

# A STEP AHEAD

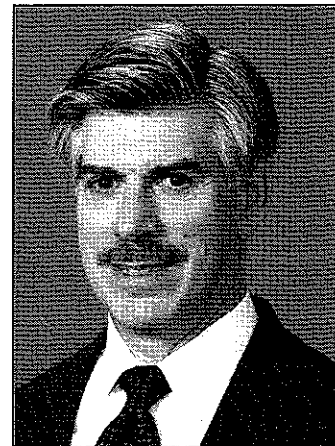
## **SPRING CLEANING - TIME TO REVIEW AND RENEW**

**T**ax season is over! Spring has sprung! It's time to "review and renew." It's time for the annual Berwitz & DiTata LLP "Review and Renew" program. Each spring, we encourage our clients, friends and "would be" friends to focus on estate planning, refresh those resolutions and stop procrastinating.

**If you have never created an estate plan, now is the time.** Although estate planning is a topic that some people find difficult, we are dedicated to helping clients identify and implement their estate planning objectives with ease and efficiency. We believe that our success is founded on this fundamental commitment to communicate with our clients in a caring and responsive manner. Those who have met with us in a one-on-one consultation know that we believe that everyone can benefit from estate planning regardless of personal income or net worth. Everyone has concerns regarding the future. For instance: How can I avoid probate and the dissipation of my assets to estate taxes? How can I avoid losing control of my assets if I become disabled? How do I protect myself and my family from devastating nursing home costs? How can assets be transferred if a relative is already in a nursing home? How can I protect my minor children? In designing strategies to effectuate our clients' goals, we offer detailed advice and a high level of technical expertise. Now is the time

to achieve estate planning peace of mind! Ask those questions, explore the options, get it done.

**If you created your estate plan, or reviewed it last, more than 3 years ago - now is the time.** Are your documents up to date? Have there been changes in the law or in your life that should now be considered? The documents that address the needs of a single person are frequently insufficient when he or she marries. If a couple has children, the appointment of a guardian should be a key factor in estate planning. Those documents that were created when the kids were small may no longer reflect their parents' wishes now that the kids have grown and flown. Indeed, once your child reaches the age of 18 years, he or she should have a valid and enforceable Health Care Proxy empowering you or another to make health care decisions. The "sandwich generation" is discovering that the joy and responsibility of raising children is all too frequently overshadowed by the illness of parents. The need for estate planning takes on new meaning as one approaches retirement and, if illness threatens, timing becomes more critical. Lifetime changes affect estate planning. Even if we can't imagine what changes in our lives could affect these important documents, an estate planning review is a vital element to ensuring that your wishes will be accomplished.



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# Berwitz & DiTata LLP

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# Berwitz & DiTata LLP

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Because Berwitz & DiTata LLP understands the importance of keeping the plan current, we offer our clients a unique value-added

component: a complimentary three-year review. For those who have not yet retained our services, there is a nominal fee

to review your plan. Let us help you realize your estate planning objectives. ♦

## THE PENSION PROTECTION ACT AND THE 529 PLAN

On August 17, 2006, President Bush signed into law the Pension Protection Act of 2006 ("PPA"). Among other things, the PPA made permanent several attractive provisions regarding Qualified State Tuition Programs, also known as "529 Plans," which were scheduled to expire on December 31, 2010. These Plans provide a terrific vehicle to save for college and graduate education.

Although 529 Plans are offered in all fifty states and there is no residency requirement for the establishment of a Plan, if a New York resident establishes a New York 529 Plan, the first \$5,000 of contributions each year may be deducted on the donor's New York State income tax return (\$10,000 for a married couple filing jointly). The earnings are also exempt from New York State income taxation when used for qualified higher education expenses. Income tax considerations aside, it is important to consider the best plan for your family as there are major differences among the various states' Plans.

Funds in a 529 Plan grow free from federal income tax and may

be withdrawn at any time to pay for higher education expenses such as tuition, fees, supplies, room and board (if certain requirements are met), books and equipment. Under the old law, income on funds withdrawn from a 529 Plan was taxed to the beneficiary at the federal level. Under the PPA, however, if funds are withdrawn to pay for higher education, including undergraduate or graduate school and approved trade, technical or other occupational training, they are not subject to federal income tax. If the funds withdrawn from a 529 Plan are not used for qualified educational expenses, the earnings will not only be subject to both federal and state income tax, but also a 10% penalty. This penalty will be waived if the withdrawal is occasioned by the death or disability of the designated beneficiary or, subject to certain limitations, if the designated beneficiary receives a scholarship.

If the named beneficiary decides not to pursue higher education or does not fully utilize the 529 funds, the account owner can name another member of the beneficiary's family as a

beneficiary to avoid income tax and the imposition of penalties. In fact, the account owner can change the beneficiary at *any time* and for *any reason* as long as the new beneficiary is a "member of the family" of the current beneficiary, a term which is very broadly defined and includes: the mother or stepmother, father or stepfather, grandparents, son, daughter, stepchildren, siblings or step-siblings, nieces or nephews, spouse or spouses of any of the above. The PPA permanently added first cousins to the list of eligible family members.

