

# Divorce:

## *When Fighting Makes Things Worse, Should You Mediate*

By Anne (Jan) W. White

**D**ivorce ranks as the most traumatic experience in a person's life next to the death of a child or spouse. Divorce hits especially hard because each spouse not only loses the marital relationship, but also risks losing financial security and time and influence with his or her children. The former spouse becomes an adversary who makes competing demands for the remaining things most valued by the couple. Traditional divorce law has encouraged divorcing couples to fight it out to divide these things of value. Mediation encourages a different approach to disentangling family and financial relationships in a divorcing family. The goal is to make the parting as gentle as possible as the couple separates their finances and learns new ways of co-parenting.

Traditionally, divorcing parties have chosen attorneys to put forth their case and attempt to obtain as much of the couple's resources as possible. In other words, the attorney's job was to win for the client, with the result that the other spouse lost. When parties went to court, clients and attorneys alike lost the ability to control the costs and the outcome. For most clients, the lack of control and the unpredictability of a judge-imposed outcome added to the client's anxiety. However, since divorcing parties were often hurt and angry, they were vulnerable to the temptation to hire an attorney who encouraged aggressive tactics to achieve victory over the other spouse.

The cost of such tactics is high. If custody or complicated financial issues are involved, hotly

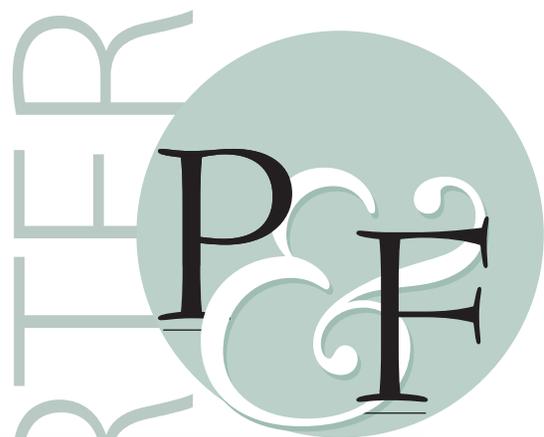
contested divorce litigation can cost each party \$100,000 or more, substantially depleting the family's financial resources. When there are children, the antagonism generated by litigation can cause serious deterioration in the parties' abilities to co-parent.

Recognizing the limitations and the expense of the traditional process, couples have in the last 20 years increasingly turned to mediation as a way to avoid the cost and hostility associated with litigation. Mediation can assist divorcing couples to reach an agreement between themselves, privately and informally. It is one way parties can attempt to resolve their differences out of court. The goal is a fair written agreement that resolves all issues arising from the marriage: custody, child and spousal support, property division and allocation of debts, among others. When all issues have been settled, and a written agreement signed, the parties can pursue a relatively cheap and quick uncontested divorce.

Mediators and parties who have participated in mediation generally agree on the following advantages of mediation:

- Shorter time to reach agreement;
- Substantial cost savings;
- Costs usually paid out of marital funds or otherwise split equally;
- More flexibility for couples to design their own agreement;
- Solutions and remedies that a court cannot order;

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Pasternak & Fidis, P.C.

7735 Old Georgetown Road

Suite 1100

Bethesda, Maryland

20814-6183

301-656-8850

Fax: 301-656-3053

www.pasternakfidis.com

**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  
M. Bradley Blommer

**Divorce & Family  
Law Group**

Anne (Jan) W. White  
Linda J. Ravdin  
Vicki Viramontes-LaFree  
Jennifer J. McCaskill

**Estate Planning &  
Administration Group**

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Lauren D. Krauthamer

**Litigation & Dispute  
Resolution Group**

Mitchell I. Alkon  
Roger A. Hayden, II  
M. Bradley Blommer

# The New HIPAA Privacy Rules and Your Estate Planning

by Geoffrey M. Christian

**T**he Health Insurance Portability and Accountability Act of 1996 (HIPAA) allows workers to continue their health insurance coverage when their employment changes or terminates. Congress recognized that these new rights would lead to an increase in electronic transmissions of employee health-care information by health plans and health-care providers. Congress directed the issuance of privacy regulations that would govern the exchange of information to protect a patient's right to have health information remain confidential.

