

# The Importance of Estate Planning for Subcontractors

by Tarick Loutfi and Jim Rohlfiing

Many Subcontractors use lawyers to review contracts and help resolve construction disputes but don't take the time to meet with an attorney to prepare an effective estate plan. Working with an attorney on an individualized estate plan can be an effective means of reducing future expenses. Typically, subcontractors and other business people ought to have an estate plan in place to protect their family and their assets and to provide for a transition of their business in the event of their death or incapacity. In these shaky economic times and when we are experiencing a change in political control at the Federal level, estate plans are more important than ever.

An effective estate plan will organize your estate and express your preferences to avoid undue confusion and expense at a time when your family is least able to manage it. Death is not the only reason to have an estate plan. Your incapacity or disablement are also important reasons for one. Without a proper estate plan, the government rather than you will decide what will be done regarding you, your family and your assets.

The following are some of the important things an effective estate plan should do:

## **A. Protecting Your Family:**

- from painful decisions regarding your last wishes;
- from inability to pay for costly medical or nursing care expenses and burial expenses;
- from stress and fighting over the division of property;
- from confusion over your remaining financial decisions;

## **B. Protecting Your Estate:**

- from unnecessary legal fees, accountants' fees and appraisal fees;
- from delay in the distribution of your assets and costs which result from delay; and
- from distribution which is not according to your wishes.

## **C. Protecting Your Children:**

- from the courts deciding who will have custody and raise your minor children;
- from the courts deciding how much of your estate will go to the minor children and adult children;
- from additional attorneys' fees incurred as a result of opening a separate minor's estate for each minor child in the probate court.

## **D. Reducing Estate/Inheritance Taxes:**

- the significant loss of one's estate due to the payment of Federal and State taxes;
- through estate planning married couples can reduce or eliminate inheritance taxes; and
- the money for taxes that have to be paid can be obtained by the appropriate designation of the beneficiary or beneficiaries on life insurance and other assets.

## **Estate Planning Documents:**

### **Wills:**

A basic will is an important vehicle to assure that your property will be distributed according to your wishes. If you have assets titled in your name at your death, it may be necessary to go through a court process called "probate" to effect their transfer (such as obtaining a transfer of a deed to property), even though a will may leave that property to a specific person. Wills do not prevent probate, but they almost always make it simpler.

### **Living Wills:**

Illinois, like many other states, has enacted the Living Will Act which recognizes the fundamental right of persons to control decisions regarding their own medical care, "including the decision to have death-delaying procedures withhold or withdrawn in instances of a terminal condition." 755 ILCS 35/1. The best way to have these wishes respected is through a properly executed written declaration. This document can prevent many thousands of dollars being spent by your family toward proving your unexpressed wishes in court, or toward additional life support systems being utilized by your hospital due to uncertainty about your wishes and a fear of lawsuits by your family.

### **Living Trusts:**

A funded revocable trust can be a valuable method to avoid an expensive and distribution-delaying probate proceeding at death. While it does not always avoid the payment of estate and gift taxes, a living trust benefits your family and protects your assets. Your family will not have to wait months, or even years, to receive the assets you give them in a Will. The trustee you have designated will see to the immediate distribution according to your wishes, and title assets (house, car, bank account) will revert to the successor beneficiaries you have named.

Some people who realize the high cost of probate may attempt to "transfer" title to assets to family members or friends during their lifetime to avoid probate. However, transferring title to your house, cars, bank accounts and other assets can leave you without adequate security for your remaining years.

Thus, one of the safest and most effective ways to secure your assets is with a funded revocable trust. You will need a trust document, as well as advice from an attorney or financial professional about how to properly register your trust assets. Your designated trustee can then administer your trust assets without the interference of any court or third party.

### **Powers of Attorney:**

There are two main types of Powers of Attorney, a Healthcare

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Power of Attorney and a Power of Attorney for Property. A Healthcare Power of Attorney allows the person designated by you to handle your healthcare/medical decisions during your lifetime either in the event that you are incapacitated or at a set point in time. A Power of Attorney for Property allows the person designated by you to make financial decisions on your behalf during your lifetime.

### Your Taxable Estate Includes:

#### Your Assets:

- Cash, bank accounts, money markets; real estate; stock, bonds, mutual funds, I.R.A.'s; automobiles, boats; jewelry, art, antiques, heirlooms; pension and profit sharing plans, KEOGHS; annuities; life insurance from employer, self or spouse, credit cards or clubs; assets held in trust; and inheritance or other transfer of assets, or interest in third party's assets.

