A STEP AHEAD

THE LESSONS OF ANNA NICOLE SMITH

In death as in life, Anna Nicole Smith provides estate planners with "real life" lessons. When in 1994, at the age of 26, she married J. Howard Marshall, who was then 89 years old, we learned about the spousal right of election, the legal right of one spouse to inherit from the estate of the other, and about the importance of utilizing pre-nuptial agreements to protect assets for one's children when one remarries later in life. When Marshall died, a mere 14 months later, and his estate was immediately encumbered with the highly public battle between Smith and Marshall's son, we learned about the public nature of the probate proceeding and the expense and delay that is often attributable to such proceedings.

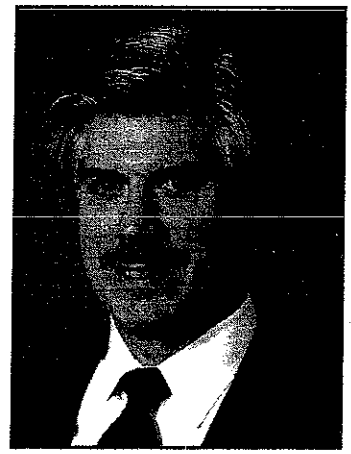
Now Anna Nicole Smith has passed away, five (5) months after the birth of her daughter Danielynn and the death of her 20 year old son Daniel. Not surprisingly, within days the newspapers had access to a copy of her Last Will and Testament, a document that was executed in 2001. At that time, she was unmarried and had only one child. The Will directs that, at her death, all of her assets be held, in trust, for her son Daniel and that the principal be paid to him in three installments, when he reached the ages of 25, 30 and 35.

Smith's desire to provide for her only child should come as no surprise to anyone. But Smith's Will does not stop there. In it she intentionally declines to provide for future spouses and future children, living, afterborn or adopted.

Perhaps at the time this Will was prepared, and in an effort to protect her entire estate for Daniel's benefit, it made sense to Smith to exclude children later born. However, her Will utterly fails to provide for the possibility that Daniel would die before her. As difficult as it is for any parent to consider that a child may predecease them, estate planning must be "contingency planning." When one is preparing a Will, or other estate planning documents, one must always be asking, "What if . . . ?"

Moreover, Smith's Will illustrates the importance of periodic review. We strongly encourage our clients to contact us when important life

See **THE LESSONS OF ANNA NICOLE SMITH,** Page 2



In This Issue:

Berwitz & DiTata LLP

Winter 2007

Volume 4, Issue 1

THE LESSONS OF ANNA NICOLE SMITH, from Page 1

events occur, such as the birth or death of a loved one, in order to review the existing plan to ensure that it is still reflective of their wishes in light of the new circumstances. Indeed, we usually devote the lead article in the Spring issue of **A Step Ahead** to this theme.

Smith had three opportunities to reconsider the terms of her Will: when she learned she was pregnant, when she gave birth to Dannielynn, and when Daniel died. Either of the first two events should have been reason enough to reevaluate and revise. Perhaps she would have wanted Dannielynn to have the same protections that were spelled out for Daniel, a trust with three age distribution milestones. Without doubt, Smith's failure to address her failed estate plan now creates confusion where there should be certainty. And for this reason, Smith's estate will likely be played out in the tabloids over the months and years to come.

Let's take a lesson from Anna Nicole Smith. Let's make sure that our estate planning documents contain contingency planning - just in case the unthinkable happens - and let's make time to review. After all, you have only one estate plan, the one that is in effect now. Let's learn from Anna Nicole Smith that we have only one chance to get it right, so there is no excuse to delay meeting with your advisor. ◆

WHO SHOULD SERVE AS MY FIDUCIARY?

In general, a fiduciary is a person who has the power and obligation to act for another's benefit. Fiducaries include: an Executor named in a will, a Trustee, an Attorney-In-Fact under a power of attorney, and a Guardian of property.

Since your fiduciary will be responsible to carry out various and sometimes critical duties, depending on the document under which he or she derives authority (for example, in the case of an executor, collecting, valuing, protecting and, liquidating assets, paying bills, taxes and expenses, distributing assets and income), it is important to select the right person.

A fiduciary can be any person who is not an infant, incompetent, non-domicilary alien, convicted felon, or is unable to fulfill their duties because of substance abuse, dishonesty, recklessness or want of understanding. Select someone who is trustworthy, responsible, diligent, and willing to dedicate the time necessary to do a good job. In the best of circumstances, a fiduciary should be impartial, free of conflicts of interest and able to command the respect of your beneficiaries. While your fiduciary will be responsible for exercising care and judgment in carrying out your wishes, he or she need not have particular skills or training as professionals may be hired to handle the legal, tax, financial or other specialized requirements.