The privacy rules of the HIPAA legislation took effect on April 14, 2003. The rules apply to virtually every health-care provider in the nation, including doctors, hospitals and custodial care facilities. The rules state that health-care providers must make "reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request." The rules also impose stiff penalties, including fines and/or imprisonment, for health-care providers who violate the disclosure rules.

Consultants to the health-care industry have stressed to health-care providers the "minimum necessary" directive of the HIPAA. The result has been medical providers who are afraid that they will be fired by their employers, or worse, fined and jailed, if they inadvertently release health-care information to an unauthorized person. This has caused a chilling effect on the release of health-care information by medical staff to persons who are legitimately authorized to receive such information.

This development concerns estate planning attorneys. First and foremost, health-care providers may refuse to accept health care powers of attorney that authorize agents to receive health-care information. This could render health care powers of attorney difficult, if not impossible, to use. The privacy rules could have a similar impact on the "disability" provisions found in many other types of estate planning documents, including trusts, wills and general (financial) powers of attorney.

Fortunately, it appears that a standard medical

records release (the language found in most health care powers of attorney, general powers of attorney, etc.) is sufficient to comply with the HIPAA legislation. Unfortunately, there is a possibility that a health-care provider may not recognize such a release unless the language is specially tailored to the new HIPAA privacy rules. In other words, the medical industry, in its confusion about the new rules and to avoid all possible avenues of liability, may refuse to honor the documents unless there is certain easily recognizable "safe harbor" language.

In view of these developments, some estate planning attorneys have suggested that, at the very least, the release provisions in all health-care powers of attorney be revised to include HIPAA-specific language that will allay the fears of medical professionals and allow health care agents immediate, hassle-free access to medical records.

"Springing" general powers of attorney (*i.e.*, powers of attorney that take effect only upon the principal's incapacity as determined by one or more physicians) may create additional problems. A person cannot become an agent under a springing power of attorney until a required showing of incapacity has been made. However, in the usual case, a person does not have access to medical records until that person has become the agent. Similar problems could arise with successor trustees who are to assume the duties of trustees upon the incapacity of the predecessor trustee. The successor trustee must be able to prove incapacity as provided in the trust agreement, but may not be able to do so if he/she has no access to such information. One possible solution is to draft the document to require an incapacitated trustee to furnish proof of capacity upon request and, if such trustee is unable to furnish the proof, the designated successor trustee automatically becomes the trustee. Another possibility is to state in the instrument that any fiduciary who takes office agrees to the release of his or her medical records in connection with the assertion by an interested person that the fiduciary has become incapacitated.

If you would like one of our attorneys to review your estate planning documents in the context of the new HIPAA privacy rules, please contact us. ●

# Real Estate FAQ's

By Mitchell I. Alkon

**A**lthough the refinance boom has ended, interest rates remain low and, as a result, mortgage refinancing continues. Additionally, the quantity of purchase and sale transactions appears to remain constant. The following are some frequently asked questions in these types of matters:

**Q 1.** *I am refinancing and my lender tells me I need to purchase title insurance. Didn't I already do this?*

Title insurance insures that title to the property is vested in the owner subject to certain defined exceptions and restrictions. If you purchased a title insurance policy when you bought your property, the insured on that policy are you (i.e. - Owners Title Insurance) and your current lender (i.e. - Lender's Title Insurance). Since you will have a new lender when you refinance, a new policy must be issued naming the refinancing lender as the new insured.

