Estate Planning Insights

A Quarterly Publication of

Karen S. Gerstner & Associates, P.C.

Attorneys At Law
5615 Kirby Drive, Suite 306
Houston, Texas 77005-2448
(713) 520-5205

Vol. 5, No. 1 **January 31, 2008**

WHAT'S IN A NAME?

We all remember 10th grade English class when we read Shakespeare's Romeo & Juliet, in which Juliet says, "What's in a name? That which we call a rose by any other name would smell as sweet." The first part of this newsletter will focus on some considerations regarding names used in Wills and other estate planning documents. The latter part of the newsletter will discuss HIPAA Authorizations and some relevant tax numbers.

The Testator's Name in the Will. How should the name of the "Testator" (a man who writes a Will, or, if female, a "Testatrix") be reflected in a Will? In past decades, nearly all Wills reflected the full name of a Testator, which is still perfectly proper. An example would be "Thomas Murray Smith". The more recent convention seems to be full first name, middle initial, last name, such as "Thomas M. Smith" (perhaps people are in a greater hurry today than years ago and prefer to sign a shorter name). If Mr. Smith's Will is titled, "Last Will of Thomas M. Smith", then Mr. Smith should sign his name that way on the signature lines of his Will. Many of our clients, however, have been working for big companies for so long, where they have been known by their first two initials and last name, that they do not seem physically capable of signing their full first name any longer, and want to sign their Will as follows: "T. M. Smith". We are not opposed to allowing our clients to do that; however, we feel it is important in such cases to include the client's full name in a parenthetical at the beginning of the Will, as follows: "I am T. M. Smith (sometimes also known as "Thomas M. Smith" or "Thomas Murray Smith") of Harris County, Texas".

What if the client goes by his middle name, "Murray", in our example? We generally change our approach in those cases and title the Will as "Last Will of T. Murray Smith". Some clients do not want the "T" in front of Murray in their Will in such cases. Again, we have allowed our clients to list their name in their Will, and sign it simply as, "Murray Smith", as long as they will allow us to include the "sometimes also known as" parenthetical at the beginning of their Will reflecting their full name.

How should a Testatrix's name be reflected in her Will? If the woman is single, the modern convention would be full first name, middle initial, last name, such as "Mary G. Johnson", although reflecting full first name, full middle name and full last name is fine also: "Mary Grace Johnson". What about a married woman? First, let us consider the case of a woman who has been married only one time (it can get a bit more complicated when there have been multiple marriages). If the convention of full first name, middle initial and last name is used, what would the middle initial stand for in a married woman's name–her (original) middle name or her maiden name? In general, it is preferable for a married woman to use as her *legal* name (although not necessarily the name used in her Will) her first name, then her maiden name, and then her married last name, such as, "Mary Johnson Smith" (the wife of Thomas M. Smith in our example). However, many married women continue to think of their legal name as first name, *original* middle name and married last name, "Mary Grace Smith". Legally, a woman's identity is clearer when her maiden name is used for her middle name (and middle initial), rather than her original middle name; however, many women are resistant to dropping their original middle name. Our convention is to list a married woman's name in her Will as full first name, middle initial representing her maiden name, then married last name, such as "Mary J. Smith", but we frequently change this at a client's request.

What if the woman goes by both her first name and original middle name, such as "Mary Grace"? Then we would list her name in her Will as "Mary Grace J. Smith" or "Mary Grace Johnson Smith".

It gets more complicated if a woman has been married more than one time. Thus, if Mary Smith marries Robert Paul Wesson after the death of her first husband, Tom, she *could* then be listed in her new Will as "Mary Grace Johnson Smith Wesson", but that is a lot of name to sign. Many of our clients prefer something simpler, such as

"Mary S. Wesson", representing full first name, middle initial (representing prior married last name), new married last name, or, in the alternative, "Mary J. Wesson", representing full first name, middle initial (for maiden name), new married last name. Again, it would also be acceptable to title the Will, "Last Will of Mary Wesson" and include in the "sometimes also known as" parenthetical the complete full name ("Mary Grace Johnson Smith Wesson").

Of course, if this particular lady actually goes by "Mary Grace" and not just "Mary", then she will most likely want her Will to include both her full first name and full (original) middle name in the title and she may want a couple initials, too, such as "Mary Grace J. S. Wesson". The Will in this case could also just be titled "Last Will of Mary Grace Wesson", allowing Mary Grace to sign her first name, middle name and new married last name (again, we would want to include the "sometimes also known as" parenthetical listing all five names at the beginning of the Will).

The more common the last name (e.g., Smith, Jones, etc.), the more important it is to include further identification information in the Will. This is even more important in the case of fiduciaries who are named in the Will than it is with respect to Testators (see below).

