BEAN KINNEY & KORMAN PC
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# Wills, Trusts and Estates Newsletter

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## WHEN YOU THOUGHT IT WAS SAFE TO GO BACK IN THE WATER - ESTATE TAX REVISIONS

### BY JONATHAN C. KINNEY, ESQUIRE

In January 2013, when President Obama and Congress compromised on changes in the estate tax area, most commentators thought the changes (part of the American Taxpayer Relief Act of 2012) meant that further changes to estate and gift taxes were off the table, at least for a couple years. Apparently, this is not the case.

Additional tax revisions were proposed in the administration's 2014 budget. The current estate tax law (passed in January 2013) provides that each individual has a $5.25 million "exemption" from estate, gift or generation skipping tax. This means that a married couple can effectively shelter $10.5 million with the amounts indexed for inflation going forward after 2013. As part of the estate tax compromise, the estate tax rate was increased to 40 percent on amounts above these exemption limits.

The administration's 2014 budget is proposing to drop the exemption to $3.5 million for estate and generation skipping taxes and reduce the gift tax exclusion to $1 million. This proposal also contemplates raising the top estate tax rate to 45 percent and the "exemption" would no longer be indexed for inflation.

While it's unlikely that Congress, as it's presently comprised, would acquiesce to these changes, it does provide some insight as to future proposals that may be made to cut exemptions and raise estate tax rates.

There are a number of other tax proposals contained in the 2014 budget, primarily those intended to raise taxes on the wealthy and upper middle class. These include:

- Limiting the amount that could be placed in retirement plans, 401(k)s, IRAs, Roth IRAs, etc. The basic concept is to limit the amount to a value equivalent to what a higher income government worker would receive as a pension/annuity benefit.

- New restrictions on deductions for upper bracket taxpayers. These restrictions would affect deductions for employer-sponsored health insurance premiums purchased with pretax dollars, employee contributions to 401(k)s and other retirement plans. It would also limit itemized deductions for items such as mortgage interest and charitable deductions. This is in addition to restrictions

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in the “Please Amendment” deduction limits already passed in January.

- Establish a minimum 30 percent tax to apply to individuals with joint income of more than $1 million or single individuals with incomes of $500,000 or more.

- Eliminate current provisions that allow investors to sell a portion of stock holdings and to specify which shares are sold. Under the new administration proposals, investors would use an average cost basis rather than a first-in first-out basis or highest or lowest cost basis.

Again, we don’t anticipate that all of these proposals will become law but this at least provides a look at what may be on the table.

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## BASIC INFORMATION ABOUT DURABLE POWERS OF ATTORNEY

### BY LORI K. MURPHY, ESQUIRE

**Durable General Power of Attorney – What Is It?**

The Durable General Power of Attorney is a document executed by an individual with mental capacity (the “principal”) in which he or she nominates an agent (formerly known as an “attorney-in-fact”) who can to take certain actions on behalf of the individual. Serving as an agent is no laughing matter. The agent must act in the best interests of the principal, in good faith, and only attend to matters expressly granted in the document. When an agent is serving on behalf of the principal, the agent is in a fiduciary role and owes a duty of care and loyalty to the principal.

State laws govern the form and meaning of powers of attorney and those laws have evolved. In 2010, Virginia adopted stricter statutes to address the drafting, use and enforcement of powers of attorney in statutes called the “Uniform Power of Attorney Act” in Title 64.2, Chapter 16 of the Code of Virginia (hereinafter referred to as the “Act”).

**What Does the Act Do?**

The new act applies to all powers of attorney with a few exceptions (e.g., it does not apply to health care decisions or the power to make arrangements for burial or cremation). It thankfully makes all powers of attorney durable unless the document itself provides otherwise. This means the power of attorney is effective even after the principal loses capacity. Copies of the power of attorney are now effective - no longer is there a need to bring the original document with you. Further, it strictly identifies certain actions an agent cannot take unless expressly stated in the document.

**Scope of Power of Attorney**

Virginia is strict about certain grants of authority to an agent. Unless expressly addressed in the power of attorney, the agent will have **no** authority to do any of the following important actions:

(1) Deal with the principal’s revocable trust;
(2) Make gifts (to spouses, the agent, family members, etc.);
(3) Create or change rights of survivorship;
(4) Create or change beneficiary designations (on insurance policies for example);
(5) Delegate authority granted in the power of attorney;
(6) Address the principal’s rights to joint or survivor annuities; or
(7) Exercise any fiduciary powers that the principal has the authority to delegate.

