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Living trusts sometimes enrich only the lawyer

by Gary R. Gehlbach

The revocable living trust is a wonderful estate planning vehicle with considerable flexibility and applicability to estate plans. As is true with any trust, it has advantages and disadvantages and its suitability depends on the particular circumstances. In many estate plans, however, it is simply not needed.

Many married couples with relatively simple estates probably do not need trusts. Upon the death of the first spouse, practically all assets pass to the surviving spouse as the surviving joint tenant on joint tenancy assets (usually their marital residence, bank accounts and other assets held as joint tenants) or as the designated beneficiary (for example, life insurance, IRAs and "payable on death" accounts). These transfers do not depend on the deceased spouse's last will or on a trust. If the deceased spouse owned some assets in his or her own name and not in joint tenancy, a small estate affidavit usually is sufficient to transfer those assets without probating the will or administering a trust.

For the surviving spouse and for other single adults, a revocable living trust should be considered but isn't always necessary. Our office routinely administers estates in which the person did not have a trust, and probating the person's will often is unnecessary. On the other hand, a living trust in some circumstances is appropriate. Each situation is different, and sometimes the existence of a trust involves more administration than if the person did not have a trust.

Recently, we've seen a proliferation of living trusts being promoted by non-attorneys. This phenomenon seems to reoccur every five years or so. Former Illinois Attorney General Roland Burris was quite effective in staunching this trend during his tenure, using the Illinois Consumer Fraud and Deceptive Business Practices Act. Unfortunately, this practice by non-attorneys, or backroom attorneys with little or no contact with the clients, is back in full force and is a considerable detriment and expense to unsuspecting suspects.

In representing a married couple recently in their acquisition of rental property, I received a call from the title company advising me that my clients wished to take title in their trust. Unaware

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Inside

FMLA details continue to plague employers

by Douglas E. Lee

Recent court decisions applying the Family and Medical Leave Act remind employers that FMLA issues should be handled carefully.

The FMLA applies to employers that employ 50 or more employees for each working day during 20 or more workweeks in the current or preceding calendar year. To determine whether it employs 50 or more employees, an employer must count all full-time and part-time employees (including employees on paid or unpaid leave) who work within 75 miles of the work site at issue.

To be eligible for coverage under the FMLA, an employee must have been employed for at least 12 months by the employer and worked at least 1,250 hours during the previous 12-month period. An employee who is covered under the FMLA is entitled to 12 workweeks of leave during any 12-month period for the birth or adoption of a child, the placement of a child for foster care, the need to care for a spouse, child or parent suffering from a serious health condition or the need to attend to the employee's own serious health condition.

In one recent case, the U.S. Circuit Court of Appeals for the First Circuit was asked whether an employee who had a five-year break in service was able to use his prior ser-

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Minimum wage increases take effect July 1

by Douglas E. Lee

Increases in the minimum wage are likely to affect most Illinois employers.

Beginning July 1, 2007, the minimum hourly wage for most employees will increase from $6.50 to $7.50. That wage will increase to $7.75 on July 1, 2008, to $8.00 on July 1, 2009, and to $8.25 on July 1, 2010.

A few exceptions to the new minimum wage requirements exist. Starting July 1, 2007, for example, an employer may pay a new employee $0.50 less than the regular minimum wage during the first 90 consecutive calendar days of the employee's employment. The minimum wage for employees younger than 18 years of age also is $0.50 less than the regular minimum wage.

The minimum hourly wage for tipped employees also will increase on July 1, 2007. Currently $3.90, the wage increases to $4.50 on July 1, 2007, $4.65 on July 1, 2008, $4.80 on July 1, 2009, and $4.95 on July 1, 2010. The minimum hourly wage for tipped employees who are younger than 18 years of age is $0.30 less than the minimum wage for other tipped employees.

FMLA . . .

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vice in determining whether he had been employed by the employer for at least 12 months. The court, focusing on Department of Labor regulations that allow employees to use nonconsecutive months to satisfy the 12-month threshold, held the length of the break in service was irrelevant. The court therefore said the employee – who had been fired after missing 13 days of work – could proceed with his lawsuit against his former employer.

In another case, the U.S. Circuit Court of Appeals for the Seventh Circuit reinstated a former employee's lawsuit against an employer that had claimed the employee had failed to give adequate notice of his serious health condition. In this case, the employee sporadically supplied his employer with information that the employee was seeing a doctor, that he was not feeling well and that he had had a biopsy. At no time, however, did the employee request FMLA leave.

The court held that the information provided by the employee was sufficient to notify the employer that the FMLA might apply. "An employee need not expressly mention the FMLA in his leave request or otherwise invoke any of its provisions," the court said. "The employee's notice obligation is satisfied so long as he provides information sufficient to show that he *likely* has an FMLA-qualifying condition. . . . Once an employee informs his employer of his probable need for medical leave, the FMLA imposes a duty on the employer to conduct further investigation and inquiry to determine whether the proposed leave in fact qualifies as FMLA leave."

