Trusts & Estates

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Medicare Will Now Pay for Crisis Planning Before the Crisis

BY: ARTHUR P. BERGERON

Have you spoken with your doctor about how you want to be treated if you become incapacitated? The answer for many, if not most, aging individuals is no. This is unfortunate because, as you get older, the odds that you will find yourself incapacitated—because of a stroke, a heart attack, a fall, or any number of other mishaps—increase. In situations such as these, if you are incapable of making decisions yourself, you will want to ensure that you are treated the way you would have chosen to be treated if you were able to decide. But how does one do this, exactly?

Start with your primary care doctor. Your primary care doctor has watched these situations unfold many times and has helped patients deal with them. He or she will be a great resource. Now is an especially good time to discuss these issues with your doctor, given that the Centers for Medicare & Medicaid Services ("CMS"), the government agency that runs Medicare, announced that as of January 1, 2016, Medicare began paying doctors to have these conversations with their patients.

When you speak with your doctor, he or she will likely bring up the importance of signing a MOLST (Medical Orders for Life-Sustaining Treatment) form. The MOLST form was developed by the Massachusetts Department of Public Health to encourage people to consider and express their wishes in advance as to how they want to be treated in certain emergency situations. The MOLST form, which must be signed by both you and your doctor, provides guidance to doctors and other health care providers such as EMTs in the event you are incapacitated. Do you want artificial resuscitation if you are terminally ill? Do you want to be rushed to the hospital in every emergency, even though you have always said you really want to die at home? These are some of the questions that the MOLST form addresses.

The next person to speak with is the health care agent you have named in your Health Care Proxy ("HCP"). By signing your HCP, you appoint an agent to make health care decisions on your behalf in the event that you are unable to do so. While many people have HCPs in effect, many of these people may have not actually spoken with their designated health care

agents about how they want to be treated. Your health care agent has a tremendous amount of responsibility over your care should you become incapacitated. Therefore, it is critical that you communicate to your agent how you want to be treated and, particularly, your wishes regarding life sustaining treatments. Also, you should note that the recent policy change by CMS allows your health care agent to participate in these discussions with your doctor, so you should consider bringing your agent with you to discuss these issues with your primary care doctor. ■

New Basis Requirements for Executors of Estates

BY: JANET W. MOORE

On July 31, 2015, President Obama signed the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, creating two new sections of the Internal Revenue Code (the "Code") requiring the reporting of the basis of property acquired from a decedent. An Executor (also known as a Personal Representative) of an estate is now required to give to the IRS and to each beneficiary of an estate a statement identifying both the property received by the beneficiary and the basis in the property acquired.

This statement must be finalized, generally speaking, within sixteen months of the decedent's date of death, and the actual due date is dependent upon when the estate tax return is filed. The value listed on the statement will be the value of the property as reported on the estate tax return.

The purpose of the new law is to ensure that the basis of property included in the decedent's estate is reported consistently for both estate tax and income tax purposes.

On August 21, 2015, the IRS issued Notice 2015-57, which postponed the initial due date for any basis reporting until February 29, 2016, to allow the IRS and the Treasury Department to issue guidance and develop the necessary forms. Effective February 11, 2016, the IRS issued Notice 2016-19 extending the date to March 31, 2016 and recommended that Executors wait to prepare the statements until proposed regulations addressing specific requirements have been issued by the Treasury Department. Most recently, the due date for initial basis reporting has been extended again to June 30, 2016.

Draft form 8971, "Information Regarding Beneficiaries Acquiring Property from a Decedent", was issued on December 18, 2015. Once the form is finalized, an Executor who is required to file a federal estate tax return will be required to complete the form and furnish it to the IRS and beneficiaries to comply with this new basis reporting requirement.

If the Executor fails to file Form 8971 with the IRS by the due date and if reasonable cause for the delay cannot be shown, a penalty will be imposed. Penalties will also be applied for failure to include all required information, failure to include correct information, failure to file correct supplemental information, and failure to furnish correct information to beneficiaries by the due date.

The purpose of the new law is to ensure that the basis of property included in the decedent's estate is reported consistently for both estate tax and income tax purposes. Ultimately, the law means that beneficiaries who inherit property will be told their basis and must use this basis for future tax reporting. ■

Let's Get Physical: Body Donation in Massachusetts

BY: EMILY L. CRIM

Most of us are familiar with the small heart or other symbol on a driver's license signifying that a person is an organ donor. But what if you would like to donate your entire body—organs and all—"to science," as it is commonly phrased? How does one go about doing this? This article discusses how estate planning can address body donation; note that this discussion covers only the donation of one's entire body, not the donation of one's organs.

