Their complexity also makes employees less likely to select them. Additionally, there is no current requirement to disclose the fees charged with the annuity option. This last shortcoming can be addressed by requiring fee disclosures for annuities similar to what will be required of 401(k) service providers under new Department of Labor fee disclosure rules. However, to be fair, not all the problems with annuities rest on insurer shoulders, as it is difficult to price an insurance product when the data needed to make a reasonable calculation is not known. Of course, a defunct insurance company which charges too little for annuity products would do no one any good.

Conclusion

Even given potential issues with requiring an annuity option for 401(k) plans, the time has come to hedge as a society against the risk associated with the recent embrace of the 401(k) as the private retirement funding vehicle of choice in the United States. The proposal described herein seeks to diminish the retirement security deficit through three interlocking regulatory parts: (1) a requirement to offer an annuity as part of 401(k) distribution options; (2) mandatory education pre-distribution on annuities; and (3) mandatory fee disclosure by annuity providers. These steps will likely reinvigorate the annuities market in the United States and help to bring an end to the 401(k) Follies.

Durable Power of Attorney, Health Care Power of Attorney, and Advance Directives

By Don R. Castleman*

Any discussion of retirement planning should address the situation that arises once we can no longer make decisions in our own behalf and someone else must do so for us. If we do not make provision for those circumstances while we are still competent to do so, it becomes necessary for the courts to do it and the costs and complications are significant. We can avoid those complications and costs with three relatively simple instruments: durable power of attorney; health care power of attorney; and advance directive (or "living will").

Durable Power of Attorney

This document empowers an attorney-in-fact to handle financial and property transactions for the principal. Nearly all states have some form of statutory durable power. Unless the power is being granted for a specific transaction, the use of the statutory form is preferred because it will be recognizable by the institutions and agencies to which it may be presented (banks, motor vehicle division, etc.) without the necessity of review by their legal departments, legal advisors, etc.

There are a few issues that most statutory forms may not address, and the statutory form should be modified as follows:

a. Grant to the attorney-in-fact the authority to appoint a successor. (This became very significant recently when a client, whose wife had slipped into the darkness of Alzheimer's some years ago, was himself diagnosed with terminal cancer. Because the power she had granted to him while she was still competent included the power to appoint a successor he was able to substitute a daughter to take care of her affairs after his death. Without it, we would have had to have a court appointed guardian of the estate with considerable costs involved.)

b. Grant to the attorney-in-fact the authority to make gifts including gifts to the attorney-in-fact. This facilitates tax planning as well as probate avoidance opportunities. (For example, transfer title to the automobile while the owner is still alive but is no longer driving, and it may not be necessary to open an estate administration at all, particularly when coupled with the use of inter vivos trusts.)

c. Grant to the attorney-in-fact the authority to add to or to create trusts of the assets of the principal. This will enable the creation of probate avoidance trusts.

In all jurisdictions, the power of attorney must, to be durable, include the statement that the power granted shall not be affected by the subsequent incompetency of the principal. In addition, most will allow the power to be made conditional upon the incapacity of the principal. It is better not to so provide because then one has to deal with the issue of what is sufficient to satisfy anyone dealing with the attorney-in-fact that the principal is in fact incapacitated. It is better, since the power of attorney is usually not effective until it is recorded, to simply place the executed power in a drawer until it is needed and then record and thereby activate the power.

Health Care Power of Attorney

This is also a statutory form and certainly should comply with and adopt the language of the statute to insure its effectiveness. There are no real issues with this document itself. The issues

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arise in the interface of this document with the terms of the Advance Directive.

Note that most jurisdictions allow the execution of a Health Care Power of Attorney separate and apart from the execution of the Advance Directive, but most also allow the two to be combined into a single instrument. The execution requirements are usually the same for both, so there is no real reason to have two instruments when one will do.

