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The Pasternak & Fidis Reporter

Pasternak & Fidis, P.C.
7735 Old Georgetown Road
Suite 1100
Bethesda, Maryland
20814-6183
301-656-8850
Fax: 301-656-3053
www.pasternakfidis.com

Your Own Private Foundation– The Easy Way

by Nancy G. Fax

You don't have to be Bill Gates to have your own grantmaking foundation. With as little as $10,000 in cash or stock, you can establish your own family fund housed at the Montgomery County Community Foundation (MCCF) or, if you're not a resident of Montgomery County, at a community foundation where you live.

Your family fund, known as a donor-advised fund, will feel much like a private foundation, but without the expense, administrative burdens and restrictions that come with private foundations. A number of Pasternak & Fidis clients have established donor-advised funds with MCCF and have reported being very satisfied with this easy alternative to a private foundation.

How does it work? To set up your own family fund you simply sign a two-page agreement with MCCF. You choose a name for your fund, which may include your family name or, if you prefer, may reflect the charitable purpose of the fund. You choose the most tax advantageous assets to donate (cash, stock, real estate, etc.) and you decide how you would like your fund invested. You can recommend to MCCF that your fund be invested with any money manager you know and like, or you can choose one of MCCF's investment portfolios. You receive a full income tax deduction upon creation of your fund and additional income tax deductions each time you add to your fund.

After your fund is established, any time you want to make a donation, you let MCCF know of your wish. Following a quick due diligence review of your request, a grant award letter and a check are sent to your selected charity, naming your fund as the donor.

MCCF houses over 50 donor-advised funds, ranging in size from $10,000 to several million dollars. Each fund tells a wonderful story of an individual, family or business in the county who has chosen to be philanthropic. Some are memorial funds, honoring the lives of loved ones who have passed on. Some donors set up funds for the purpose of getting their children or grandchildren involved in the philanthropic process. Cumulatively, since MCCF was launched eight years ago, these funds have given away more than $10 million to a wide array of nonprofit organizations in the county, in the region and beyond - anywhere the donors want to give.

With the approach of the end of the year, this might be a good time to consider charitable giving in general and the use of a donor-advised fund as the vehicle for your charitable giving in particular.

To learn more, contact Pasternak & Fidis partner Nancy Fax, who is the Chair of the Montgomery County Community Foundation and who houses her donor-advised fund at MCCF. MCCF is a regional affiliate of the Community Foundation of the National Capital Region, headquartered in Washington, D.C. To visit MCCF on the web at its parent foundation's website, go to www.cfncr.org/mccf.

Pasternak & Fidis, P.C.
Attorneys at Law

7735 Old Georgetown Road
Suite 1100
Bethesda, MD 20814-6183
(301) 656-8850
Fax: (301) 656-3053
www.pasternakfidis.com

Business, Real Estate & Commercial Transactions Group
N. Alfred Pasternak
Mitchell I. Alkon
Roger A. Hayden, II
J. Michael Conroy

Divorce & Family Law Group
Anne (Jan) W. White
Linda J. Ravdin
Vicki Viramontes-LaFree

Estate Planning & Administration Group
N. Alfred Pasternak
Marcia C. Fidis
Nancy G. Fax
Patrick M. Schoshinski
Lauren D. Krauthamer

Litigation & Dispute Resolution Group
Mitchell I. Alkon
Roger A. Hayden, II
J. Michael Conroy

FREQUENTLY ASKED QUESTIONS

About Premarital Agreements

by Linda J. Ravdin

What is a premarital agreement?

A premarital agreement is a contract entered into by a couple who plan to marry. It determines their rights regarding property and support when the marriage ends—whether by death or divorce. Some premarital agreements provide that each party will keep all money earned and property acquired before or after marriage; in other words, what's his is his and what's hers is hers. Other agreements provide for each party to keep pre-marital and inherited property and for property acquired through their efforts during the marriage to be shared. Some agreements provide for one spouse to make transfers of cash or property to the other spouse or provide for alimony for a dependent spouse in the event of divorce.

I am planning to get married? Do I need a premarital agreement?

Every married couple has a premarital agreement. State laws provide certain property rights for a surviving spouse after the first spouse dies. State laws also provide for division of property if the parties divorce and for support for spouses who are unable to support themselves. In that sense, state law is the parties' agreement. Today it is increasingly common that couples choose to write their own agreement to meet their own objectives and reflect their own values rather than to allow state law to determine their rights at death or divorce.

