

July 2003

*Special Interest
Articles:*

- MD Unitrust
Legislation
- Attorney is a
Beneficiary
- Estate Planning
Misconceptions

ESTATE PLANNING

Babirak, Albert, Vangellow & Carr, P.C.

Announcements

Please take note that the name of the firm has changed from Babirak, Albert, Vangellow & Shaheen, P.C., to Babirak, Albert, Vangellow & Carr, P.C. David Shaheen has left the firm to pursue his own practice. The new name reflects the rejoining of shareholder, Neil Carr, to this firm late in 2001. Mr. Carr practices out of our Washington, D.C.

office, and his practice focuses on advising established and emerging growth companies in connection with corporate finance and transactional matters and business planning. Please also note that in order to reflect the new name of the firm, the firm's website address has changed to www.bavcpc.com, and Milton Babirak's e-mail address has changed to

mbabirak@bavcpc.com.

In addition, the firm has relocated its Washington, DC office from 2121 K Street, N.W., Washington, D.C. to 1828 L Street, N.W., Suite 1000, Washington, D.C. Mr. Babirak can be reached there at 202.463.8480.

Maryland Unitrust Legislation

On October 1, 2002, Maryland legislation was enacted that gave a trustee of an "income-only" trust in Maryland, new power to pursue an investment strategy designed to maximize the trust's total return, while also fulfilling the trustee's duty to administer the trust impartially for the benefit of both income and remainder beneficiaries. Under this new law, a trustee is now able to convert a trust into a unitrust. A unitrust is a

trust from which the income beneficiary is entitled to receive annually a fixed percentage of the fair market value of the trust's assets, or to make an adjustment between principal and income. A trustee is able to distribute a fair return to the income beneficiary, without being limited to distributing only the trust's accounting income as determined under general principal and income accounting rules. This new law is codified at sections 15-

502.1, 15-502.2, and 15-502.3 of the Estates and Trusts Article of the Annotated Code of Maryland.

Attorney as Beneficiary

“...drafting a will in which he was named a beneficiary violated MRPC Rule 1.8(c) by creating an obvious conflict.”

In the recent Maryland case of *Attorney Grievance Commission v. Charles F. Stein III*, CA Misc. Docket AG No. 26, Sept. Term 2002, the court ordered an indefinite suspension for a lawyer who drafted a will in which he was the beneficiary. The lawyer was not related to his client, and the client was not represented by independent counsel. The court found that the lawyer knew or should have known that drafting a will in which he was named a beneficiary violated MRPC Rule 1.8(c) by creating an obvious conflict.

Estate Planning Misconceptions

There are many misconceptions associated with estate planning. A few of the more common misconceptions are listed below for your consideration:

1. Revocable trusts save estate taxes.

An asset that does not go through the probate process does not mean the asset escapes taxes. The same estate tax planning goals can be accomplished via a will or a revocable trust.

2. A revocable trust means no probate.

Probate is the process by which a decedent's property is marshaled, inventoried, sold, accounted for and distributed according to the decedent's will or the intestacy laws. Property titled in the decedent's name only is subject to probate. Assets titled jointly, with right of survivorship, as well as assets passing by beneficiary designation, bypass the probate process. These assets pass by operation of law.

Merely having a revocable trust does not guarantee that no part of the estate will need to be probated after death. In actuality, only assets that have been titled in the name of the trust will be exempt from

the probate process. Clients often fail to fully fund their revocable trust, especially in the case of assets that are acquired after the revocable trust is created. Clients with revocable trusts also need a pour over will which provides that any property remaining in the decedent's own name at the time of his death will be “poured over” to his revocable trust after passing through the probate process.

3. Merely placing property in joint names “simplifies” your estate.

While titling property jointly with the right of survivorship will avoid the probate process, other factors should be considered before deciding to place property in joint names. For married couples, owning property jointly often negates the estate tax savings of the bypass trust, which is designed to hold the applicable exclusion amount. Since only property in the decedent's own name will be distributed per the terms of the will, jointly held property will pass outside of the will to the surviving spouse, and will not be available to fund the bypass trust. If the couple does not have sufficient assets to fund the bypass trust, some or all of the decedent's applicable exclusion amount might be wasted. As a

result, often times, the surviving spouse will have more property than anticipated left in his or her estate, possibly giving rise to an estate tax.