Senior Versus Junior. Many clients ask us to list them as a "Senior" in their Wills, such as "Thomas M. Smith, Sr." While they may be called Senior by family and friends, there is no "Senior" on their birth certificate and, technically, "Senior" is not part of their legal name (although it probably does not hurt to include it). On the other hand, if someone is a "Junior", that designation will appear on his birth certificate and *is* part of his legal name. In that case, the Junior should be reflected in the person's Will, such as "Thomas M. Smith, Jr." Some people have a Roman Numeral after their name. The question in those cases is whether there should be a comma before the Roman Numeral. We like to be consistent with the person's birth certificate, so it will either be "Thomas M. Smith, III" (with a comma), or "Thomas M. Smith III" (without a comma), depending on the person's legal name.

Nicknames. Some people *appear* to go by nicknames (e.g., "Betty" or "Billy Bob") when, in fact, that is actually their given name on their birth certificate. Other people may go by a nickname on a regular basis (e.g., "Jack"). Technically, it is better to reflect the person's legal name in his Will in that case and then include his nickname in the "sometimes also known as" parenthetical, such as: "I am John Edward Carlson (sometimes also known as "Jack Carlson") of Harris County, Texas."

Unusual Names. One interesting part of our job is meeting people who have unusual legal names. I once met with a woman whose first name--her legally given name--was "Panda". I can only imagine what her parents were doing, perhaps visiting the local zoo, right before she was born. I tactfully remarked what an unusual name she had. To my surprise, she expressed no anger toward her parents and, in fact, was grateful her parents had given her a name that was different as she was a regional sales representative for a national computer company and everyone she met always remembered her because of her name (she had such a great personality that she turned what could have been a "lemon" of a name into "lemonade"–it's not surprising that she was a very successful sales rep for her company).

How Should Fiduciaries' Names Be Listed in a Will? One consideration in deciding how to reflect the names of persons who are being appointed in a Will to serve as Executor and/or Trustee is whether there could be any misunderstanding or confusion regarding the person to whom you are referring. Suppose Tom Smith has a son, John Alexander Smith, a brother, John Edward Smith, and a nephew, John Robert Smith. If Tom Smith wishes to name his son as an Executor and Trustee in his Will, it would be best for him to list his son as either "John Alexander Smith" or, at least, "John A. Smith" to distinguish him from John E. Smith and John R. Smith. Thus, names should be listed in a way to avoid a mistake regarding the correct person. Suppose Tom Smith also has a daughter who has been married at least once before and whose current full name is "Dorothy Jean Smith Brown Jackson". Assume Tom names his daughter Dorothy as a fiduciary in his Will and refers to her using her full name. If Dorothy is actually appointed as Executor of Tom's Estate, the Letters Testamentary issued to her by the Probate Court will reflect her full name and most financial institutions will prefer that she sign her full name on all paperwork, documents, forms, checks, etc. If Dorothy needs to write and sign 100 checks to pay bills, income taxes, estate taxes, final medical expenses, attorneys' fees, CPA fees, etc., she is going to end up with a terminal case of writer's cramp before her term of service ends! This is another case where a shorter name can be used and, if necessary to avoid confusion, a "sometimes also known as" parenthetical can also be used in the Will in the place where the person is first identified.

What if A Woman Named as a Fiduciary in a Will Later Marries? Many of our clients call to advise us that their daughter or another female named in their Will has gotten married and changed her name and so they want to amend their Wills (amendments to Wills are done via "Codicils"). While it is fine to make this change, this is technically not necessary (unless the name change could result in actual confusion regarding the identity of the

person so named). The particular woman named in the Will is still the same person she was before, even if her name has changed. If the clients wish to make other changes to their Wills anyway, then it may be worth the expense to make this additional change but, otherwise, it may not be worth spending the money to have a Codicil prepared just to do this.

Name Summary. It is important that the name of the Testator and Testatrix in a Will be correct, but it is not technically necessary for the full legal name to be used in the title of the Will or on the signature pages as long as the person is clearly identified in the beginning of the Will by his or her full name and other names, if applicable. The same thing is true regarding the names of persons who are being appointed in a Will to serve as a fiduciary. Keep in mind that the way a fiduciary's name is listed in the Will may be the way the fiduciary must sign all papers, checks and documents in carrying out his or her duties. All of these name considerations apply to other estate planning documents as well, such as Revocable and Irrevocable Trusts, Statutory Durable (financial) Powers of Attorney and Medical Powers of Attorney.

HIPAA Authorizations. Switching to another "name", our firm has created a document for our clients due to some negative aspects of the "Health Insurance Portability and Accessibility Act" passed in 1996, a law that is commonly referred to by the name of "HIPAA". Many doctors and other health care providers have created their own HIPAA Authorizations for use by their particular office or clinic. What we have created is a *global* HIPAA Authorization that our clients can present to anyone in the medical field (doctors, nurses, pharmacists, hospitals, etc.). HIPAA makes it illegal for persons in the health care field to discuss a particular person's personal health information with anyone but that person. The penalties for violating HIPAA can be severe. Thus, medical providers are now fully aware of HIPAA restrictions and will not speak with anyone other than the person in question about anything without specific written authorization. This restriction applies to important situations, like being too ill to speak with the doctor's office yourself and wanting your spouse or child to do so for you, as well as more trivial situations, like not being able to schedule a doctor's appointment or order a prescription refill for your spouse. Another example where a HIPAA Authorization might be useful is if you are going to have surgery and family members may call the hospital, perhaps long distance, to find out how you came through surgery. The hospital will basically have to hang up the phone unless the person calling is specifically listed in your HIPAA Authorization. Many people do not have a global HIPAA Authorization because such a document did not really exist until about four years ago, when estate planning lawyers finally realized that HIPAA, which is primarily an act dealing with health law and insurance law, had some implications for the estate planning practice. If you do not have a HIPAA Authorization and would like to obtain one, please call our office to schedule a "check up", in person or by phone, to discuss it. If your estate plan was created more than 5 years ago, you are due for a "comprehensive" estate planning check up anyway.