Employers covered by the FMLA accordingly should monitor closely all requests for medical leave and all medically related absences. As the FMLA currently is interpreted, employers make and rely on eligibility assumptions at their peril.

Carbon monoxide detectors required in all homes

by Megan G. Heeg

As of Jan. 1, 2007, Illinois' Carbon Monoxide Alarm Detector Act requires all homeowners and owners of buildings containing a "dwelling unit" to equip the home and/or building with carbon monoxide alarms. In most cases, this will require owners to install operating carbon monoxide alarm detectors within 15 feet of every room used for sleeping purposes.

The Act imposes additional requirements on residential landlords. Every residential landlord must provide each tenant with written information regarding alarm testing and maintenance and, at the time the tenant takes possession, ensure that the alarm's batteries are in operating condition. Thereafter, the tenant must test and maintain the alarm, replace batteries as required and provide the owner with written notice of any deficiency the tenant cannot correct.

To be approved under the Act, a carbon monoxide alarm:

- must be battery powered, electrical with a battery backup or wired into the unit's AC power line with secondary battery backup;
- must comply with regulations of the Illinois State Fire Marshal, bear the label of a nationally recognized testing laboratory and comply with the most recent standards of the Underwriters Laboratories or the Canadian Standard Association and
- can be combined with a smoke detector, provided the combined alarm meets all applicable rules and regulations and that the combined unit emits an alarm that clearly identifies which hazard is involved.

Willful failure to install or maintain an alarm is a Class B misdemeanor, and tampering with the alarm (including removing the batteries from an installed alarm, other than for maintenance or replacement) is a Class A misdemeanor for the first conviction and a Class 4 felony for a second or subsequent conviction.

Legislation requires landlords to protect domestic violence victims

by MEGAN G. HEEG

Through the Safe Homes Act, the Illinois General Assembly has enlisted residential landlords in the effort to protect victims of domestic violence.

Under the Act, which became effective Jan. 1, 2007, a landlord can be brought into the middle of a family dispute in two ways. First, a landlord in some circumstances must allow a tenant to terminate a lease without liability for rent. Second, a landlord can be required to change a tenant's locks. In both instances, however, the legislature attempted to clearly define the responsibilities of the landlord and the tenant.

A tenant can terminate a lease without liability for future rent, for example, only if:

- the tenant or a member of the tenant's household was under a "credible imminent threat" of domestic or sexual violence at the property and the tenant gave written notice to the landlord prior to or within three days of vacating the property that the tenant was vacating the property because of the threat or
- the tenant or a member of the tenant's household was a victim of sexual violence on the property and the tenant gave written notice to the landlord prior to or within three days of vacating the property that the tenant was vacating the property because of the sexual violence.

A tenant seeking to terminate a lease because of sexual violence must provide the landlord with medical, court or police evidence of the violence or a statement from a victim services or rape crisis organization. Moreover, the tenant must provide the date of the violence, which must be within 60 days of giving the landlord notice unless the tenant could not have reasonably given notice sooner because of reasons related to the violence, such as hospitalization or seeking assistance for shelter or counseling.

Similarly, a landlord can be required to change a tenant's locks upon the tenant's request if the tenant reasonably believes that a member of the tenant's household is under a credible imminent threat of domestic or sexual violence at the property from a non-tenant. With this request, the tenant must provide medical, court or police evidence of domestic or sexual violence or a statement from a victim services, domestic violence or rape crisis organization.

Upon receipt of a lock change request and the supporting evidence, a landlord must within 48 hours change the locks or give the tenant permission to change the locks. Although the landlord may charge a fee for changing the lock, the fee may not exceed the reasonable price customarily charged for such service. If the landlord fails to take action within 48 hours, the tenant may change the locks without the landlord's permission, provided the tenant do so in a "workmanlike manner with locks of similar or better quality than the original lock." If a tenant changes the locks, he or she must give the landlord the new key within 48 hours of the locks being changed.

Although few tenants are the subject of domestic violence, landlords must be cognizant of the duties and rights imposed under the Act so that the landlord can quickly respond to lock change requests and identify tenants who have a defense to a lawsuit for rent due after the tenant has vacated the property.

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that my clients had a trust, I called the husband. He informed me that several months ago he and his wife had attended a living trust seminar at a local restaurant where they were feted with a free lunch (the proverbial free lunch, as it turns out). The presenters admonished the attendees not to involve their attorneys, who, the attendees were warned, would try to talk them out of the need for a trust or charge them too much.

