Leach&Walker
A PROFESSIONAL CORPORATION

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Dear Client:

We hope that you are having a wonderful summer. It has been almost a year since we opened the doors to our new law firm and we think this is a good time to share with you some recent developments in the law and in our office.

RECENT DEVELOPMENTS IN THE LAW

1. Federal Estate Tax, Gift Tax and Generation-Skipping Transfer Tax Exemptions. In 2001 Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). This Act revised the applicable exclusion (aka "exemption") amounts for estate tax, gift tax and generation-skipping transfer ("GST") tax. In 2009, the applicable exclusion amount for estate tax is $3,500,000 which means that each of us can transfer that amount through a combination of lifetime taxable gifts and bequests at death without any estate tax liability. The GST tax exclusion amount is the same as for the estate tax. The current exclusion for lifetime gifts is $1,000,000, which means that you can give up to $1,000,000 (over and above "annual exclusion" gifts of $13,000 per year per person, and gifts for qualified medical and educational expenses) during your lifetime without any gift tax liability. The highest estate, gift and GST tax rate for transfers in excess of these exclusions is 45%.

Under EGTRRA, in 2010, unless this law is changed, the estate and GST tax systems are completely repealed, although the gift tax will remain, with a tax rate of 35%. However, on January 1, 2011, all three tax systems are reinstated to their 2002 levels, with the exclusions for estate tax and GST tax returning to $1,000,000, indexed for inflation. The highest tax rate for transfers in excess of the exclusion amounts reverts back to 55%, the 2002 rate.

Many commentators expect that Congress will act to ensure that the estate and GST tax systems are not repealed in 2010. These commentators also believe that Congress will set the estate tax applicable exclusion amount at somewhere near $3,000,000-$5,000,000 per person. However, some commentators also suggest that Congress believes it does not need to act before the end of this year, but could enact changes any time before October 2010 to avoid a full repeal of the systems.

At this point, it is anyone's guess as to what Congress will decide to do. We all know the dire straits that our federal and state economies are in. We believe that it is likely that Congress will act to keep these transfer tax systems in place and will keep the applicable exclusion amount at or around the 2009 level of $3,500,000, but that is only an educated guess.

2. No Contest Clauses. Most Wills and Trusts contain "no contest clauses" that state that if a named beneficiary challenges the terms of the Will or Trust (or takes any

other action defined by the document as a "contest"), that beneficiary will not receive any distribution from the Will and/or Trust, thus punishing the beneficiary for challenging the estate plan. The purpose of "no contest clauses" has always been to discourage beneficiaries from challenging the terms of an estate plan because the plan sets forth the decedent's express wishes and such challenges usually cost the estate or Trust a lot of time and money to defend.

For many years, beneficiaries were able to ask a court for declaratory relief as to whether or not a particular proposed action by the beneficiary would trigger the no contest clause. This way the beneficiary would be able to determine if the benefits of challenging the terms of an estate plan outweighed the potential loss of a bequest to the beneficiary due to a violation of the no contest clause.

The court became clogged by the many declaratory relief applications filed by beneficiaries. Many lobbyists and lawmakers also argued that there are public policy reasons why beneficiaries should be able to challenge estate plans without fear of losing their inheritance.

In 2008, the California Legislature enacted a new law that restricts overly-broad no contest clauses in estate planning documents. At the same time, the new law eliminates the contestant's opportunity to obtain a prior declaratory relief ruling and the contestant must show s/he has "probable cause" to bring the challenge. In other words, it may be easier for beneficiaries to challenge aspects of your estate plan, but they will have a greater risk of being disinherited if they do not have "probable cause" to bring their challenge to your estate plan. This new law becomes effective on January 1, 2010.

We have revised our standard no contest clause paragraphs in order to address this new law. We will discuss the ramifications of this new law with you when you ask us to prepare new estate planning documents or amendments to your existing estate planning documents. If you are concerned about the possibility of any of your beneficiaries challenging the terms of your estate plan and your documents do not include our revised no contest clause language, please feel free to contact us to discuss this issue further. It may be necessary to amend your documents.