Some individuals believe that placing a child's name on assets is another desirable way to avoid the probate process and lessen the impact of the parent's death on the ability of the child to access the property. The problem with this approach is that in many cases, the parent will be deemed to have made a taxable gift of one-half of the value of the property to the child. By adding a child's name to the property, moreover, the parent loses control of the property. Any sale must be signed off on by the child, and the child's creditors may reach to the property to satisfy claims against the child.

4. An estate plan is not needed for an estate of less than \$1 million.

Many assume that if the total value of their estate is less than the amount of the applicable exclusion (currently \$1 million), then they do not need an estate plan. Even if tax planning is not the primary concern for an individual, he or she may have other concerns that should be addressed via an estate plan. An estate plan can provide that young children's shares in an estate be held in trust until the child has reached a certain age. Special needs trusts can also be created for disabled children or elderly parents. Parents of minor children should nominate a guardian to care for their children until they reach the age of majority. In addition, an individual may desire to name testamentary guardians, contingent beneficiaries, personal representatives and trustees. Without a will, these matters will be decided by state law or handled in a court proceeding, with no guarantee of results consistent with the decedent's intentions.

5. Life insurance proceeds are not included in the insured's estate.

Life insurance often comprises a large, if not the largest, portion of an estate. Life insurance proceeds are, indeed, included in the insured's estate. If a life insurance policy exposes, or may expose, an estate to taxation, the insurance may be assigned to an irrevocable life insurance trust to hold the insurance policy during the life of the insured, and at the death of the insured, the proceeds will be paid to the trust. The trustee of the trust may use the proceeds to purchase assets from the insured's estate to provide liquidity to pay expenses, debts, or taxes. A properly drafted irrevocable life insurance trust can remove the value of the policy from the insured's gross estate.

6. Once an estate plan is signed, the work is done.

Proper titling of assets and designating of beneficiaries can be as important to many estate plans as the estate plan itself. Because jointly held property will pass by operation of law, making it unavailable to fund a bypass trust, the couple's assets often should be divided so that they are holding the property as tenants in common, or so that each spouse holds property in his or her own name. Assets, moreover, which are to pass by beneficiary designation, such as life insurance, must be reviewed to ensure that the designations are consistent with the rest of the estate plan. IRA's retirement plans and annuities also must be reviewed for terms or restrictions which affect the method of payout permitted to a beneficiary, or restrict how the beneficiary is designated.

7. The estate tax has been repealed.

As discussed in previous newsletters, the estate tax is not scheduled to be repealed until the year 2010. Until then, the exclusion amount increases every year from \$1 million to \$3.5 million in the year 2009. In 2010, Federal estate taxes are repealed, but only for one year. In 2011, the estate tax may return in 2011 at the 2001 levels.

8. Your child should always be your personal representative, trustee and attorney in fact.

Parents very typically name their child or children as fiduciaries in their estate planning documents. Fiduciaries include personal representatives (executors and executrixes), trustees and attorneys-in-fact. Some parents, however, blindly appoint their child or children without much regard given to whether they are an appropriate choice. Not all children are able to manage assets or understand the process of properly administering an estate or a trust. Some children also may not have the parent's best interests at heart or may be tempted to use the power for their own benefit. Naming multiple children as fiduciaries may also be ill advised due to the chance of conflict and the burden of a group having to make decisions together. It is a common misconception that corporate and professional fiduciaries are

prohibitively expensive and should be appointed only as a last resort. A child fiduciary who mismanages an estate and causes financial losses through negligence and inattention, is often more costly.

9. All I need is a simple will.

In reality, there is no such thing as a simple will or a simple estate plan. Even the most straightforward estate plans will often have unexpected issues in need of resolution. These issues range from individuals who have added their child's name to real property, individuals who wish to leave parts of their estate to minors, disabled or elderly beneficiaries, individuals who are interested in disability planning, individuals with retirement plans with inconsistent beneficiary designations, etc. Even young couples with modest estates need trusts for their minor children, as well as testamentary guardians. Individuals with children from prior marriages may want to give particular attention to the preparation of estate plans in order to plan for children of both marriages. This is because the surviving spouse may change the plan after the first spouse dies, unless trusts are created to hold the property, and assets are titled to properly fund the trusts.