My fiancé(e) and I just got our degrees and neither of us has any assets or expects to inherit any. Should we have a premarital agreement?

Most young couples in this situation do not really need a premarital agreement. However, every young couple considering marriage can benefit from talking about some of the same issues that are generally covered in a premarital agreement. For example, they might discuss their views about whether they will pool their income and share all the fruits of their labor, or whether a party wants to maintain separate bank accounts and control his or her income. They might also discuss what they each would consider fair if the marriage did not work out. Most people getting married do not discuss money matters until after they get married; sometimes they find out too late that their ideas about money are quite different.

My fiancé(e) asked me to sign a premarital agreement. Doesn't that mean he/she does not trust me?

Not really. There are many reasons a couple considering marriage may want a premarital agreement. A party may wish to favor children of a prior marriage in his or her estate planning. The surviving spouse's rights make that difficult without a premarital agreement. In fact, a pre-marital agreement can improve family relationships when a stepparent enters the picture by giving children the peace of mind of knowing that their inheritance expectations remain intact. In some cases both parties have children and assets from a prior marriage. A premarital agreement can allow them each to provide for their own children regardless of which of them dies first. Even when a party has no children, he or she may want an agreement to have the right to direct assets to his or her family rather than have them go to a spouse's nieces and nephews. When there is a family business, the party, and his or her family members, may feel a premarital agreement is necessary to protect the business in the event of a death or divorce. With the high incidence of divorce, even hopeless romantics must recognize the risk of failure. When a party has been married and divorced he or she may be reluctant to marry again without a premarital agreement. For many couples it is better to acknowledge the possibility of divorce and agree on a fair division of property in advance if things do not work out for them than to take their chances with the courts.

Are premarital agreements only for the very rich?

Not at all. Moreover, with the huge appreciation in real estate and the tremendous value many workers have in their retirement plans, many

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Family Limited Partnerships In Estate Planning

The Impact of the Hackl Case

by Lauren Krauthamer

A Family Limited Partnership (FLP) can be a useful tool in estate planning. An FLP can enable family members to transfer wealth to the younger generation with significant tax and non-tax benefits. However, as a result of a 2002 U.S. Tax Court case this tool requires careful planning to be effective.

Under § 2503(b) of the Internal Revenue Code, every U.S. citizen can give up to $11,000 per year (the "annual exclusion amount") to an unlimited number of recipients without having to pay gift taxes. The donor must file a gift tax return to report any gift that exceeds the annual exclusion amount. (No gift tax will be due unless the donor has used up his or her $1 million gift tax exemption.) In order for a gift to qualify for the annual exclusion the recipient must receive a present interest, not a future interest, in the gifted property. A present interest is an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property.

For years gifts of FLP interests were thought to qualify for the non-taxable annual exclusion. However, in 2002, the U.S. Tax Court and then the U.S. Court of Appeals for the Seventh Circuit ruled against taxpayers A.J. and Christine Hackl. The Courts upheld the IRS's contention that the Hackls' gifts of interests in a limited liability company (similar to an FLP) were future interests and therefore not eligible for the annual exclusion.

Despite the ruling in *Hackl*, using gifts of limited partnership interests as an estate planning tool is still possible. Some of the approaches that taxpayers can take in gifting limited partnership interests include the following. First, taxpayers can avoid the *Hackl* problem and satisfy the present interest requirement in order to make gifts of partnership interests eligible for the annual gift tax exclusion by giving the beneficiaries of the FLP interest a "put right". A put right is typically a thirty-day window of time during which the beneficiaries can demand a withdrawal of their interest in the entity or request the fair market value of their interest in the entity in cash. The beneficiary's ability to demand cash creates a present interest and qualifies the gift for the annual exclusion. A disadvantage of a put right is that the valuation discount on the interest may be lowered (which taxpayers prefer to be high) because the beneficiary has the ability to realize the current value of the interest within a definite period of time.

Another approach is to avoid the *Hackl* issue altogether by making gifts that are larger than the annual exclusion amount. As noted above, as long as the gifts do not exceed the donor's $1 million lifetime gift tax exemption, no gift tax will be due.

Even with the challenges presented by *Hackl*, making gifts of FLP interests can still be a useful estate planning tool, provided the transfers are done correctly.

