

# estate planning newsletter

spring 2012

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**Our 2012 newsletter** focuses on practical issues you or loved ones may face and (for once) includes no long article about taxes. Your preferences concerning end of life care are the most personal part of your planning, so we've included an article about some planning tools you may consider. Individuals considering serving as trustees or wrestling with choosing trustees should enjoy the article written from the first person perspective of a novice trustee. Our work with our firm's robust family law practice led to a useful article on estate planning and divorce.

## Our discussion of taxes is brief, but important:

2012 is the final year for the high \$5M lifetime estate, gift and generation-skipping tax exclusions. This is a "one-time offer" from Uncle Sam: the tax exemptions drop to \$1M in 2013 under the current law, *unless Congress changes the law again*. The high exemptions and the expectation that asset values will increase present a unique opportunity for clients to make large wealth transfers to their families and reduce their future taxable estates. If you are considering significant wealth transfers, please talk to us soon. We expect the end of 2013 will be very busy for our team.



*"I'd like to congratulate you on dying with dignity."*

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## AHCDs, DNR Orders, Living Wills, POLSTs, .....

**What does it all mean?** We routinely recommend that each estate planning client complete an Advance Health Care Directive (AHCD), appointing an agent to make health care decisions for the client if he is unable to make those decisions himself. Beyond providing the form and having a brief discussion with the client about the choice of agent, the key decisions to be made on the form, and who should receive copies of the AHCD, we do not spend much time discussing that aspect of the estate plan. In light of increasing public attention to health care matters, especially issues relating to end-of-life care, we want to expand on that discussion by providing an update about AHCDs and telling you more about ways to ensure that your wishes about your care are implemented.

**What is an AHCD?** Its most basic function is to state your end of life health care instructions in writing. If the document also allows you as the "principal" to name a person as the "agent" to carry out those instructions, it is also a power of attorney for health care.

**What form of AHCD should I use?** The California Health Care Decisions Law authorizes the use of AHCDs and includes a form that meets the requirements of that law. Using that statutory form is not required. Our firm provides the California Medical Association's version of the form to its clients because the CMA form is more readily accepted by health care providers than other forms. AHCDs signed in another state are accepted in California if the non-California AHCD is valid under the law of the state where it was signed.

**HIPAA:** The Health Insurance Portability and Accountability Act of 1996 (HIPAA) required the adoption of national standards to protect the security and privacy of certain health information. If you signed your health care directive prior to 1996, it may not include proper authorization for your agent to access your medical information if necessary. If you need to update your AHCD, you may download the CMA form from our firm's website [hogequenton.com](http://hogequenton.com).

**How can I make my AHCD more useful to my agent?** The CMA form of AHCD gives the principal two options to guide the agent in making "end of life" decisions:

1. Do not prolong my life if I have an incurable and irreversible condition that will result in my death in a relatively short period of time, or I become unconscious and it is reasonably medically certain that I will not regain consciousness, or the risks and burdens of treatment would outweigh the expected benefits OR
2. Prolong my life as long as possible within the limits of generally accepted health care standards.

No matter which option is selected, the form directs that treatment for pain relief be provided at all times, even if it hastens death.

However, whichever option you select, unless you and your named agent talk in detail about what your wishes would be in specific situations or unless you attach more explicit directions to your AHCD, the agent must make an educated guess about your wishes. In the January 29, 2012 edition of the San Jose *Mercury News*, reporter Lisa Krieger described how difficult it was for her as her elderly father's agent to make decisions about his care at each step of his treatment at the end of his life. Here's a link to the article, which generated many responses from readers who had faced the same challenges: <http://tinyurl.com/mercurynewsstory>.

### Who should have copies of my AHCD?

We suggest that you keep the original document in a safe place, known to your agent, and that you provide copies to your agent, your primary care physician, to a hospital at the time you are admitted for treatment, and perhaps also to those named as successor agent in the AHCD and close family members who are not named as agent. The California Secretary of State maintains a registry of AHCDs. You may obtain a registration form and information about how to register at <http://www.sos.ca.gov/ahcdr>. Only limited information about your AHCD is made available on that website, including the fact that you have signed such a form and the name and contact information of your agent. That information is provided only to health care providers and others you authorize to receive the information.