These specific grants of power need to be provided in the document. If not, it is a good reason to update the power of attorney.

**Financial Institution and Banks**

When an agent named in the power of attorney presents a properly executed Durable General Power of Attorney to a financial institution or bank (“institution”), we have seen a desire of that institution to request the agent to prove agency on a power of attorney form prepared by the institution. This is troublesome for many reasons, including the fact that if the agent is using the power of attorney, it is often due to the principal's lost mental capacity. This means there is no opportunity for the agent to obtain the individual's signature on the institution's own form.

However, the new act helps in this regard. It requires the institution to accept the properly executed power of attorney (with some exceptions) within seven days after it is presented for acceptance. There are valid exceptions that would cause an institution to fail to accept a properly executed power of attorney (e.g., the institution has received notice of termination of the power of attorney), but the institution can no longer require the power of attorney to be on its own form. In fact, a person who refuses to accept a properly executed power of attorney (absent exceptions) is liable for reasonable attorney fees and costs incurred in requiring the institution to accept the power of attorney.

### Updating Powers of Attorney

Typically, powers of attorney do not need to be updated frequently. However in light of the adoption of the act, it is a good idea for a person with capacity to execute new powers of attorney if the existing ones were executed prior to July 1, 2010. Other key points to consider include proper execution (notary and witnesses per each state's statutes) and the scope of the power of attorney (to ensure specific actions are expressly listed in the document).

We also like to ensure the related but separate Advance Directive/Health Care Power of Attorney is up to date (to grant, at a minimum, the agent the necessary authority under the Health Insurance Portability and Accountability Act of 1996), and we often also address health care privacy rights in the Durable General Power of Attorney.

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## UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

### BY JONATHAN C. KINNEY, ESQUIRE

The Virginia legislature recently passed the Uniform Real Property Transfer on Death Act. The Uniform Real Property Transfer on Death Act allows real property to be treated in a similar fashion as bank accounts, stock brokerage accounts, etc. which currently have a transfer on death or pay on death designation.

The Uniform Real Property Transfer on Death Act authorizes the creation of a transfer on death deed which, if properly drafted and recorded among the land records, passes title directly to the grantees or beneficiaries named in the deed without the need for probate.

Basically, the Uniform Real Property Transfer on Death Act means that Virginia is among a small but growing number of states that allow both personal property and real property to be titled in a manner that property does not have to pass through probate.

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## *PER STIRPES* MEANS *PER STIRPES*, CORRECT?

### BY JONATHAN C. KINNEY, ESQUIRE

So, does *per stirpes* mean *per stirpes*? In most cases the answer is yes, however, this is not the case in circumstances in which heirs in the closest degree of kinship are deceased.

This issue arises in jurisdictions that have adopted the Uniform Probate Act ("UPC"). The UPC utilizes the modern per stirpes approach and provides that an intestate estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship.

The more traditional *per stirpes* definition begins the division at the generation closest to the deceased regardless of whether or not there are surviving individuals in that generation. The modern *per stirpes* ignores the generation without surviving individuals in that generation and begins at the first generation that has living issue. The distinction

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between strict *per stirpes* and modern *per stirpes* reach different results in instances where all the heirs of the closest degree of kinship are deceased.

For instance, in the case of the four Hall sisters – Emma, Grace, Isadora and Samantha. Emma and Grace both passed away last month unmarried and without descendants. Both Emma and Grace died without a will (intestate). Isadora had one daughter, Lucky. Samantha maintained her family name and had three sons – Joe, Red and Bob (whom they called Boot). At the time of Emma and Grace's death, their parents were deceased; Isadora and Samantha had passed away a few years before. Lucky, Joe, Red and Boot are living.

Emma lived in a state that adopted the UPC while Grace lived in the state that follows the traditional *per stirpes* rule. It would appear that there will be a different result in how the assets of Emma and Grace are distributed. Emma's assets would be distributed evenly between Lucky, Joe, Red and Boot while Grace's assets would be distributed one-half to Lucky and one-sixth each to Joe, Red, and Boot, leaving each of the Hill boys in an unlucky position.

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