Advance Directive or "Living Will"

This document has basically two components. First, it establishes under which conditions the person wants the directive to apply: (a) terminal illness; (b) persistent vegetative state; and (c) advanced dementia (only a few states have added this provision). Second, it indicates what the directive is in case the condition arises: (a) withholding of extraordinary medical treatment; (b) withholding of artificial hydration and nutrition; or (c) withholding of both. "Extraordinary medical treatment" would include resuscitation, mechanical breathing, etc. "Artificial nutrition and hydration" would include nasal gastric feeding tube and/or intravenous fluids and nutrition.

Some statutory forms are set up so that once you have selected the conditions to which the directive shall apply, only one directive may be given. If different directives are desired for different conditions (i.e., withholding artificial nutrition and hydration for terminal illness, but not for advanced dementia), then the statutory form can be modified to so provide without affecting the validity of the directive under the statute.

Finally, in the interface of the directive with the appointment of the health care agent, the instrument should clarify whether the agent has the authority to override the directive or is, himself or herself, bound by the directive. Some thought should be given to that option as it might be preferable to relieve the agent from any feeling of responsibility for carrying out the directive.

In any case, I want to talk a bit about the difference between withholding extraordinary means, and withholding artificial hydration and nutrition. It is the latter that was at the heart of the case that started the national awareness of the issue and resulted in the widespread legislation.

In January 1983, 25-year-old Nancy Cruzan was involved in an automobile accident in which she ended up face down and unconscious in a small amount of water in a ditch. Not otherwise seriously injured, she suffered irreversible brain damage from the deprivation of oxygen and was in a "persistent vegetative state" kept alive by a nasal gastric tube. The doctors predicted she could live 30 years in that state. The family wanted to remove the tube, and the state of Missouri in its role as parens patriae objected. The Supreme Court determined that in the absence of a direction by Ms. Cruzan, the state could in that role control the decision. *See Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). The legal and medical community of course concluded from that that if she made such a statement, then the state should not be allowed to interfere and the Advance Directive was born.

Ironically, the *Cruzan* decision was rendered on June 25, 1990. Four months earlier, February 25, 1990, 26 year old Terri Schiavo collapsed in her St. Petersburg home in cardiac arrest which deprived her brain of oxygen for a sufficient time that the same sort of irreversible damage was done to her brain.

While an advance directive coupled with a HCPA might have helped to avoid the sensational and political storm that surrounded the dispute between Terri's husband who wanted to pull the tube and her parents who wanted it kept in, the odds are almost certain that if the *Cruzan* opinion had been rendered before Terri's collapse, a healthy 26 year old would have not seen any need to take advantage of the option that the Supreme Court had granted to us all. (I always point this fact out to my students who are, on average, mid-twenty healthy young adults, and urge them to take advantage of the opportunity before them. I have provided them with the statutory form.)

But, despite the legal permissibility of the advance directive to do so, is withholding of nutrition and hydration from someone morally defensible (unless we believe in a right to commit suicide)?

The Pontifical Academy for Life and the World Federation of Catholic Medical Associations met in an International Congress on Life Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas in March 2004, at Vatican City in Rome. Pope John Paul II in his address to that group concluded that the word "persistent" in description of a vegetative state was a medical guess, not a certainty, and in fact that the application of the term "vegetative" to a human life offended the dignity of the life God has given. He further stated and the Joint Statement of the Congress posited: "Withholding of Water and food even by artificial means is euthanasia and a serious violation of the Law of God.… No evaluation of costs (psychological, social or economic) can outweigh the value of human life."

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The Pope did not mention the responsibility of the patient, but the Joint Statement did address the effect of attempting to direct such withholding: "Personal autonomy can never justify decisions or actions against one's own life."

This position has been reaffirmed by comments of Pope Benedict and most recently by Directive 58 issued November 29, 2009, by the U.S. Conference of Catholic Bishops. The directive, addressed to all Catholic medical care facilities, requires that in the case of any person needing a feeding tube to stay alive, one must be surgically inserted and maintained indefinitely.

