

AUTUMN 2009 NEWSLETTER

Estate Tax Repeal is Only a Few Months Away (Maybe)

The existing federal estate and gift tax laws were last revised comprehensively in 2001. For 2009, the current estate tax laws provide for an estate tax exemption amount of \$3.5 million. This means that, assuming no taxable gifts were made during one's life, an individual can leave \$3.5 million of assets free of estate tax in 2009. Under the existing laws, the estate tax is scheduled to be repealed entirely for 2010, and then return in 2011 at which time the exemption amount is scheduled to drop back to \$1 million.

Although estate tax repeal once seemed like a merely theoretical and unlikely result, the passage of time and the lack of legislative action in this area have created a situation where estate tax repeal is now a real possibility.

Of course, Congress could (and very well may) change the tax laws in the meantime. Ever since the new laws were enacted in 2001, Congress has considered numerous proposals to either repeal the estate tax permanently or to provide for revised estate and gift tax laws for the years 2010 and beyond. At this time, it is impossible to determine what provisions any new legislation would include. However, action (or inaction) by Congress may affect a number of individuals' existing estate plans.

No matter what the future holds for the estate tax, we are available to advise you with regard to your particular planning needs.

Colorado's Long-Term Care Insurance Program

This summer the state has partnered with the U.S. Department of Health and Human Services to help Coloradoans start planning for their long-term care (LTC) needs under the *Own Your Own Future* campaign. The program encourages residents age 45-65 to purchase LTC partnership insurance in order to protect more of their assets for potential Medicaid qualification purposes.

LTC services generally include nursing facilities and home/community-based services necessary for a chronic disease, serious accident, sudden illness or cognitive impairment such as Alzheimer's disease. LTC services differ from traditional medical care in that the focus is on maintaining a patient's quality of life rather than improving the patient's medical condition. Thus, LTC services are typically not covered by Medicare and other types of health insurance. However, LTC services are provided by Medicaid, which is only eligible to qualifying low income and low net worth individuals.

For Medicaid eligibility purposes, in addition to other requirements, an individual must have less than \$2,000 of non-exempt assets (e.g., cash, stocks, bonds, non-residential real estate, etc.). This means that an individual applying for Medicaid might have to "spend down" excess assets in order to be eligible for Medicaid.

Under the new program, every dollar of benefits that is paid out from a *qualifying* long-term care insurance policy can also be protected (i.e., disregarded for Medicaid eligibility purposes) if a policy holder later chooses to apply for Medicaid. For example, an individual who is currently ineligible for Medicaid could purchase a qualifying \$200,000 LTC insurance policy. Later, if LTC services are required and the \$200,000 LTC insurance benefits are exhausted, the individual may subsequently qualify for Medicaid (to thereafter continue LTC services) if he or she has less than \$202,000 of non-exempt assets. In other words, for every dollar that a *qualifying* LTC insurance policy pays out in benefits, a dollar of personal assets can be protected (i.e., disregarded during the eligibility review and at estate recovery) if the policy holder chooses to apply for Medicaid. Thus, the program allows Coloradoans to plan for their future LTC needs without depleting all of their assets to pay for LTC.

Stover & Spitz LLC can assist with many elder law needs and, to the extent a matter is outside of our area of expertise, we can refer you to an LTC insurance agent or other professional who can better assist you.

Bigger Estate Tax Exemption Means Fewer Estate Tax Returns

As the estate tax exemption has risen, the number of federal estate tax returns has been dropping. The IRS reports as follows:

Year	Returns Filed	Exemption
2001	108,071	\$1 million
2007	38,031	\$2 million

The estate tax return audit rate is nearly eight times that for individual income tax returns.

The estate tax exemption amount for 2009 is \$3.5 million, but that may change soon.

See the back page for more about the future of federal estate and gift tax laws.

2009 Colorado Legislative Update

Although the state's financial worries may have dominated the most recent session of the Colorado General Assembly, the legislature also addressed a number of estate planning related topics in 2009. The following is a brief summary of two important new Colorado laws concerning estate planning matters:

The Colorado Uniform Power of Attorney Act (CUPOAA)

On April 9, 2009, Governor Ritter signed CUPOAA into law, which will govern many aspects of the agency relationship created by a power of attorney. The stated intent of CUPOAA was to balance: (a) the need for individuals to be able to create an agency relationship that will be honored by third parties; and (b) the need to protect the principal (*i.e.*, the person signing the power of attorney), and particularly an incapacitated principal, from financial abuse by his or her agent.