**POLST Forms.** Even though California law provides that health care providers are not subject to civil or criminal liability for honoring your wishes, as conveyed by your agent, some providers remain concerned about the risks of

terminating life-sustaining treatment when the patient lacks capacity. If you are seriously ill or have been diagnosed with a terminal illness and you are concerned that health care providers, including emergency responders such as EMTs, firefighters, or paramedics, may not honor your decisions in an emergency situation, you should ask your physician about completing a POLST form (Physician Orders for Life-Sustaining Treatment). This form is similar to, but more extensive than, a Do Not Resuscitate (DNR) form. A POLST form is completed and signed by your physician, based on discussions with you or with your agent. The form converts your wishes about resuscitative and life sustaining measures in an emergency into medical orders that must be followed by persons involved in your treatment. For example, a POLST may direct that emergency medical care employees are not to attempt to resuscitate you (a DNR order) or may direct that you are to be transported from your home to a hospital only if your comfort needs cannot be met in your home.

A POLST does not replace an AHCD; it complements it and applies primarily when emergency care is required. California law does provide that if the orders in a POLST are inconsistent with directions in the patient's AHCD, the POLST orders will control. So, it is important that your agent know if your physician has completed a POLST form for you.

## Responsibilities of a Trustee.

We represent trustees who are administering a trust after the death of the person who established the trust or administering irrevocable trusts such as a life insurance trusts or an education trusts.

**So what does a trustee face?** Read on:

Wow -- I've just been named a trustee. I guess it makes sense -- Mom and Dad always did like me best and I am a smart, savvy professional, so taking on the role of trustee for the trust they set up for me and my siblings should be no problem at all. Okay, now what?

Reading the trust document seems like a good first step. Let's see, it mentions the "trust estate" which seems to mean the assets in the trust that shall be "administered" by the trustee (me) under the terms of the agreement. It looks like determining what the assets of the trust actually are is a good place to start. I have some idea of what Mom and Dad owned, but how do I make sure I have the complete picture? Plus, do I need to know what debts they had and do I continue to pay the liabilities? Okay, a few early questions, but I should be able to figure it out.

Once I figure out what the assets are, then what? Do I need to do anything with the title to the assets, put them in my name, and prepare any transfer documents? How do I get complete access to accounts and assets held at various banks and financial institutions? I suppose I can figure it all out with some phone calls and enough time.

In thinking about the debts, do I have to give notice to creditors, file any tax returns, or make estimated tax payments? The questions really seem to be piling up, and no easy answers are apparent.

Now I'm also realizing that one of my duties as trustee is to provide an accounting to the beneficiaries of the trust. I talked to an accountant who told me that an accounting is a report of the trust's assets, its income and expenses, and sales of assets for a defined period of time. Wow, that sounds like a lot of work. I guess I should make sure to maintain careful financial records and copies of everything, just in case.

Well, since I am related to the beneficiaries and the trust was set up by Mom and Dad, I should get some sort of a break, right? A quick Google search seems to indicate that no matter my relationship to the others involved in the trust, I am still going to be held to standards set under California law. I am a fiduciary -- a person who holds a position of trust -- meaning I have legal duties that I must follow as stated in the document and the California Probate Code. Do I actually need to read the Code to make sure I comply with all the standards? What happens if I make a mistake?

Okay, most important, I suppose I can just pay money out to myself and my siblings when we need money or it seems like a good time to do so. The trust indicates that I, as trustee, have absolute discretion to pay or apply sums of income for the benefit of a beneficiary if I determine it to be necessary for the beneficiary's proper health, education, support or maintenance. Well, what exactly does that mean? And how closely do I have to follow that instruction? Things quickly seem to be getting quite complicated....

**The role of a trustee is unlike anything most people have encountered before.** The best and most prudent first step is to contact an attorney whose practice focuses on trust preparation and trust administration. Having an advisor with the knowledge and skills necessary to help navigate through the many potential landmines is the best thing a trustee can do when placed in that unfamiliar role. The professionals in the Estates and Trusts Group at Hoge Fenton are here to help ensure your success as a trustee. We also represent trustees in disputes with beneficiaries (and vice versa).

## Divorce? Don't forget about your estate plan.

The plans you and your spouse made for distribution of your assets at death may change when you become single, and your estate plan must change with them. Revoking a trust created during marriage and creating a new estate plan, remembering to change the beneficiaries of your life and disability insurance plans after your divorce is finalized, and revoking your Advance Health Care Directive and Durable Power of Attorney and executing new ones are essential estate planning actions you should consider when preparing for a divorce or during the divorce proceedings.