This conflict, between a statutory authority legal right to make the personal decision to forgo nutrition and hydration and the position of anyone, including the Catholic Church, that such action is morally or ethically indefensible sets up a dichotomy with several interesting issues:

- What is the responsibility of an attorney who is asked to prepare an Advance Directive? Knowing what I now know about Directive 58, should I inquire if the client is Catholic? If I didn't know about Directive 58, should I? Should I make inquiry into the position of other religious groups?
- Should I alert my students to this dichotomy when I cover Advance Directives in Class? (I guess the answer to that may depend on the answer to the previous question.)
- Finally, what happens when the family presents the advance directive and asks to have the tube removed and the institution refuses? In a recent case in North Carolina, the medical facility refused for three months to comply, and the family rejected the bill for services during that three-month period. The court held that, because the family had not provided supporting documentation required by the advance directive statute, it was liable. (The clear implication is that had the family complied with the statute, the medical facility would not be entitled to recovery.)

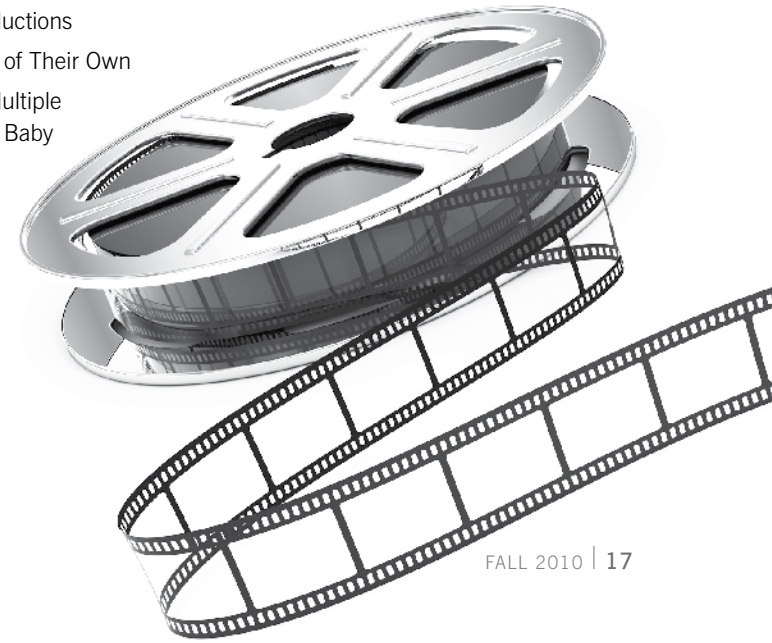
It has been only 20 years since *Cruzan*, so this subject is somewhat in its infancy. It will be interesting to see how the issue unfolds. ■

Tax Bites Makes Movies for Tax Lawyers

By Gail Levin Richmond*

Perhaps you've been too busy to go to the movies. Perhaps none of the titles or plots sounded appealing. Perhaps you need to spend your spare time accumulating CLE credits. Whatever the reason, consider it gone. Hollywood wants you back so much that the powers-that-be asked Tax Bites for help. Our response was simple: remake popular old films using new titles and plots. The new titles appear below. The plots are up to you—Tax Bites will publish creative submissions in a future issue.

- Dr. Strangelove or: How I Learned to Stop Worrying and Love the AMT
- Some Like It Deductible
- Sunset Date Boulevard
- Planes, Trains & Section 30D Automobiles
- Gimme Tax Shelter
- The Treasury Department of the Sierra Madre
- Close Encounters of the Audit Kind
- EZ Rider
- All the President's Tax Returns
- Abbott and Costello Meet EGTRRA
- Raiders of the Lost Tax Accrual Work Papers
- Risky Business Deductions
- A 501(c)(6) League of Their Own
- Three Men and a Multiple Support Agreement Baby



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