

The Advanced Planner

A Compendium of Ideas and News for Clients and Friends of Zell Law



ZELL LAW
Estate & Business Planning

Key points of interest:

- Your revocable trust may need updating in order to take advantage of trust code rule changes.
- Trust beneficiaries have default rights, however, these rights can be waived.
- Trustees have greater decision making authority and responsibility.

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The Virginia Trust Code

Introduction

21 states have adopted the Uniform Trust Code including the Commonwealth of Virginia and the District of Columbia. The main purposes of the Uniform Trust Code are to: (i) unify laws among the states; (ii) enable states to have clear and precise rules on trusts; and (iii) provide individuals with a readily available source for determining their state's law on trusts. Before the adoption of the Uniform Trust Code by Virginia and D.C., trust law was scattered throughout the state statutes in several titles. Today, the information on trusts is located in one chapter.

This article focuses on the unique provisions of the Virginia Uniform Trust Code ("VUTC"). Because the VUTC applies to trusts created before, on or after July 1, 2006, Virginians

should be aware of its basic rules. Most of the rules are actually default rules meaning that the trust instrument can either waive them or provide a different set of rules. It is only when the trust instrument is silent that the VUTC default rules will apply. In certain situations, creators of trusts prior to July 1, 2006, may want to update their revocable trust in order to take advantage of the new rules or to waive certain default rules. The VUTC provides few mandatory provisions regarding the creation of the trust, the requirement of good faith, the enforcement of the spendthrift provisions (protection against creditors), and the court's powers regarding modification and termination of the trust, the responsibility of the trustee and legal fees. The main innovations of the VUTC are the following:

Trust Certification

The trustee can provide to any institution a one page trust certification instead of a full copy of the trust document. In this document, the trustee certifies the validity and existence of the trust and can limit the specific provisions for the particular purpose of the certification.

Beneficiaries' Rights

The rights of the beneficiaries are better protected under the VUTC. With the new legislation, a beneficiary can request a copy of the trust instrument at any time. The trustee has the duty to inform certain beneficiaries regarding the administration of the trust and is required to provide an annual report to all of the beneficiaries of the trust. The trustee has to notify the beneficiaries within 60 days

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Around the Water Cooler ...

Blueprint for Wealth moves to WFED 1500 AM

Saturdays 7:30AM-8AM

Starting December 6th, the Zell Law very successful and informative *Blueprint for Wealth* radio show can be heard on Saturdays from 7:30-8:00AM on 1500 AM. The show helps

listeners realize their *personal dreams of wealth and freedom* by discussing how to design and implement estate and business plans to fit their needs.



New Zell Law Employees

We are extremely pleased to announce that **Janet L. Kuhn, Esq.** has joined the firm as Senior Of Counsel. Janet is known throughout the country as a leader and expert in the areas of Elder Law and Elder Estate

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- Trustee fees can be reduced by the court if specific instructions have been provided by the grantor in the trust instrument.
- Pet owners may create trusts to provide for the care of their pets after they are gone. The bequest should be an amount reflecting the actual cost of care of the pet.
- Trusts are generally protected against creditors, but there are exceptions such as for child or spousal support.

- Unmarried couples may gift one another \$12,000 per year or use their lifetime gift tax exemption to make transfers to a partner.
- Use of life insurance, trusts, powers of attorney and health care directives can help make estate planning for unmarried couples less difficult.

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of any of the following events: (i) a new trustee has agreed to serve; (ii) the trust has become irrevocable; and (iii) the method or rate of the trustee's compensation has changed. These provisions are default rules and can be waived in the trust instrument. For instance, during the life of the grantor and when the grantor serves as a trustee, the grantor may want to waive certain requirements regarding information, accounting and reporting.

Trustee's Powers

The VUTC allows the trustees to delegate certain of their functions. Now, a decision can be made by the majority of trustees instead of by unanimous consent. The trustee can terminate a trust when its value is under \$100,000. The trustee can also combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the rights of the beneficiaries and the accomplishment of the trust purposes are not impaired. The trustee can better settle disputes without the court's involvement because the VUTC permits the virtual representation of certain beneficiaries such as minor, incapacitated,

unborn, or unascertained persons by family members or by another beneficiary. All these powers will make the trustee's life easier. On the other hand, the court keeps tight control on the fees of the trustee. The court can reduce or increase the trustee's fee even if specific instructions have been provided by the grantor in the trust instrument.