In 2012, Massachusetts adopted the Uniform Anatomical Gift Act, M.G.L. c.113A (2012), which allows anyone eighteen years of age or older to donate his or her body upon death to an accredited medical school, hospital, college, university, dental school, organ procurement organization, or specific person for purposes of research or education.

Who may donate?

You may make a donation or anatomical gift of your body at any time while you are alive. Your guardian or designated health care proxy (so long as the proxy document does not prohibit it) may also make a donation on your behalf.

If you do not make a donation during your life, certain other individuals may make gifts on your behalf after your death.

These individuals are divided into ten "classes" with the following priority:

1. Your health care proxy;
2. Your spouse;
3. Your adult child;
4. Your parent;
5. Your adult sibling;
6. Your adult grandchild;
7. Your grandparent;
8. Any adult who has exhibited special care and concern for you;
9. Guardian of your person at the time of your death; or
10. Any person with the authority to dispose of your body.

If a class has more than one member, certain rules apply. Say, for example, you have five adult children, with no spouse or health care proxy. Any one of your children may donate your body after your death, unless that child knows that one of the other children objects. In that case, the majority will rule, meaning that the donation will go forward only if the majority of your children agree to it.

But what if, in this example, your spouse is alive, and he or she objects to the donation even though your children have already agreed to donate? Then, your children cannot make the donation since your spouse, a member of a class with higher priority, objects to the donation.

How do you donate?

There are a number of ways by which you may donate your body after your death. One way is through your will. A second way is by a written record signed by you or by a person authorized to sign for you if you are not physically able to sign. The signature must be witnessed by two people, and at least one witness must be disinterested. A third way to donate is by any form of communication during terminal illness or injury expressing this wish. The communication must be made to at least two adults, with at least one of them being disinterested. You may always later amend or revoke your donation using these three same means.

A will alone is usually not the best mechanism for making a donation. There is only a short period of time after a person passes away during which his or her body can be successfully preserved for use, typically 24 hours at most. Although anatomical gifts provided for within wills are immediately effective upon death, wills are rarely reviewed or even discovered during this brief period. Accordingly, if you make a provision in your will for the donation of your body, be sure to reflect your wishes in other documents, as well as communicate your wishes to others. From a practical point of view, institutions may prefer that you designate the donation during your life. Medical schools have body donating programs and some require that the donor register during his or her life in order for the body to be accepted after death. Harvard Medical School, for example, has an "Instrument of Anatomical Gift" form, which is available online.

What if you do not want to donate?

If you want to make sure that your body is not donated after your death, you can take affirmative action to ensure this. This is accomplished by will, by a signed written statement witnessed by two adults, with at least one being disinterested, or by any form of communication during terminal illness or injury to two people, at least one of whom being disinterested. Massachusetts law favors a donor's intent above all else, and prohibits other individuals, such as family members, from circumventing your clear wishes after your death. ■

Massachusetts Budget Proposal Would Radically Change MassHealth Estate Recovery Rules and the Elder Law Practice

BY: ARTHUR P. BERGERON & EMILY L. CRIM

In January, Governor Charlie Baker released his administration's budget proposal for 2017. While the plan covers numerous areas, one part, Outside Section 11 or "OS 11," proposes changes that would significantly expand the scope of estate recovery claims that MassHealth could pursue after the death of residents aged 55 and older who received MassHealth benefits prior to their deaths. These proposed changes would affect all applicants who qualify for MassHealth after July 2016, regardless of any prior estate planning done by applicants or their spouses. Therefore, anyone who has done such planning should closely follow this proposal and plan accordingly.

MassHealth, which is the Massachusetts version of the federal Medicaid program that pays for long term care services, is available to people who qualify. Many people aged 55 and older apply for MassHealth either because they require nursing home care or because they need substantial in-home care in order to remain at home. Under current law, MassHealth has a claim against the probate assets of any deceased person who received these kinds of MassHealth benefits prior to his or her death. However, the agency has no claim against the assets of a MassHealth recipient's surviving

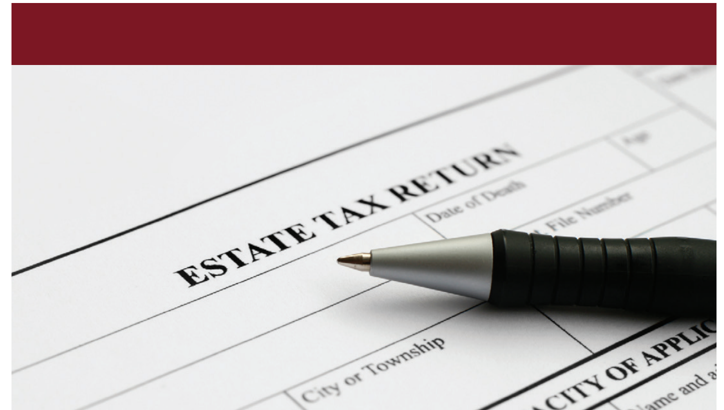
spouse. OS 11 in the proposed budget seeks to change that.