Some Relevant Tax Numbers. Moving from "names" to "numbers", several important tax numbers have not changed while some others have. The annual exclusion from the federal gift tax remains at $12,000 for 2008. This is the total amount that any one person can give to any other person within one calendar year and not be making a "taxable gift", assuming the gift qualifies as a "present interest" gift. A gift will be a *present interest* gift if it is (1) made outright (directly) to an adult recipient or (2) made to (a) a 529 plan or (b) a custodial account under the Uniform Transfers to Minors Act (UTMA) on behalf of a recipient who is a minor. (Please note that gifts made to most trusts do not qualify as present interest gifts unless the trust provides for special withdrawal rights). Thus, married couples can give $24,000 this year to each recipient without making a taxable gift. Gifts of any size (no limit) may be made to a spouse who is a United States citizen without tax consequences due to the unlimited gift tax marital deduction. Gifts made this year to a spouse who is *not* a United States citizen, however, will qualify for the gift tax marital deduction only up to $128,000 in value (this is an increase from $125,000 in 2007). The lifetime gift tax exemption amount is still $1,000,000 (no change). This is the cumulative amount of *taxable gifts* that a person can make in his lifetime without having to pay a gift tax.

The federal estate tax exclusion amount and the generation-skipping transfer tax exemption amount ("GST exemption") both remain at $2,000,000 for 2008. The federal estate tax rate stays at 45% for 2008.

The long term capital gains tax rate is still 15%. This may be the lowest rate we will see in our lifetimes. So, if you are "on the fence" about selling an asset due to incurring capital gains taxes, you may want to go ahead and do it now, when the rate is at an all time low. This rate could well be changed as a result of the upcoming national elections. The Social Security wage base for 2008 (the amount subject to the 6.2% Social Security tax) is increased to $102,000 (up from $97,500 in 2007). The Medicare wage base (the amount subject to the 1.45% Medicare tax) remains unlimited. The standard business mileage rate is increased to 50.5¢ per mile for 2008 (up from 48.5¢ in 2007). The 2008 mileage rate for charitable use of a vehicle is 14¢ per mile, while the medical and moving rate is 19¢ per mile.

The "Applicable Federal Rate" ("AFR") for determining the present value of an annuity, an interest for life and a remainder interest was 4.4% in January and has dropped to 4.2% in February. Thus, it may be a good time to create a "short-term" Grantor Retained Annuity Trust ("GRAT") or a Charitable Lead Annuity Trust ("CLAT"). Both techniques are designed to transfer wealth to the next generation at a reduced transfer tax cost. With the current low AFR, the likelihood that substantial amounts will be transferred to the next generation free of transfer taxes is increased. If you are interested in exploring these techniques, you can call our office to schedule a consultation.

Publication of Prior Firm Newsletter Written by Karen S. Gerstner in National Periodical. We are pleased to report that a version of the newsletter written by Karen S. Gerstner called, "Avoiding Probate Court Litigation" (July 31, 2007), will be published in the March/April 2008 issue of *Probate & Property* magazine, a publication distributed nationwide to members of the Real Property, Probate and Trust Law Section of the American Bar Association.

Welcome To Another New Staff Member. We have a new secretary/administrator named Felicia Jones. A photo of Felicia is now on the firm's website. In fact, all of our photos are now on the firm's website, found at www.gerstnerlaw.com. There are also many educational articles on our website, as well as all of the firm's prior newsletters. Click on the "Reference Center" button when you reach the home page of our website. All articles can be downloaded and printed on your home computer.

Contact Us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone, fax or traditional mail at the address and phone number shown below.

You can also reach us by e-mail addressed to:

Karen S. Gerstner*	karen@gerstnerlaw.com
Kathryn Miller Connelly	kathryn@gerstnerlaw.com
Jill Gary Hughes	jill@gerstnerlaw.com
Felicia Jones	felicia@gerstnerlaw.com
Biljana Salamunovic	biljana@gerstnerlaw.com
General delivery	gerstnerlaw@yahoo.com

*Board Certified, Estate Planning & Probate Law, Texas Board of Legal Specialization

KAREN S. GERSTNER & ASSOCIATES, P.C.
A Professional Corporation
Attorneys At Law
5615 Kirby Drive, Suite 306
Houston, Texas 77005-2448

Telephone (713) 520-5205
Fax (713) 520-5235

www.gerstnerlaw.com

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