CUPOAA updates much of the language from the prior power of attorney act to take into account technological developments, such as electronic transfers that the agent may undertake, and modern types of business entities, such as limited liability companies (LLCs) that the principal may be involved with. CUPOAA also makes revisions with respect to those powers which must be specifically granted if the principal wants the agent to have such powers, including, but not limited to:

- Gifting;
- Creating or changing rights of survivorship;
- Creating or changing a revocable trust;
- Creating or changing a beneficiary designation; and
- Exercising the rights a principal has to act on behalf of a partnership or LLC.

CUPOAA is effective January 1, 2010, but most of its provisions are retroactive and will therefore apply to existing powers of attorney. In light of this new legislation and the fact that other circumstances may have changed, please let us know if you would like us to review your existing power of attorney documents and advise you as to whether any revisions may be desirable.

The Colorado Designated Beneficiary Agreement Act (CDBAA)

On April 9, 2009, Governor Ritter also signed CDBAA into law. Effective July 1, 2009, CDBAA allows any two competent adults who are not married to enter into a "designated beneficiary agreement" which can grant each party one or more certain rights, including, but not limited to, the following:

- the right to be covered under the party's health insurance plan (if the party's employer provides coverage for designated beneficiaries as dependents);
- the right to visit the party in health care facilities, such as hospitals and nursing homes;
- the right to receive notice of the withholding or withdrawing of life-sustaining procedures for the other party;
- the right to have priority for appointment as the other party's conservator, guardian, or personal representative;
- the right to inherit property through intestate succession if the other party dies without a valid will;
- the right to have standing to sue for wrongful death of the other party; and
- the right to direct the disposition of the other party's last remains.

Under CDBAA, a party can grant or withhold any one or more of the enumerated rights to or from his or her designated beneficiary. In addition, to be valid, the designated beneficiary agreement must be signed and acknowledged by both parties and it must be recorded with the County Clerk and Recorder of the county in which one of the parties to the agreement resides.

It is worth noting that virtually all of the rights granted under CDBAA could previously (and still currently can) be addressed by an individual's other estate planning documents including, but not limited to, a will, living will, powers of attorney and a Health Insurance Portability and Accountability Act (HIPAA) authorization. More importantly, a beneficiary designation agreement pursuant to CDBAA does not control over any conflicting "superseding legal document," regardless of when such legal document was executed.

Please also note that, with respect to many of the rights granted, a designated beneficiary agreement alone is not sufficient to grant the rights recited in the agreement. Additional documents, such as deeds or beneficiary designation forms, will need to be prepared in order to carry out all of the desires expressed in the designated beneficiary agreement. Therefore, individuals who wish to enter into a designated beneficiary agreement must coordinate their agreement with their other estate planning documents in order to ensure that the intended rights and powers will actually be granted to a designated beneficiary.

★ ★ ROLL CALL ★ ★

Thomas L. Stover attended the summer American College of Trust and Estate Counsel (ACTEC) meeting in San Francisco in June, where he is active with the Practice Committee. He also attended the Colorado Bar Association's Trust and Estate Section's annual retreat in Snowmass the same month. Tom is currently working on a continuing legal presentation this fall entitled "Asset Protection for the Common Man." In addition to numerous bicycle rides (including two century (100 mile) rides) this summer, he celebrated his brother's completion of all of the Colorado peaks over fourteen thousand feet by climbing Pike's Peak from the trailhead in Manitou Springs with him on July 22. This required a hike of 13 miles and 7,400 vertical feet. Tom completed climbing all 54 of Colorado's fourteens in 1997, but he still enjoys revisiting them!

Jennifer M. Spitz recently joined National Academy of Elder Law Attorneys, Inc. (NAELA).

NAELA is a professional association of attorneys who are dedicated to improving the quality of legal services provided to seniors and people with special needs. This summer Jennifer volunteered to help build a Habitat for Humanity house in her hometown of Santa Fe, New Mexico. Her son, Christopher, accompanied her and "helped" with the groundbreaking.



David H. Brantz has been accepted into the inaugural Boulder County Leadership Fellows Program. The program, which is funded in part by a \$375,000 grant from the John S. and James L. Knight Foundation, works to enhance the participants' leadership skills, while broadening their professional networks and building trust between the various Boulder County communities. The fellows are a diverse, cross-sector group that will explore the challenges facing Boulder County while learning from established community leaders and each other.