My clients, who owned their relatively few assets in joint tenancy with each other or with beneficiary designations in favor of each other, were then informed that a living trust for the two of them would cost "only" $3,000. This may have seemed a bit steep until the presenters warned them that most attorneys would charge $6,000-7,000 for this service. The attendees were even given the names of two attorneys to call to verify the "normal" $6,000-7,000 charge. My client later called the two numbers given, one apparently to a Chicago attorney and the other to a Springfield attorney. Not surprisingly, the Chicago attorney quoted my client a fee of $7,000, while the Springfield attorney quoted a fee of $6,000.

The $3,000 fee quoted is substantially higher than the cost of most legitimate estate plans prepared by competent estate planning attorneys. Attorneys to whom I have mentioned this story have commented that this fee is outrageous. The company promoting this scheme, however, claimed the fee will cover future service. This is still an outrageous fee, and I highly doubt this company will be available when future service is needed.

Because my clients had only retained me to represent them in a purchase of a residence and not for any estate planning, they were not receptive to my suggestion that (i) the fees they had paid were exorbitant (no estate tax planning was needed and, to the best of my knowledge, no unusual circumstances were present) and (ii) a joint trust, or even separate trusts, may not have been appropriate for them.

While I would like to have pursued the purveyors of this scam, my clients were unwilling to share any further details with me. Clearly they had been warned not to trust local attorneys, who purportedly would not understand the nature of trusts.

New legislation targets e-mails, other electronic data

by Douglas E. Lee

Recent changes to the Federal Rules of Civil Procedure require everyone who might be involved in litigation to be aware that e-mails and other electronically stored data are subject to discovery.

While electronically stored information always has been available to adverse parties in litigation, the amended rules clarify parties' responsibilities in requesting and providing this information. A party that is not providing potentially relevant information because it believes the information is not readily accessible, for example, must inform the opposing party of this fact. The opposing party then can make its own determination as to whether the information is readily accessible. Even if the party agrees the information is not readily accessible, it can seek a court order requiring that the information be provided.

A related issue is when a person or company must preserve potentially relevant electronic information. In most cases, courts have held that a person or company that "reasonably anticipates litigation" must revise its document retention/destruction policy and preserve all electronic information that might be relevant to the litigation. When it reasonably anticipates litigation, a company also must adequately inform its officers and employees of the information that is relevant and the need to preserve that information.

In Print and At the Podium

Mr. Gehlbach recently was awarded the Austin Fleming Newsletter Award for his years of work on the *Real Property* newsletter of the Illinois State Bar Association. The Fleming Award is the highest honor the ISBA gives to newsletter editors . . . **Mrs. Heeg** authored an article regarding insurers' duty to defend for *The Lautum News*, the newsletter of the Illinois Association of Mutual Insurance Companies . . . **Mr. Lee** was quoted extensively in an article in the *Nashville Scene* concerning the confidentiality of arrest records . . . **Mrs. Heeg** served as a member of two panels of bankruptcy trustees at the U.S. Trustee's annual regional seminar, discussing various changes in bankruptcy law . . . **Mrs. Considine**, who was responsible for the legal division, assisted the Lee County United Way in surpassing its 2006 goal . . . **Mr. Lee** recently served as a judge in the national First Amendment Moot Court Competition at Vanderbilt University in Nashville. . . . **Mrs. Considine** has been elected a member of the board of directors of Dixon Habitat for Humanity, Inc. . . . **Mr. Gehlbach** recently presented estate planning programs for state employees . . . **Mrs. Heeg** has been a featured speaker at bankruptcy seminars sponsored by the Illinois State Bar Association and the Whiteside County Bar Association . . . In a recent commentary for the web site of the First Amendment Center, www.firstamendmentcenter.org, **Mr. Lee** used the context of the negotiations between the Dixon Public School board of education and the Dixon Education Association to demonstrate the importance of First Amendment freedoms.

Deals and Decisions

Mr. Ehrmann successfully petitioned the Illinois Supreme Court to hear a case involving grandparent visitation rights . . . **Mr. Gehlbach** recently structured a corporate reorganization for two brothers and their corporate farming business . . . **Mr. Lee** recently represented clients in the sale of substantially all of their business assets. The transaction involved nine separate contracts, the sales of several parcels of real estate and the transfers of other business equipment and assets . . . **Mrs. Heeg** continues to represent creditors in bankruptcy, recently obtaining for one client a court order maintaining the debtor's liability for the debt and for another client an order allowing the client to continue its state court repossession action . . . **Mrs. Considine** recently completed her eighth guardianship for a local not-for-profit agency . . . **Mr. Lee** successfully represented a client seeking to enforce a business asset purchase agreement, obtaining a summary judgment order compelling the seller to complete the transaction . . . **Mr. Gehlbach** completed a reverse tax-deferred exchange of real estate for a client . . . **Mr. Gehlbach** recently developed a series of forward Section 1031 exchanges to enable farm clients to relocate and improve the quality of their farmland.