Although your title might have been "good" when you bought the property some years or even months ago, subsequently there could have been liens or judgments entered against you, easements granted, or a home equity loan secured. Your new lender will want to make sure its security interest in your property is valid and protected, so a title search will be run and a new lender's title insurance purchased. The good news is that, if a title insurance policy was previously issued within ten years of your refinance, you might be eligible for a discount on the title insurance premium.

**Q 2.** *I am selling investment property in Maryland. I am a nonresident of the State of Maryland and the settlement attorney tells me he will have to withhold part of my proceeds to apply to my Maryland income tax obligations. Is this true?*

Yes. A new law became effective on October 1, 2003 which requires all instruments of conveyance (i.e. - deeds, assignments of lease, and any other documents that change ownership on the assessment records of the State

Department of Assessments and Taxation) to include a statement of the seller's net proceeds. The State of Maryland will withhold 4.75% of the net proceeds (7.0% if the seller is an entity) to apply to the seller's Maryland income tax obligation at the time of the recording of the instrument. The seller will be exempt from this

**Although the refinance boom has ended, interest rates remain low and, as a result, mortgage refinancing continues. Additionally, the quantity of purchase and sale transactions appears to remain constant.**

withholding if he executes a certification that he is a resident of Maryland or that the property was his principal residence as defined in section 121 of the Internal Revenue Code. Additionally, the seller can apply to the Comptroller's Office for a full or partial exemption for other reasons.

**Q 3.** *My significant other and I (we are not married) are purchasing a home together. How should we take title?*

The choices are joint tenants with a right of survivorship or tenants in common. There is another form of ownership called tenants by entirety, which also provides for survivorship, but that is only for a married couple.

With a joint tenancy, if one of the co-owners dies then the other automatically becomes the sole owner by survivorship. Thus, if A and B own as joint ten-

ants with a right of survivorship and A dies, then B becomes the sole owner, even though A left his estate by will or intestacy to C. With tenants in common, each tenant owns an undivided interest in the property that passes by devise or intestacy. In the above example, if A and B owned as tenants in common, then

upon A's death his interest passes to C. A variety of issues may arise when unmarried individuals, including same sex domestic partners, purchase real estate, i.e. - what if one owner wants to sell and the other doesn't, what if one owner supplied the down payment, how is the equity shared if an owner is added to title, etc. We strongly recommend that the owners enter into an equity sharing agreement prior to or at the time of their purchase or the transfer of any interest so each party's rights and responsibilities will be clearly determined. Pasternak & Fidis, P.C. can assist in the drafting of this document.

**Q 4.** *My loan officer promised me a 5.5% interest rate but the Truth In Lending Statement ("TIL") he gave me recites a rate of 5.53%. Why is this?*

A TIL indicates the Annual Percentage Rate ("APR") over the life of the loan. To prepare this federally mandated document the lender must treat certain fees and costs as interest. As such a 5.5% interest loan with points and loan fees will cause the APR to increase over 5.5%. The higher the fees and costs the higher the APR, and the greater the variance between the APR and quoted interest rate. Additionally, if your loan is adjustable, the lender will have to make certain assumptions to determine the APR for



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the life of the loan. For example, if you are securing an interest rate that is fixed for the first five years then adjusts every year thereafter, (i.e. - a "5-1 ARM"), you will know, at closing, the interest rate payments for the first five years but not thereafter. To determine the APR the lender will, for year six, presume that your interest rate index will be the same rate as at the time of closing and determine the adjustments accordingly. Thus, for an adjustable rate loan, the TIL's APR may not bear much resemblance to the actual interest rates in effect during the term of the loan.

Mitch I. Alkon, as an agent of a national title insurance company, conducts real estate closings for residential and commercial properties. Mr. Alkon contributed written materials for a seminar on title law in the District of Columbia that was presented to attorneys and real estate professionals on December 9, 2003. ●

- Opportunity for each party to tell his or her side and be listened to;
- Diminished polarization and hostility;
- Greater likelihood of compliance with the parties' obligations under the agreement.