Regarding the investment duty of the trustee, the requirement to invest prudently may be waived by the grantor. This flexibility does not prevent liability of trustees, who are required to always act in good faith. Trustees cannot use exculpatory clauses (which would waive liability for acting in bad faith or with reckless indifference), but they can have beneficiaries consent to the conduct so that the trustees can be protected from further liabilities on that conduct.

Pet Trusts

Before the adoption of the VUTC, the law treated pets as tangible personal property. While Americans spend over \$36 billion per year on their pets, and many pet owners consider their pets as family members, any arrangements for the care of the pets upon the death or incapacity of the owner

were unenforceable. Now, pet owners can create a trust for the care of their pets, but they are not allowed to simply bequeath their entire estate to their pets. The court has the power to reduce the bequest to an amount "required for the intended use." The creator of the pet trust should keep a record of the calculation of the cost of care of the pet in order to justify the amount of the bequest. It is particularly important for pets with a long life expectancy, such as Macaws, which can live up to 80 years.

Protection against Creditors or Spendthrift Provisions

Like most states, Virginia recognizes trust protection against creditors and sets certain limits to that protection. In general, creditors cannot request that the trustee make a distribution to the beneficiaries when the trust is irrevocable and the trustee who is not the grantor has discretionary powers. As an exception to the spendthrift protection, a trustee may be compelled to pay support to a child or spouse or former spouse of the beneficiary.

If you would like to learn more about the Uniform Trust Code of Virginia or D.C. or take advantage of the new provisions,

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Estate Planning for Unmarried Couples

Introduction

In today's world where statistics show that more individuals are not getting married, federal and state laws in large part still favor marriage, particularly the tax laws. For couples who choose not to get married or for whom marriage is not recognized, but are in a committed relationship, basic planning options often are not available. Nonetheless, unmarried cou-

ples do have some alternatives when it comes to achieving their estate planning goals.

Challenges couples face

Under our current transfer tax system, transfers that are made between a husband and a wife qualify for the unlimited marital deduction for estate and gift tax purposes. For unmarried couples, the marital deduction is not available. This means that

any transfer between unmarried couples during their lifetimes may be subject to gift tax and that upon the death of the first partner, estate tax may be due depending on the value of the decedent's estate.

To avoid these consequences, unmarried couples can make use of annual exclusion gifts. Currently an individual may gift up to \$12,000 per person per

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year. However, unmarried couples cannot gift split, that is they cannot gift up to \$24,000 per person per year, but do retain some of the benefit of using annual exclusion gifts. Another way to avoid gift taxes is for unmarried couples to utilize their lifetime exemption from gift tax, currently \$1 million per person, to make transfers to their partner.

Another difficulty that unmarried couples face is that, although holding their assets as joint tenants with rights of survivorship will avoid probate and is the easiest manner in which to transfer assets to the survivor, 100% of the value of those joint assets generally is included in the estate of the first to die. This result will occur with any asset including the jointly held personal residence. In addition, the survivor has the burden of proving how much he or she contributed to the joint asset in order to reduce the value included in the decedent's estate. For unmarried couples that have been together for years, it may be next to impossible to

produce such records unless they were maintained from the beginning.

Finally, in matters of financial, health care and post-mortem decisions, a 'non-family' member may be excluded from the decision-making process unless specified in the proper legal documents.

Planning opportunities unmarried couples may consider

If an unmarried couple has a taxable estate and since the couple would be unable to make use of the unlimited marital deduction on the death of the first to die, then life insurance may be an option for their estate plan. Each person could obtain a life insurance policy on the other to replace assets that are used to pay any estate tax or to cover any debts of the decedent. The couple will have to show an "insurable interest," that is that the death of his or her partner will cause financial loss or create a legal liability (e.g., to assist in covering the mortgage on a jointly held residence).

Remember, life insurance is included in calculating the value of a decedent's estate. Therefore, in a taxable estate situation, a couple should consider either purchasing the life insurance policy through or assigning the policy to an irrevocable life insurance trust. The trust would be for the benefit of the survivor. If certain provisions exist in the trust, then it is possible to exclude the death benefit received from the life insurance from the decedent's estate and the survivor's estate.

Some couples may want a simpler plan that provides for their partner, but ultimately distributes to other family members or children from previous relationships. In this scenario, unmarried couples can create revocable trusts where they appoint their partner as a co-trustee or successor trustee as well as a beneficiary. A revocable trust creates the greatest flexibility for unmarried couples as the creator of the trust is able to control what happens to his or her assets following death. Moreover, a revocable trust can be named as beneficiary of a life insurance policy so that the

proceeds from such policies would be distributed according to each partner's wishes and not outright. A revocable trust can also avoid probate and provide for the grantor's incapacity. For example, if the decedent owned a home and wanted to permit the survivor to live in the home after his or her death, but ultimately the home would pass to other beneficiaries, then the decedent could state these wishes in a revocable trust and have the trust own the home.