Often, our clients will designate a spouse or adult child to serve in a position of trust. Most of us believe that those with whom we are closest are more likely to know and understand how we make decisions and, for this reason, make the same decisions. Other family members, friends, business associates and professional advisers, such as accountants, attorneys or financial advisers with whom we have had long standing relations, may also be good candidates. Financial institutions, such as banks and trust companies, will also

See **MY FIDUCIARY,** Page 3

MY FIDUCIARY, from Page 2

agree to serve as executors and trustees in the right circumstances.

An individual who serves as your fiduciary may have greater sensitivity to the family issues at stake and may be more approachable and responsive to your needs and/or those of your beneficiaries. The advantages of a corporate fiduciary, on the other hand, are experience, expertise, permanence and impartiality. A corporate fiduciary is less likely to be influenced by pressure from beneficiaries. The selection of a corporate fiduciary may prevent "bad blood" caused by appointing one family member over another.

You may choose more than one fiduciary, but appointing more than two is not generally advisable as it may lead to complications and disputes. Having two fiduciaries may offer "the best of both worlds." You could combine the responsiveness and sensitivity of an individual with the permanence and professionalism of an institution. Co-fiduciaries might serve jointly, or have separately defined duties and functions. For instance, one may focus on investing, record keeping and accounting, while the other makes more personal decisions.

To some of us, choosing our successors - those who will step into the decision-making role when we no longer can - is easy. To others, the task of selecting the right fiduciary requires careful consideration and reflection. Please call on our services to assist you. Often, discussing your concerns with your legal advisor will clarify the issues and signal the solution. ◆

MISTAKES AND MISCONCEPTIONS

Estate planning, whether simple or complex, requires careful attention to details which, if overlooked or misunderstood, can undermine the plan's effectiveness. We will devote space in each issue to highlight common estate planning mistakes and misconceptions.

Holding assets in joint accounts with a spouse or loved one may not be an effective estate planning tool. For instance, although a joint bank account in the name of a parent and child may effectively transfer the amount deposited by the parent to the child upon the parent's death, in the interim, the funds in that account are subject to the debts and liabilities of the child. If the child is sued and has insufficient sums from which to pay an adverse judgment, the account can be attached, depleting funds which were to have been available, during the lifetime of the parent, for the parent's maintenance and support. If the child divorces, that account may fall subject to litigation tactics. Additionally, if only one child is named on the account, he or she may be unable or unwilling to fully effectuate the parent's wish to divide the funds in the account equitably with the other children without incurring tax consequences. This could lead to inequitable distribution. And if a parent creates an account naming multiple children as co-owners, and one child predeceases, the parent may unintentionally disinherit grandchildren! As far as the government is concerned, the funds held in a joint account are your funds. They are part of your estate for estate tax purposes and are considered yours as far as Medicaid eligibility is concerned unless it can be established that the assets were deposited by the other account owner. ◆

Berwitz & DiTata LLP

310 Old Country Road • Suite 101 • Garden City, NY 11530
Telephone: (516) 747-3200 • Facsimile: (516) 747-3727
Website: www.berwitz-ditata.com

TAX REMINDERS

If you have paid a premium on a long-term care insurance policy during 2006, the payment may be eligible for an income tax deduction if it is a "qualified" policy issued on or after January 1, 1997 or is a "grandfathered" policy purchased before that date. The payment will be treated as an "unreimbursed medical expense" and is deductible, on the federal return, to the extent that all unreimbursed medical expenses exceed 7.5 percent of adjusted gross income. New York State provides a tax credit of 20 percent for premiums paid on policies that qualify under federal law and meet certain New York minimum standards. Thus, it is important for you to advise your tax preparer of your long-term care insurance policy so you can determine if the premium payment is eligible for a deduction and/or credit.

Additionally, benefits received from a long-term care insurance policy in 2006 may be includable in your income. Benefits from "reimbursement type" policies, which pay for the actual services a beneficiary receives, are not included in income. However, benefits from "per diem" or "indemnity" policies, which pay a predetermined benefit amount per day regardless of the charges billed by the provider for services, are included in income to the extent that they exceed the beneficiary's total "qualified long-term care expenses" or $250 per day, whichever is greater.

If you transferred property or assets to an irrevocable trust during the past year, you may be required to file a gift tax return with your income tax return for 2006. It is important that your tax preparer or attorney review your gifts to determine whether a return is necessary. If so, you can elect to utilize some of your unified credit to avoid the payment of any gift taxes. Our clients are welcome to have their tax preparer call us with questions and we will also prepare their gift tax returns for a nominal fee. ◆

We Practice Preventative Law!™