The mediator - unlike an arbitrator - has no power to make or force an agreement. Only the parties can do that. Consequently, the mediator has no more ability to assist and direct the parties than they give him or her. There is no required training or certification for mediators, although many have received mediation training. Nor is there an educational requirement, although most are either attorneys or mental health professionals. Like attorneys, mediators vary in their preferred approach.

There are couples who should not mediate. If there is an extreme imbalance in power in the relationship and the weaker party lacks an

attorney who can compensate, there is a risk that the weaker party will be bullied into acquiescence. If either or both parties are intransigent on issues, or follow the advice of an attorney who is intransigent, mediation is unlikely to be successful. On the other hand, if parties come to mediation with an open mind, willingness to listen and a motivation to reach an agreement, they often will be successful.

At Pasternak & Fidis, P.C., we recognize that there is a more respectful way to "fight" for a client:

- to pursue the client's financial security but not at the cost of the remaining good feelings and family relationships and
- to pursue a fair deal that does not take advantage of the other party.

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## Real Estate Settlement and Closing Services

**D**id you know that Pasternak & Fidis, P.C. can close your next purchase or refinance transaction? As your title agent, we will order title searches and survey, draft HUD 1 settlement sheets, and issue title insurance policies.

Our fixed fee charges are reasonable and competitive and, with over 20 years of experience, we will provide the same first-class service and counsel that our firm is known for in the Washington metropolitan area.

Whether in Maryland, DC or Virginia, tell your real estate agent or lender that you want to use Pasternak & Fidis, P.C. as your closing agent in your next purchase or re-finance. ●

## PASTERNAK & FIDIS, P.C.

# N E W S

**Nancy Fax will be a speaker at several upcoming programs on the Uniform Trust Act of 2003, which recently was enacted by the District of Columbia Council. Nancy will speak at the D.C. Estate Planning Council on February 19 and at the D.C. Bar on February 25 and March 23. Nancy was actively involved in the enactment of the Uniform Trust Act in the District of Columbia and is now working on enactment in Maryland. An article summarizing the Uniform Trust Act will appear in a future edition of the newsletter.**

**Linda Ravdin was noted as one of the DC area's best divorce lawyers in the February, 2004 issue of *Washingtonian Magazine*. The article, "Breaking Up Isn't Hard To Do," states that "No lawyer in Washington is more up to date on the making and breaking of prenuptial agreements than Ravdin."**

**Nancy Fax has been elected as Chair of the Montgomery County Community Foundation. Her term begins in April, 2004. She has been on the board of the MCCF for several years and has been serving as Chair of the Professional Advisors Council of the Foundation.**

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# Selecting A Trustee

By N. Alfred Pasternak

Once you and your estate planning attorney have determined that a trust should be part of your estate plan, you need to consider selecting the trustee. Your trustee, if an individual, will most likely be a family member, friend, business partner or professional advisor (attorney, accountant, investment advisor), or, if a corporation, a financial institution that is able to provide trust services.

This article will outline some of the more practical, common-sense issues to be considered, but will not address tax issues that often play a role in the selection of a trustee.

## Some of the questions you need to ask yourself when considering an individual to serve as trustee of your trust are:

1. Is the person honest, reliable, likely to exercise good judgment and be fair and impartial?
2. Is the person coping with any major personal problems?
3. Does the person know and care about the beneficiaries of the trust?
4. Is the person familiar with your philosophy and desires?
5. Does the person have a conflict of interest that might affect his or her decision making?
6. Will the person command the respect of the beneficiaries?
7. Will the person be available to tend to the business of the trust and be responsive to the beneficiaries' requests?
8. Does the person have the experience and sophistication to perform the duties of a trustee and to obtain the necessary investment, legal and accounting assistance?
9. Does the person have an appreciation of the detail necessary to handle the record-keeping, accounting and reporting requirements?
10. Does the person recognize the potential personal liability for failing to live up to the duties of trustee?