3. <u>Gifts to Care Custodians</u>. Some years ago, in an effort to protect elders from elder abuse, a law was passed providing that gifts in excess of three thousand dollars ($3,000) by "dependent adults" to "care custodians" who are not family members are invalid. The problem with this law for our purposes is that the definitions of "dependant adults" and "care custodians" are overly broad.

A "dependent adult" is any person over age sixty-four (64) "who has physical or mental limitations that restrict his or her ability to carry out normal activities or protect his or her rights". This of course includes many people who are unable to drive, shop, or handle necessary household tasks, but are mentally competent. The definition of "care

custodian" is also overly broad and includes providing homemaking assistance, driving to appointments and shopping, as well as more professional health or social services to dependent adults.

Initially the California courts interpreted care custodian to exclude persons who provided services to an elder who did so out of friendship and longstanding acquaintance. Unfortunately, in 2006 the California Supreme Court in a split decision overruled those prior decisions and ruled that care custodians could include those persons who act out of a pre-existing personal friendship. Thus, for example, a long-standing gift in a Will or Trust by an aged person to a life-long friend could be deemed invalid if the recipient demonstrates her friendship by helping with driving, cooking or shopping, even if the recipient never knew about the intended gift! At the current time if you intend to make gifts to persons who might be considered "care custodians" those gifts may be declared void if they are challenged, unless the court determines that the gift was not the result of fraud, duress, or undue influence. Such a proceeding would be costly as well as unpleasant to the beneficiaries of your estate.

Another way to avoid this result is to have an independent attorney conduct a review of your estate plan and issue a certificate indicating that the proposed gift is not the result of fraud or undue influence.

It is clearly burdensome to ask clients to engage an independent attorney to review their estate plan and their motivation in making their intended gifts, but it is our duty to advise you of this Supreme Court decision and the danger that some or all of your estate plan might be invalidated unless you obtain a "certificate of independent review."

4. POLST Form. The Physician Orders for Life-Sustaining Treatment Form ("POLST Form") became legally effective in California on January 1, 2009. The POLST Form is voluntary and is intended to help you communicate better with your healthcare providers regarding your wishes for life-sustaining treatment. The form does not replace the Advance Health Care Directive. Instead, it includes a place for you to express your wishes regarding resuscitation and artificial feeding, among other things. In order to complete the POLST Form, you must discuss it with your physician and have him/her sign the form. The law requires that all healthcare providers honor your wishes presented on the POLST form. The form is supposed to be on bright pink paper but it is acceptable on other colored paper or in faxed form. If you would like to learn more about the POLST form, we suggest you go to www.finalchoices.calhealth.org or talk with your physician. We also will be happy to provide copies of the POLST form upon request.

RECENT DEVELOPMENTS IN OUR OFFICE

1. Bill Payment Service. Some of our clients need assistance with their bookkeeping and household bill processing and payment. In response to this need, our office will now provide bill payment service to our existing clients for an hourly fee of

approximately $35-40 per hour. Diane Amader, our bookkeeper, will oversee this service.

This service will include: assembly of bills for payment, preparation of checks, balancing checkbooks and household budgets, and assistance with documentation for our clients' tax preparers. The service will be provided by a member of our staff who is proficient in accounting software and who is directly supervised by Diane Amader and an attorney in the office. The staff member will meet with the client(s) on a regular basis (either at the client's home or in our office) to organize bills, prepare checks to be signed by the client, and review the client's checkbook/budget. We will not have direct access or control over any client bank accounts nor will we sign any checks on behalf of clients. All checks must be signed by the client individually. However, we will ensure that bills are paid on time and assist in balancing the household budget. We will also prepare reports of income and expenses as requested.

We think this service will be a helpful to some of our clients.

2. New Contract Attorney – Renée Conrad. We have hired Renée Conrad as a part-time attorney in our office. Renée graduated from University of California, Berkeley and Santa Clara University Law School. She has been practicing law since 1995. Most recently, she was employed by Noland Hammerly Etienne & Hoss in Salinas. We are pleased to have Renee as part of our firm and look forward to introducing her to our clients.

We hope the information in this letter will be helpful to you. Please let us know if you need our assistance in the future. As always, we feel very fortunate to have you as our clients.

Very truly yours,

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