debtor's delinquency. On top of that, the cosignor's own credit rating could take a hit if the debtor doesn't pay the debt or pays it late. All in all, the watchwords for cosigning on a loan are "proceed with caution."

LONG ARM OF THE LAW

Long-arm statutes permit a court in a particular state to bring within its jurisdictional reach nonresident persons who, by their actions, have had at least such "minimum contacts" with the forum state that it is fair and just to subject them to the powers of a court in that state. In earlier times such contacts were as likely as not to take a physical form. But today, as a recent case illustrates, in the age of computers and the Internet the only thing physical about the contact may be someone's clicking a mouse or striking a keyboard from his or her home in another state or country.

A chemical company based in Connecticut decided to terminate the employment of Jackie, an employee of a Canadian subsidiary of the company. Jackie lived and worked in Ontario, Canada. According to the company, upon learning of her impending termination and just before it, Jackie forwarded from her company email account to her personal email account some confidential and proprietary data files belonging to the company.

She had previously agreed in writing to safeguard such information and to use it only for proper company purposes. The company sued Jackie in a federal court for unauthorized access to, and misuse of, a computer system and for misappropriation of trade secrets, in violation of Connecticut statutes.

Jackie's contention that she was beyond the reach of Connecticut's long-arm statute was ultimately unsuccessful. Her conduct while she was domiciled and working in Canada, in accessing a computer server located in Connecticut to misappropriate confidential information belonging to her employer, was sufficient to confer personal jurisdiction over her under Connecticut's long-arm statute.

While even more generally worded parts of the long-arm statute may have supported this result, the statute specifically provides for personal jurisdiction over persons who use a "computer" or a computer network located within the state, and the court found that the company's server, which Jackie had used, was a "computer" for jurisdictional purposes.

For a court to exercise personal jurisdiction over a nonresident, not only must the jurisdiction be authorized under the state's long-arm statute, but such an exercise of power must satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

Under well-settled U.S. Supreme Court precedents, this means that the nonresident must have engaged in some act by which it availed itself of the privilege of conducting activities in the forum state, and the resulting exercise of personal jurisdiction must be "reasonable." The facts of the chemical company's case against Jackie met these constitutional tests.

First, Jackie had purposefully availed herself of the "privilege" of conducting activities within Connecticut by allegedly accessing a computer server located in Connecticut in order to

misappropriate confidential information belonging to her employer. She was allegedly aware of the centralization and housing of her employer's email system and the storage of confidential proprietary information and trade secrets in Connecticut, and she used that email system and its Connecticut servers in retrieving and emailing confidential files. Moreover, it was also significant that Jackie had directed her allegedly tortious conduct towards a corporation in Connecticut.

As for the reasonableness of bringing the nonresident defendant before a court in Connecticut, the court explained that although Jackie would have to travel to Connecticut to defend the suit, both Connecticut and the employer company had sufficient interests in resolving the matter in Connecticut. Not only was the employer based in Connecticut, which was where the majority of the corporate witnesses were located, but also Connecticut itself had an interest in the proper interpretation of its laws.

NEW HIPAA RULE

The U.S. Department of Health and Human Services has adopted a new rule concerning privacy and security for health information, to take into account changes that have occurred in health care since enactment of the Health Insurance Portability and Accountability Act (HIPAA) of 1996. Some of the key features in the 563-page final rule are outlined below.

Privacy notices given by covered entities, such as health-care providers and health plans, must now include a statement about a patient's right to restrict the disclosure of his or her health information when paying out of pocket for the service.

"Downstream" business associates of covered entities are also covered by the new HIPAA rule. Thus, such subcontractors as billing and phone services, document and data storage companies, and other such entities whose functions involve the disclosure of protected health information are subject to liability for violations and the potential for agency enforcement action and penalties. This aspect of the new rule was meant to prevent covered entities from effectively skirting their HIPAA obligations by farming tasks out to subcontractors.

Before the new rule, a breach had to be reported to a patient if it posed a significant risk of financial, reputational, or other harm to the individual. Now, if health information is compromised, a data breach is presumed, with the attendant notification requirements, unless there is a low probability that the protected information was in fact compromised.

Factors to consider as to whether a breach must be reported are the nature and extent of the information, the person to whom the data was disclosed, whether that person actually viewed it, and whether the risk was mitigated in some manner.

While patients already had a right to a copy of their health records, the new rule changed the default form of production from a hard copy to an electronic copy when the information is maintained electronically. Entities may charge a reasonable fee for providing the information, and now the information must be provided within 30 days of the request.

The new final rule took effect on March 26, 2013, and compliance with all applicable requirements must occur by September 23, 2013.