The freedom you have to make changes to your estate plan ends once a Petition for Dissolution of Marriage is filed. That's because the day you file the Petition certain restraining orders known as Automatic Temporary Restraining Orders or ATROs go into effect against you, which prevent you from taking any action that changes your family's financial status quo. The purpose of the ATROs is to protect each spouse against the other spouse hiding or disposing of assets or removing a spouse and children from a spouse's insurance policies or retirement plans once a dissolution case is opened. These ATROs must be taken seriously because the penalties for violating them can be severe. Nevertheless, you can protect your estate even if you find yourself in the middle of divorce proceedings without having done any pre-planning.

Despite the ATROs, you can revoke the trust you and your spouse created during marriage if your spouse agrees. Revoking your joint trust and creating a new estate plan that would provide for a distribution of all your assets you received in a property settlement are prudent and important actions you should consider. Why? Because if you fail to revoke your trust and you die before the divorce is final, the terms of your trust created during marriage will be honored and your spouse will receive what you intended him or her to receive if you had remained married. If you revoke your trust but fail to execute a new estate plan, your estate may be administered pursuant to the intestacy laws. Those laws specify who will receive your assets if you were to die without a will or trust. In many cases, that would be your spouse, or it might be your spouse and your children. But, what if your children are minors? They may receive their share of your estate without any safeguards as to how it is managed and distributed after they reach age 18. There may be many other unintended consequences of relying on the intestacy laws. Your best bet is to first revoke your trust created during marriage and then create a new estate plan to take its place.

**Post-divorce clean up.** Your divorce is finalized; now what? Protect your estate by taking the following actions:

- change the beneficiaries of all accounts for which your former spouse is named as the beneficiary
- if you have not done so already, revoke your Advance Health Care Directive and Financial Power of Attorney if your former spouse is named as your agent, and execute new ones
- if you have not done so already, revoke your will or trust created during marriage and execute a new estate plan
- if real or personal property was divided pursuant to your divorce, take all steps necessary to make sure your former spouse's name is removed from title to any property that was awarded to you

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Contact Hoge Fenton's Estate Planning and Family Law Groups for assistance in reviewing your estate planning options before and after a Petition for Dissolution of Marriage is filed and for assistance in complying with the ATROs.

# about hoge fenton's estates & trusts group.

Hoge Fenton's estate planning and tax attorneys offer practical and proactive approaches to the issues you face, both in estate planning and estate or trust administration matters. Through the breadth and depth of our attorneys' experience, we can offer you creative solutions to tax and non-tax problems. We believe it is important to listen to you and work with you to implement your personal and family goals and values. We believe that the best estate planning attorneys are those who offer their clients solid legal, tax, and business experience, as well as non-legal skills as counselors and advisors.

We can help you with:

- personal estate planning
- closely held business planning
- estate and trust administration
- trust and estate litigation



Should you have a question about anything contained in this newsletter, or any other issue, please feel free to contact:

## estate planning




**J. Timothy Maximoff**  
Chair, Estates & Trusts  
and Taxation  
408.947.2437 direct  
jtm@hoge fenton.com



**Janice W. Fox**  
408.947.2488 direct  
jwf@hoge fenton.com



**David S. Howard**  
408.947.2447 direct  
dsh@hoge fenton.com



**Robert J. Browning**  
408.947.2411 direct  
rjb@hoge fenton.com

## trust & estate litigation



**David W. Mitchell**  
408.947.2495 direct  
dwm@hoge fenton.com



**Steven D. Siner**  
Managing Shareholder  
925.460.3374 direct  
sds@hoge fenton.com



**Denise E. Chambliss**  
925.460.3364 direct  
dec@hoge fenton.com



**Paul W. Breen**  
408.947.2442 direct  
pwb@hoge fenton.com

*If you would rather receive an electronic copy of this newsletter and other Hoge Fenton announcements, please send your name and email address to Patty Blanquies at [pvb@hoge fenton.com](mailto:pvb@hoge fenton.com)*

Silicon Valley Office  
60 South Market Street, Suite 1400  
San Jose, CA 95113  
408.287.9501

Tri-Valley Office  
4309 Hacienda Drive, Suite 350  
Pleasanton, CA 94588  
925.224.7780

[hoge fenton.com](http://hoge fenton.com)

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