### Your Debts:

- Household mortgages, auto loans; other loans - Credit card debts; funeral expenses; medical expenses; and legal fees, accounting fees and appraisal fees

There is no substitute for effective estate planning. You have worked hard for your money, and you need to assure that it goes to your family and designated beneficiaries rather than to the government, probate lawyers, doctors and other creditors. The best way to achieve that goal is to set up an effective estate plan.

The above is purposely simplified for ease of understanding. It is not to be relied upon as a replacement for advice from an attorney who is familiar with your specific circumstances. Feel free to contact us, Tarick Loutfi (312) 551-1105 [tarick@cs.com](mailto:tarick@cs.com) or Jim Rohlfing (312) 923-7100 [jtr@rolaw.net](mailto:jtr@rolaw.net) with any questions about the above or to make an appointment to discuss your estate planning needs.



## Illinois Prompt Payment Act One Step Forward, One Step Back...

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subcontractor has waived the provisions of the Act, and seek to have the court enforce the provisions of the Act despite the waiver, arguing that the provisions of the Act cannot be contracted away because they are important public policy. Such a lawsuit is supported by the plain language of the law, which is that "all construction contracts shall be deemed to provide" the provisions of the Act discussed above. In addition, the court would no doubt consider the legislative history of the Act by which the legislature had considered making the provisions of the Act waivable and then decided to exclude the ability to waive the Act's protections. This indicates that the legislature intended for the Act to create a policy mandating prompt payment to contractors and subcontractors.

A well-established case offers an illustration of how courts have decided that a law constitutes public policy so that the provisions of the law cannot be waived. In *George v. City of Danville*<sup>8</sup>, a state law set a minimum salary that a municipality can pay firemen. The City of Danville was having budgetary limitations, and asked the city's firemen to accept a lower salary than the state law required, rather than being forced to discharge 25 members of the force. The firemen agreed to accept the lower pay. The court, however, ruled that the state law constituted an important public policy, even though the law did not expressly state that the legislature intended for the law to be public policy. The court reasoned that the purpose of the law was to be able to create an acceptable rate of pay for firemen so that capable people would be attracted to such a job, and that this purpose was important enough to create a public policy. Accordingly, the court held that the firemen and the city could not waive the requirement of the minimum salary for firemen.

In a case seeking to interpret the provisions of the Prompt Pay Act, a plaintiff would be asking the court to recognize three important points: (1) the actual language of the Act that "all construction contracts shall be deemed to provide" the provisions of the Act; (2) the legislature deleted the provision in the original bill that authorized a waiver of its provisions; and (3) having contractors and subcontractors timely paid is an important public policy - making sure that the vital construction industry does not falter due to non-payment or untimely payment.

Therefore, before turning to the legislature to amend the Prompt Pay Act, the authors of this article recommend that subcontractors search for an opportunity to have the issue determined by the courts. Once such an opportunity is found, it is hoped that subcontractor organizations in the state might assist the individual plaintiff so that a fair clarification of the law may be obtained for the benefit of all subcontractors. Meanwhile, it would be prudent for subcontractors, who after all cannot know for sure how a court would rule on the issue, to refuse to waive their rights under the Act. In the end, it benefits the individual subcontractor as well as the entire industry for all participants to insist on fair treatment in their subcontracts.



<sup>1</sup> *People v. Howard*, 374 Ill.App.3d 705, 870 N.E.2d 959,967 (2007) • <sup>2</sup> *People v. Howard*, 374 Ill.App.3d 705, 870 N.E.2d 959,967 (2007) • <sup>3</sup> *George v. City of Danville*, 315 Ill.App. 17, 42 N.E.2d 300, 301 (1942) • <sup>4</sup> *George v. City of Danville*, 315 Ill.App. 17, 42 N.E.2d 300, 301 (1942) • <sup>5</sup> *Byron Community Unit School No. 226 v. Dunham-Bush, Inc.*, 215 Ill. App.3d 343, 574 N.E.2d 1383, 1387 (1991) • <sup>6</sup> *Byron Community Unit School No. 226 v. Dunham-Bush, Inc.*, 215 Ill.App.3d 343, 574 N.E.2d 1383, 1387 (1991) • <sup>7</sup> *People v. Bilelegne*, 381 Ill.App.3d 292, 887 N.E.2d 564 (2008). <sup>8</sup> 315 Ill. App. 17, 42 N.E.2d 300 (1942), affirmed by *George v. City of Danville*, 383 Ill. 454, 50 N.E.2d 467 (1943).