This article was adapted from a longer paper written by Lauren Krauthamer which won second prize in the American College of Trust and Estate Counsel (ACTEC) Mary Moers Wenig Student Writing Competition. The full text of the paper is available at the ACTEC website: www.actec.org

What You Sh

By N. Alfred Pasternak

Everyone has the right to make personal decisions about health care, and doctors are required to get your consent before treatment. But what if you can no longer decide? Anyone can wind up hurt or sick and unable to decide about medical treatments. An advance directive speaks for you if you cannot. It is a useful legal document for an adult of any age to plan for health care. While no one is required to have an advance directive, it is smart to think ahead and make a plan now. If you don't have an advance directive and later you cannot make decisions for yourself, then your next of kin will make health care decisions for you. But even if that's who you want deciding for you, an advance directive can make things easier for your family and help prevent arguments among family members about your care.

What can you do in an advance directive?

An advance directive allows you to decide whom you want to make health care decisions for you if you cannot. You can also use to it say what kinds of treatments you do or do not want, especially the treatments often used near the end of a person's life.

1. *Health Care Agent.* This is a person you name to make decisions about your health care. (This is also sometimes called a "durable power of attorney for health care," but, unlike other powers of attorney, this is not about money.) You can pick someone in your family or almost anyone else you want. This person has the authority to see that doctors and other health care providers give you the type of care that you want, and that they do not give you treatment against your wishes. Pick someone you trust to make these kinds of serious decisions and talk to this person, to make sure he or she understands and is willing to accept this responsibility.

hould Know about Advance Directives

2. *Health Care Instructions.* These instructions let providers know what treatments you wish to have or not have. (Sometimes this is also called a "living will," but it has nothing to do with an ordinary will about property.) Examples of the types of treatment you might decide about are:
    a. Life support — such as breathing with a ventilator;
    b. Efforts to revive a stopped heart or breathing (CPR);
    c. Feeding through tubes into the body;
    d. Medicine for pain.

How do you prepare an advance directive?

1. Begin by talking things over, if you want, with family members, close friends, your doctor, and a religious advisor. Many people go to a lawyer to have an advance directive prepared. You can also get sample forms yourself from many places, including medical, religious, aging assistance, and legal organizations. There is no one form that must be used. You can even make up your own advance directive document.

2. To make your advance directive valid, it must be signed by you in the presence of two witnesses, who will also sign. In some states, certain persons may not serve as witnesses. These include beneficiaries under your will, health care providers and others who may have a financial relationship with you. You should give copies of your advance directive to those named in the document. Copies are just as valid as the original.

When would your advance directive take effect?

Usually, your advance directive will take effect when your doctor determines that your are not capable of making a decision about your care.

Can you change your advance directive?

Yes, you can change your advance directive at any time. The most recent one will control.

An advance directive can make things easier for your family and help prevent arguments among family members about your care.

PASTERNAK & FIDIS, P.C.

NEWS

Pasternak & Fidis welcomed J. Michael Conroy to the Firm as a Partner in early July, 2004. Mike has been in practice in Montgomery County for over 30 years and brings substantial litigation, mediation, business and real estate experience to the practice. He is the President-Elect of the Maryland State Bar Association (MSBA) and will assume the Presidency of MSBA in June, 2005. Look for an in-depth profile of Mike Conroy in the next *P & F Reporter.*

Marcia Fidis stepped down as Managing Partner of Pasternak & Fidis, P.C. in August, 2004 after 18 years of service. She remains active in the Firm both in Bethesda and her Easton, MD office. Nancy Fax has taken on the role of Managing Partner.

P & F Managing Partner Nancy Fax became the chair of the Montgomery County Community Foundation (MCCF) on April 1, 2004, having served as a member of the board for several years. MCCF is the regional affiliate of the Community Foundation for the National Capital Region, headquartered in Washington, D.C. (See our article in this issue, *Your Own Private Foundation – The Easy Way,* for more information on MCCF).

P & F Partner Linda Ravdin was re-appointed for a second term as chair of the Publications Board of the American Bar Association (ABA) Family Law Section.

Associate Vicki Viramontes-LaFree has been elected to the American Inns of Court, Montgomery County. This prestigious organization is dedicated to enhancing the professionalism, skills and ethics of the legal community through regular programs and discussions.

In September, 2004 Nancy Fax participated in a panel on the Uniform Trust Code at the Mid-Atlantic Regional Meeting of the American College of Trust and Estate Counsel (ACTEC), and she spoke on the same topic to the Montgomery County Bar Association (MCBA) in October, 2004.

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FREQUENTLY ASKED QUESTIONS

About Premarital Agreements

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middle class people have substantial assets to protect. One reason even people of modest means may want an agreement is to decide in advance how assets accumulated during the marriage will be handled in the event of divorce or when the first spouse dies. Deciding such matters in advance, before a breakdown in the relationship, can significantly reduce legal fees for divorce and can give both parties peace of mind.