Under OS 11, MassHealth would have a claim against any interest that a deceased MassHealth recipient had at the moment of his or her death in assets that are not subject to the probate process. These assets include life estates in real property and joint ownership interests in real estate or other kinds of property, such as bank accounts, stocks, and bonds, as well as annuities, life insurance policies and retirement accounts. Additionally, OS 11 allows MassHealth to have a claim against the estate of the surviving spouse of the MassHealth recipient, regardless of whether the surviving spouse ever received MassHealth benefits or has since remarried or moved outside of Massachusetts. Potential MassHealth claims could thus survive for years or even decades after a MassHealth recipient's death.

How could OS 11 affect elder law? For years, elder law attorneys have worked with clients who are concerned that they could be impoverished by the high costs of home care or nursing home care should they later become afflicted with Alzheimer's disease, any other disease causing dementia, or any illness causing them to need more care than could be provided at home. Often these are people who have saved all their lives, who own their homes, have paid off their mortgages, and hope to leave something to their children when they pass away. Elder law attorneys often advise these clients to convey a so-called "remainder interest" in their home to their children or to an irrevocable trust for the benefit of their children, while reserving a "life estate" in the home, which is the right to live in the property until death. Under OS 11, the value of such a life estate interest at death would be subject to a MassHealth claim for recovery.

Similarly, married couples who are concerned that one partner may need to qualify for MassHealth currently have the option of transferring some or all assets to the healthy spouse so the healthy spouse can continue to live at home. OS 11 would expose the assets of that healthy spouse, if he or she survives the spouse who received MassHealth, to a MassHealth claim upon the death of the healthy spouse to the extent that those assets were subject to the probate process.

Numerous bills are submitted to the Massachusetts legislature every year, but very few of them actually become law. The state budget, however, is one exception. The legislature will inevitably approve a budget in some form, likely by this summer. But the question remains as to whether OS 11 will pass, either in its current form or amended in some way. In its current form, OS 11 would affect all life estates and other property interests that are not subject to probate. In the next few months we should better know the fate of OS 11. ■



Is an Increased Massachusetts Estate Tax Exemption in the Cards this Year?

BY ANDREW B. O'DONNELL

Massachusetts remains in the minority of states that have not increased their estate tax exemption since the federal estate tax exemption was raised in 2001. The Massachusetts estate tax exemption is currently $1,000,000 per person (though it disappears if you die owning more than this amount) while the federal estate tax exemption is now $5,450,000 per person.

Legislation introduced in Massachusetts last year would increase the Massachusetts estate tax exemption to 50% of the amount of the federal estate tax exemption. The legislation would also eliminate the disappearing nature of the current exemption. The legislation is currently under review in committee. However, the legislation's future is uncertain given the loss in tax revenues that would result from its enactment.

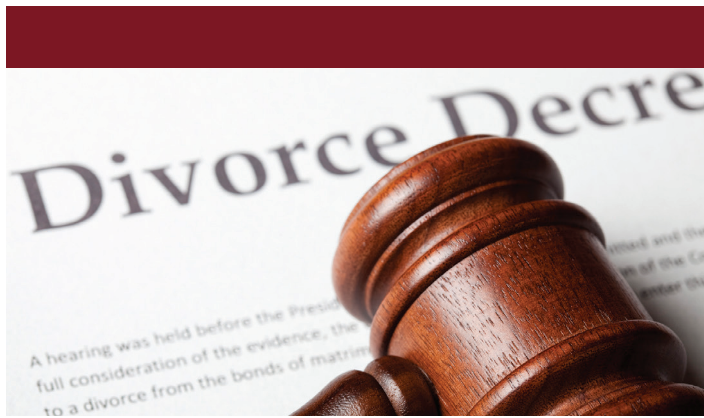
Despite the potential loss of tax revenues, proponents argue that the legislation is necessary for Massachusetts to remain competitive with other states and their estate tax systems. Florida, for example, does not have an estate tax and many wealthy Massachusetts residents have changed their domiciles to Florida to avoid or minimize their Massachusetts estate tax liability.