The PPA also made permanent the account owner's ability to roll an existing 529 Plan into a different 529 Plan every 12 months. Thus, the fund owner has the ability to change the way in which the funds are invested without actually being able to select individual investments. The rules regarding rollovers vary from state to state. A rollover from a New York Plan to another state's Plan could cause earnings and contributions to be subject to New York State income tax. From an estate planning standpoint, the funds contributed to a 529 Plan are

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generally not includible in the estate of either the donor or the beneficiary for federal estate tax purposes. Moreover, contributions qualify for the gift tax annual exclusion (\$12,000 in 2007). For a discussion of the gift tax annual exclusion, see the Fall 2006 issue of **A Step Ahead**, page 3. As an incentive to establish 529 Plans, and to maximize the potential growth of the account, the donor can "pre-fund" the 529 Plan by immediately utilizing five years of annual exclusion amounts (\$12,000 x 5 = \$60,000, \$120,000 for a married couple) in any one year provided that no further gift is made to that same beneficiary during the next four years. However, if the account

owner dies before the year he could have utilized an annual exclusion, the "unearned" annual exclusions are brought back into his taxable estate.

It is very important to coordinate gifts to a 529 Plan with other annual gifting. Thus, for instance, in addition to annual exclusion gifts, you are entitled to pay tuition expenses for your loved ones if the payment is made directly to an educational institution. Unlike annual exclusion gifts, in order to qualify for this "non-taxable" gift, these payments can not be made directly to the student. Payments for fees, supplies, room and board, books and equipment also do not qualify

for this treatment, although they may be paid directly to the student and qualify as an annual exclusion gift. Therefore, you may consider utilizing a 529 Plan to pay for non-tuition type expenses and paying tuition bills directly to the educational institution to take advantage of both types of non-taxable gifts.

The changes promulgated by the PPA make 529 Plans an attractive way to save for your loved one's higher education expenses. When you consider establishing a 529 Plan, please do not forget to take into account its overall impact on your existing estate and asset protection plans. ♦

## **PHL SECTION 4201**, from Page 4

appointment, the statute creates a priority among the survivors of a decedent as follows: (1) the decedent's surviving spouse, (2) the decedent's surviving domestic partner, (3) any of the decedent's surviving adult children, (4) either of the decedent's surviving parents, (5) any of the decedent's surviving adult siblings, (6) a court appointed guardian, and (7) the duly appointed fiduciary of the decedent's estate.

The statute provides a definition of "domestic partner." It can be established by a domestic partnership entered into pursuant to the laws of the

United States or any state, local or foreign government. The parties can be registered as domestic partners with any registry maintained by the employer of either party. The decedent or the surviving partner can be someone who is or was recognized as a beneficiary or covered person under the other's employment benefits or health insurance. Domestic partnership can also be established where there is or has been a relationship of dependence or mutual interdependence for support, as evidenced by a totality of circumstances, including but not limited to: common

ownership or joint leasing of real or personal property, common householding, shared income or expenses, children in common, signs of intent to marry or become domestic partners, or the length of the personal relationship between the parties.

The new statute provides a new tool for ensuring that our wishes are carried out and preventing conflict among our loved ones. If you would like more information about this type of planning, please do not hesitate to contact us. ♦

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### **PUBLIC HEALTH LAW SECTION 4201 - DISPOSAL OF A DECEDENT'S REMAINS**

All too often, disputes arise within a family regarding the disposition of a decedent's body - whether to cremate, bury or inter it, where to bury or how to otherwise dispose of the remains. It does not matter whether the dispute is between a second (or later) spouse and the children of an earlier marriage, between a domestic partner and the decedent's family, or among the decedent's children. The one common thread in all of these situations is that, instead of promoting closure, the disagreements and lingering hard feelings associated with this last decision create emotional distress.

Until recently, New York's laws did not adequately address the problems involving the disposition of a decedent's remains. Public Health Law §4201, which became effective on August 2, 2006, now addresses these issues.

Most significantly, this new law allows each of us, during our lifetime, to designate, in writing, a person who will carry out our wishes regarding the disposal of our remains. The written instrument must be signed by both the person whose directions it contains and the agent, and properly witnessed by two independent witnesses.

The document can designate a successor agent in the event that the agent whom you have appointed dies before you, resigns, or otherwise fails or refuses to carry out your wishes. It can also provide special funeral or burial instructions, specify whether you wish to be buried or cremated, name the funeral home which you would like to utilize, and describe the type of funeral service that you wish. In short, it can be as explicit as you feel is necessary.

The agent designated will have authority to direct and decide where and how to dispose of our remains. Absent an

See **PHL SECTION 4201**, Page 3

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