Importantly, if unmarried couples want their partner to make financial, health care or post-mortem decisions on their behalf, then each partner should have the necessary powers of attorney and health care directives in place so that a partner is included in these decisions.

If you have questions about this article, please do not hesitate to contact Catherine at extension 103 or catherine@zelllaw.com or Wayne at extension 101 or wayne@zelllaw.com.

- **Catherine F. Schott Murray, Esq.**

Around the Water Cooler...

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Planning. Janet pioneered the use of revocable living trusts in Virginia and had her own practice for almost twenty years. To say that Janet adds depth and vision to Zell Law's Elder Law section would indeed be an understatement.

Just as exciting is the addition of **Yahne Miorini, Esq.** as Of Counsel. Yahne practices in the estate planning, international estate planning, estate administration and elder law sections of Zell Law. Yahne serves on a

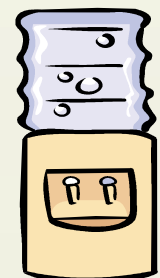
regular basis as *Guardian ad litem*, and advises guardians and conservators. She is a frequent lecturer and has authored numerous articles on a variety of estate planning topics. Yahne was raised in France and, following extensive travel, she settled in McLean, Virginia, with her husband David, and their two children. She is active in her community as a parent liaison for her children's school.

We are also pleased that **Kathy Bentley** has joined the firm as our Client Liaison and Marketing Manager. Kathy comes to

Zell Law after running the local chapter of the Muscular Dystrophy Association for several years. Her pleasant, friendly manner combined with her marketing and management experience make her the optimal *Director of First Impressions* for Zell Law. Kathy and her husband Scott live in Reston and are very involved in the lives of their four teenage children.

Finally, we are proud that our legal assistant of two years, **Barbara Hippe**, has joined our growing ranks as a full-time Assistant Paralegal. Barbara assists in the annual administration of irrevoca-

ble life insurance trusts, funding of revocable trusts, corporate recordkeeping and maintaining our extensive legal library. Barbara lives in Oakton with her husband and their two active boys.



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please contact Yahne Miorini at extension 102 or at yahne@zelllaw.com. Please see below for Yahne's next seminar on this subject.

- **Yahne Miorini, Esq.**

Trust Code Law in Virginia

On October 28th, **Yahne Miorini, Esq.** participated in the teaching of this seminar presented by Lorman Educational Services for legal and financial professionals. Among other important topics, Yahne discussed trust formation, trustee and fiduciary responsibilities and conflicts of interest in light of the new trust law in Virginia.

Educating and Being Educated in Our Community

Zell Law Breakfast Briefings

Catherine F. Schott Murray, Esq. of Zell Law hosted a well-attended breakfast briefing in September for financial advisors on the topic of *Estate Planning for Unmarried Couples*. A summary of the material is provided on page 2 of this issue of the Advanced Planner.

Our breakfast briefing on **November 19th, 7:45–9 AM**, will be hosted by **Wayne Zell** and will cover: **What You Need to Know About Asset Protection Planning**. As Wayne points out, "many clients live in states that do not fully asset protect IRAs, and even clients in those states that do risk moving to a state that does not provide an IRA with complete protection from creditors. With more and more wealth placed in IRAs and quali-

fied plans, many clients are concerned about protecting this significant asset. With proper planning, you can asset protect IRAs and qualified plans. In this seminar, we will teach you the steps you can take to protect these valuable assets."

If you are an accountant, financial advisor or financial planner and interested in attending, please contact Kathy Bentley at extension 100 or at kathy@zelllaw.com.

Dulles Chamber of Commerce

Catherine F. Schott Murray, Esq. and **Jordan Nowak, Esq.** regularly represent Zell Law at area Dulles Chamber events. The Chamber represents many of our business planning clients and Zell Law is proud to have an active membership.

Fairfax Bar Association

Catherine and Yahne attended the recent **Estates and Trusts** Section Luncheon which included an update on the use of reverse mortgages in estate planning.

Zell Law Takes Charge Cards

For your convenience, Zell Law now accepts credit cards for payment of invoices. For further information on this service, please contact **Lorri Zell** at lorri@zelllaw.com.



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