Closer to home, New Hampshire's estate tax was eliminated in 2010. Last year, Maine adopted legislation effective in 2016 that increased the Maine estate tax exemption to the amount of the federal estate tax exemption; Rhode Island, Connecticut, and Vermont in recent years have passed legislation increasing their state estate tax exemptions to $1,500,000, $2,000,000, and $2,750,000, respectively. Finally, in 2014, New York passed legislation that would raise its state estate tax exemption to the level of the federal estate tax exemption gradually over four years.

Massachusetts now has the lowest state estate tax exemption of any New England state. Nationally, more than 30 states no longer impose state estate taxes and of the remaining

states, the majority have estate tax exemptions that either track the federal estate tax exemption or at least equal or exceed $2,000,000, twice the level of the Massachusetts exemption.

The current Massachusetts estate tax exemption causes an increasingly large number of residents who are not required to pay federal estate taxes to nevertheless pay Massachusetts estate tax upon death. The ball is now in the legislature's court to determine if this result remains a sound and competitive tax policy. ■



Trust Funds Can Be Part of the Marital Estate Upon Divorce

BY ALLEN J. FALKE

The Massachusetts Appeals Court recently upheld a lower court decision holding that a husband's interest in an irrevocable trust was a marital asset for purposes of ongoing divorce proceedings. In Pfannenstiehl v. Pfannenstiehl, (Mass. App. Ct., Nos. 13-P-906, 13-P-686, 13-P-1385 decided August 27, 2015), the trust at issue had been established by the husband's father for the benefit of the husband, his siblings, and their children. Distributions from the trust were only made to the husband and his siblings. The trust was subject to an ascertainable standard, meaning that trustees were able to make distributions for the beneficiaries' comfortable support, health, maintenance, welfare, and education. It also contained a spendthrift provision, meaning the beneficiary's creditors could not reach the assets.

The Pfannenstiehls had two children with special needs. The wife had served in the military for eighteen years but resigned under pressure from her husband and his family just two years before she would have been eligible for a military pension to devote her time to caring for the children, particularly their daughter who had Down syndrome and other medical issues. The husband worked as a college bookstore manager, earning about $170,000 per year, triple the typical salary for such a job due to his family's ownership of the college.

Prior to the divorce proceedings, the husband and wife maintained a well-to-do upper middle class lifestyle while supporting their children with significant and expensive medical needs. The husband's earnings as a bookstore manager hardly afforded such a lifestyle, meaning the couple predominantly depended on the trust distributions. From 2008 to 2010, the trustees, who were the husband's brother and the family lawyer, distributed roughly $800,000 to the husband.

In August of 2010, after years of consistent distributions to the husband, the trustees stopped making distributions to him. The timing of this was telling; the distributions ceased just prior to the onset of the divorce proceedings. The distributions continued to the other two beneficiaries (the husband's siblings).

There were several issues before the divorce court. One was whether the spendthrift provision in the trust prevented the inclusion of the husband's income from trust distributions in the marital estate. According to the Court, the law established that the presence alone of a spendthrift clause does not make trust distributions "immune to inclusion in the marital estate." The Court held that "the spendthrift provision [was] being invoked as a subterfuge to mask the husband's income stream and thwart the division of the marital estate in the divorce."

A second issue was whether the ascertainable standard for distributions rendered the husband's interest includable for division under the divorce proceedings. The Court held in the affirmative, contrasting this trust with discretionary trusts where there are no standards obligating trustees to make payments. Here, the Court held, the ascertainable standard in the trust for comfortable support, health, maintenance, welfare, and education gave the husband a present enforceable right to distributions to support his lifestyle, which included funds for his children with special needs. The Court noted that the pattern of distributions prior to the divorce proceedings reflected the ascertainable standard, while also noting that the distributions were "woven into the fabric of the [couple's] marriage" and "integral to the family unit" because the couple heavily relied on these distributions to maintain their lifestyle. The Court rejected the husband's argument that the trustees were not obligated to make (and had ceased to make) distributions, finding the ceasing of the distributions to be an attempt to shield the husband's income from the wife in the divorce proceedings.

So what to do in light of this decision? If you are creating a trust, and are concerned about creditor protection for the beneficiaries of the trust you may not want to include an ascertainable standard. Alternatively, or maybe in conjunction with a fully discretionary standard for distributions, you may want to appoint a true independent trustee. ■

ABOUT US

Attorneys in the Mirick O'Connell Trusts and Estates Group counsel individuals and families in all matters concerning estate, gift, charitable and fiduciary income tax planning, elder law and special needs planning, and asset protection and Medicaid planning.

Our attorneys have extensive experience in drafting sophisticated estate planning documents and implementing wealth planning strategies. The integration of our experienced trusts and estates lawyers with our skillful litigation and trial lawyers enables us to provide sound legal advice and creative dispute resolution strategies.

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