My fiancé(e) and I plan to have children. Can I get a premarital agreement that says that if we get divorced we will have joint custody and we will share the children's expenses equally?

No. A premarital agreement cannot prevent a court from deciding custody and determining the parties' obligations for support of their minor children.

I want a premarital agreement. When should I broach the subject with my fiancé(e)?

As soon as possible after deciding to get married, before booking the caterer or putting down a large deposit for a honeymoon cruise. Unfortunately many people procrastinate because they are uncomfortable bringing up the subject. The longer the party who wants the agreement waits, the more difficult it becomes. It is also unfair to the other party to delay; delay may make it difficult for him or her to obtain competent counsel and to negotiate the terms. Unfairness breeds unhappiness and that is not a good way to begin a marriage. Ideally the parties should have 3 or 4 months to consider and negotiate the terms of agreement.

What are the requirements for a valid premarital agreement?

First, both parties must enter into the agreement voluntarily. Second, both parties should make a fair disclosure of their assets and income.

Won't the agreement be thrown out by a judge if both parties do not have lawyers?

No. There is no requirement that both parties have lawyers in order to create a valid premarital agreement. However, it is a good idea for both parties to have independent legal advice. Independent counsel for the weaker party can negotiate for better terms than may have been proposed originally and can make sure he or she understands how the agreement will affect his or her rights.

We both agree that we want a premarital agreement and we know what we want in it. Can we go to the same lawyer for our premarital agreement?

No. Even when a couple sees eye to eye on what should go in their premarital agreement, each of them should get independent advice. A premarital agreement alters the rights a spouse will have if the marriage ends in divorce or when the first of them dies. Sometimes an agreement that seems fair at the outset may have unexpected consequences. Each party should receive independent advice about the rights they would have without an agreement and how the agreement might affect them later. Each should get advice about any additional terms that he or she should consider.

Aren't premarital agreements easy to break?

Not any more. There once was a time when courts considered whether an agreement was fair to the weaker party before deciding whether to enforce it. This type of paternalism is no longer permissible. If the parties entered into the agreement voluntarily and with disclosure of assets, the court will uphold it and enforce it according to its terms. The court will enforce the agreement even if it is quite unfair to one party. This is one reason it is so important that both parties have independent counsel; independent counsel can make sure the weaker party understands that he or she cannot change the terms of the agreement later unless the other party agrees.

I am considering a premarital agreement. What should I do next?

The first step is to gather your financial information — i.e., a list of assets and liabilities and amounts and sources of income — and to give some thought to what you want to accomplish. The second step is to have a consultation with an attorney to discuss your objectives, ask questions and obtain legal advice.

Should I go to my estate planning attorney or to the attorney who handled my divorce for my premarital agreement?

Premarital agreements involve both estate planning and divorce planning. Because both disciplines are involved, the estate planning attorneys and the domestic relations attorneys of Pasternak & Fidis work together on these important documents.

Linda J. Ravdin is the author of *TM 849 Marital Agreements* (Tax Management, Inc. 2003), a guide for attorneys to negotiating and drafting premarital agreements. She is also the author of *Premarital Agreements: Trends and Recent Developments*, 15 Divorce Litigation 21 (February 2003). Copies of the latter article are available upon request. Please call Mary Tsai at extension 428 if you would like a copy.

The following Pasternak & Fidis partners are experienced in the negotiation and drafting of premarital agreements:

Divorce & Family Law Group:
Anne (Jan) W. White; Linda J. Ravdin

Estate Planning & Administration Group:
Marcia C. Fidis; Nancy G. Fax

PASTERNAK & FIDIS, P.C.

NEWS

Marcia Fidis participated as a faculty member on a distinguished panel that met in early September, 2004 on the new Maryland estate tax legislation signed by the Governor in May. This was an advanced seminar for attorneys offered under the auspices of the Maryland State Bar Association (MSBA), Section of Estate & Trust Law, the Maryland Institute of Continuing Professional Education for Lawyers (MICPEL) in cooperation with the University of Maryland School of Law and the University of Baltimore School of Law.

Nancy Fax participated as a panelist on the *Hot Topics in Estate Planning* panel at the annual fall meeting of the American College of Trust and Estate Counsel (ACTEC) in Pittsburgh, PA in October, 2004.

Partners Marcia Fidis and Linda Ravdin presented a program on estate and dissolution planning for domestic partners to employees of America Online (AOL) in May, 2004.

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