When you are considering a person to act as trustee, it makes sense to discuss with him or her what it means to be a trustee. You will want to determine if the person is reasonable, has good communication skills and that there are no interpersonal problems with the beneficiaries. In the course of the discussion, you should

take the time to explain what you expect regarding investments, distributions to the beneficiaries and the general administration of the trust.

The person whom you want to serve as trustee should explain how he or she expects to operate the trust and whether or not the person expects to receive a fee for acting as trustee.

## The person should also have some familiarity with or will need to learn the duties of a trustee. Among the duties are:

1. The duty to understand the terms of the trust and be willing to carry out the terms.
2. The duty to furnish information to and communicate with the beneficiaries.
3. The duty to perform the job of trustee with skill, care, prudence and diligence.
4. The duty to avoid conflicts of interest between the trustee's personal interests and those of the beneficiaries of the trust.
5. The duty to take control of and protect the trust property.
6. The duty to keep the trust property separate from the trustee's or anyone else's assets.
7. The duty of impartiality when making investment and distribution decisions.
8. The duty of confidentiality as regards the terms of the trust and the trust beneficiaries.
9. The duty to keep accurate records of the trust assets, liabilities, receipts and disbursements.
10. The duty to provide the beneficiaries with complete and accurate information relating to the trust property and to permit them to inspect the books, records and other documents relating to the trust.
11. The duty to provide an annual accounting to the beneficiaries of the trust property, liabilities, receipts and disbursements.
12. The duty to invest trust assets appropriately.

The likelihood of a successful relationship among all those involved with the trust will be maximized by a careful consideration of these matters and a frank discussion between you and your trustee. ●

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At Pasternak & Fidis, P.C., we see the divorcing family in human terms. The spouse we represent has many more years ahead of dealing with his or her former spouse, particularly when there are children. Moreover, quality of life is not very high for a divorcing spouse whose primary goal is revenge and who is engaged in "take no prisoners" litigation. We encourage our clients to take the high road whenever possible and to expect the best of the other spouse and his or her attorney. When both spouses and attorneys take this approach, the marital assets can be saved for the family, and there is a gentler parting with less damage to the individuals. We encourage our clients to look at their situation this way. When our clients are provided resources to plan their own financial future, they can choose their life goals, rather than focusing on the harm they can do to their spouse.

Even when clients have embarked on contested litigation, it is not too late to mediate if they have an open mind and a desire to settle. Clients sometimes come to this point when they get tired of seeing litigation costs escalate. At that point, their motivation to settle is high. We look for this point in contested litigation. We do not always succeed. Sometimes the hostility of one party is too great or an opposing attorney favors scorched earth litigation over other approaches. In those cases, we have no choice but to meet the challenge. But we recognize that this is rarely the best outcome for the client.

We seek the client centered outcome whenever possible, and we strongly believe that mediation can provide this for many of our clients. Talk to us about how we can best assist you to use mediation to achieve your goals. ●

## PASTERNAK & FIDIS, P.C.

# NEWS

Vicki Viramontes-LaFree and Jennifer McCaskill, Associates in the Divorce and Family Law Group, serve as volunteers for the District of Columbia's Family Court Self-Help Center (SHC) which is located at D.C. Superior Court. Their role as SHC volunteers is to provide legal assistance to unrepresented parties with divorce, child custody, child support, and other types of family law matters. Jennifer and Vicki provide legal information to these individuals, help them understand the law and court process, help them fill out court forms and pro se pleadings, and provide them with information and referrals to legal and community service providers.

P & F welcomes a new Associate to the Estate Planning & Administration Group. Lauren Krauthamer joined us in January, 2004. She has a B.A. from Emory University, a J.D. from American University and will be receiving an LL.M in Taxation this spring from Georgetown University Law Center. Previously Lauren worked for Ernst & Young where she was a member of the Personal Financial Counseling Group.



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7735 Old Georgetown Road  
Suite 1100  
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20814-6183

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