

ESTATE PLANNING FOR THE TERMINALLY ILL: TALKING ABOUT THE UNSPEAKABLE

By Barbara H. Cane, Attorney at Law

The world changes in a day: Sam Miller, newly retired, learns that lung cancer is the cause of his back pain; Valerie Russo's mammogram reveals advanced breast cancer; the Montgomerys are told that Jack's recent confusion is the product of Alzheimer's disease. We all know we will die someday. Mr. Miller, Ms. Russo and Mr. Montgomery have been given information which means that "someday" is very likely to be sooner rather than later. Can they talk about the unspeakable, or will they make decisions by default?

Fortunately for the Millers, a few weeks before they learned of Sam's illness, they had scheduled an appointment with their estate planning lawyer, not realizing how pertinent it would turn out to be. Caught up in the hard work it took to build the business and raise a family, they never took time to even draw a will. Now they see that their assets are far greater than they realized and that by doing some planning, they will be able to meet their own needs, cut taxes, and provide for the people and charities they care about. In addition, Sam wants to make things as easy as possible for Bea after he is gone. He wants to preserve her independence without burdening their kids who lead busy lives.

With their lawyer's help, the Millers looked carefully at their assets. Their lawyer explained that because the Millers own everything jointly, when the first spouse dies, the survivor will own everything. That means that Bea would be left with assets in excess of the \$1,500,000 federal law currently allows each person to transfer without estate or gift taxes. By splitting their assets into "his" and "hers" piles and providing that upon Sam's death a major portion of his assets will not go directly to Bea but to a by-pass trust which can provide income and principal to her and the children, they can save significant estate taxes when Bea dies. Because New York State is not so generous, and only allows \$1,000,000 to pass free of estate taxes, using the full federal exemption would result in some New York state estate taxes. They will want to explore their choice very thoroughly with their lawyer, perhaps using a disclaimer technique so that the surviving spouse can decide exactly what makes sense when the time comes.

Next, because they have more than enough resources to care for themselves very comfortably, the Millers decide to reduce their taxable estate by each making gifts of \$11,000 to each of their three sons, their daughters in law, and their grandchildren. Sam wants the pleasure of introducing each adult grandchild to his broker to set up an investment account in their name. As

long as he lives, Sam will also pay their school tuition, being careful to make the check out directly to the school. Gifts under the "grandparent exemption" will not count against his \$1,500,000 Exemption Amount. He will also give his family the gift of time, being with them as much as his health and treatment schedule allow. He will pay to fly Josh and his family in from California so the family can spend two weeks together this summer. They will do a video, so Sam can record the story of how the family got to America, how he and Bea met, and how the children grew. Even little Sarah will have pictures of herself with grandpa, no matter what the future brings.

Neither Bea nor Sam would want to live in the big house alone. They decide to give the house to an organization which runs group homes for the developmentally disabled, subject to their right to live there as long as either one of them is alive. This will be a handsome charitable gift, which will also create a hefty income tax charitable deduction they can use to offset the substantial income from selling his business. When it is time to move to a more suitable place, there will be no headaches of selling. They can either sell or donate their remaining life interest to the charity.

To make things easier for themselves and the children, Sam and Bea create revocable living trusts, one for each of them. Their smart tax planning will be in these vehicles, and because the trusts will take title to their assets now, their co-trustee can carry out transactions on their behalf. Upon their deaths, provided the trusts own all their assets, no probate will be necessary. Sam and Bea will act as trustees of their trusts, but select a suitable successor trustee to serve when either of them cannot. They are still discussing the choices with their lawyer: one or more of their children, their accountant, a corporate fiduciary are all possibilities so they can count on help when they need it.

Valerie Russo, a part-time English professor and editor, doesn't have big assets to worry about. She must stretch resources as far as possible. Her health insurance covers surgery, but not home care, housekeeping, a wig when chemotherapy takes its tolls, or other comforts. Dan and Scott, recent college graduates starting careers, are devoted sons, but they are not emotionally prepared to care for her or make medical decisions for her if she cannot. Nor are they ready to manage even a modest estate.

Bolstered by a support group at the hospital where she is being treated, she found the courage to consult her attorney about hard choices. Her first impulse was to save money by refinancing her mortgage for a lower rate. But her current mortgage is covered by mortgage insurance which would pay off the full obligation upon her death. She couldn't get this with a new mortgage. A hypothetical "balance sheet" with and without the mortgage

debt showed she should keep things as they are. She will also set up a revocable living trust naming her sister as her co-trustee now and sole trustee after her death. It is drawn so her sons will receive whatever inheritance there is (probably the proceeds from sale of the house) in a series of payments, instead of in one lump sum. She will name her sister as her health care proxy and spokesperson under her living will; her best friend, Ellen, is the back up choice. She will execute a power of attorney to her sister and Ellen, and will concentrate her modest savings with one broker to simplify management and build a team her successor trustee and sons can count on. As for meeting the costs of her own care, she will see if she can tap the value of her life insurance policy through a "viatical settlement" or buy out of a portion of its value during her lifetime.

The Montgomerys face the prospect of Jack's deteriorating memory, ability to reason, and eventually, all his capabilities. They saw it happen to his father and know denial will not change facts. While Jack still has "good days" of relative clarity, they will meet with their lawyer. They must consider what to do about their house. Should they give it to their only child, Helen, now? Their lawyer points out that because it has appreciated in value, if they give it to Helen, their tax basis will "carry over" to her so she will pay sizable capital gains tax when she sells it. More important, they need to keep their options open. It's no longer safe for Jack to drive, and Marian is not sure how long she will keep the car. Depending on how Jack's disease progresses, it may make sense for them to move to a continuing care community near Helen, so care will be available for Jack and Marian can have transportation and a support system. They can sell the house, each take their \$250,000 capital gains tax break on the sale of their residence and use the sale proceeds to finance their choice. Helen is not wealthy, but she assures them that their comfort and dignity, not her inheritance, are foremost in her mind.

Happily, the Montgomerys bought a good long term care insurance policy last year so either home care or a nursing home will be within reach when they decide what they want to do. They review their wills, sign powers of attorney, health care proxies and living wills, check the beneficiary designations on their life insurance policies and retirement plans which make up most of their assets. They close their safe deposit box (which they really didn't need), prepay their funeral arrangements, and buy cemetery plots. Marian wants Jack to share in these decisions and understands that before long he will not be able to.

By "talking about the unspeakable" all three families have found the best ways to cope with what has come their way, rather than making decisions by default. If they are granted more time, they will enjoy it more knowing that

their "affairs are in order".

The characters are fictional; the issues are real.

c. 2004 Barbara H. Cane, Law Office of Barbara H. Cane 845-353-7314 or
212-864-6401. info@canelaw.net; www.canelaw.net