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June, 2011

Re: Recent Changes in Illinois Law

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Dear Clients and Friends:

We are pleased to announce that Roberta G. Evans is joining the Rothman Law Group as an Of Counsel attorney at the beginning of July. Roberta has nearly 50 years of experience in the areas of estate planning and estate administration, including trust management, for individuals and owners of closely-held or family businesses. She is a graduate with honors and distinctions of the University of Connecticut in Government and the University of Chicago Law School.

Illinois has recently passed legislation that provides significant opportunities to both same-sex and opposite-sex unmarried couples in Illinois and to same-sex couples who have entered into legal relationships in other states. In addition, new Illinois statutory forms for powers of attorney for property and powers of attorney for health care are effective July 1, 2011.

I. Illinois Religious Freedom Protection and Civil Union Act.

A. The New Law.

On June 1, 2011, the Illinois Religious Freedom Protection and Civil Union Act (the “Civil Union Act”) became law in Illinois. The Civil Union Act defines a ‘civil union’ as a legal relationship between two people of either the same or opposite sex. Although a civil union is specifically not the same as a marriage and the parties are not legally ‘spouses’, the Civil Union Act nonetheless provides that the members of the civil union have the same obligations, responsibilities, protections and benefits afforded or recognized to spouses by the law of Illinois.

In addition, if a same-sex couple has entered into a civil union, marriage or similar relationship in another state or another country, such as a California registered domestic partnership, that relationship will be recognized in Illinois as a civil union.

B. Estate Planning Rights, Benefits and Protections of a Civil Union in Illinois.

The following are examples of the rights and benefits that directly relate to estate planning afforded to couples who enter into a civil union in Illinois:

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1. Inheritance.

The surviving partner of a couple entering into an Illinois civil union will have the right to inherit a share of the deceased partner's estate in the same manner as if they were legally married. Specifically, if there is no executed Will, a surviving partner will receive 100% of the deceased partner's estate if there are no children and 50% of the estate if there are children (the children will share the remaining 50%). Prior to the Civil Union Act, the only way to ensure that the surviving partner received an inheritance was by executing a Will or trust agreement, but, as noted below, written estate plans are still strongly recommended.

2. Health Care Decisions.

The Illinois statutory power of attorney for health care form allows an individual to appoint an agent to make health care decisions on the individual's behalf. If an individual becomes unable to make health care decisions and has not executed a power of attorney for health care, the Illinois Health Care Surrogate Act establishes the following order of individuals who can make health care decisions on behalf of the incapacitated individual (in descending priority): (i) the guardian of the patient's person; (ii) the spouse of the patient; (iii) adult children; (iv) parents; (v) siblings; (vi) grandchildren; (vii) close friend of the patient; and (viii) the guardian of the patient's estate.

Without a civil union and a valid power of attorney for health care, the patient's partner would be considered a close friend with a very low priority for making health care decisions. With a civil union, however, the other partner is first in priority, if no guardian of the person for the patient has been appointed by a court.

3. Tenancy by the Entirety.

A couple who has entered into an Illinois civil union should be entitled to own their principal residence as tenants by the entirety. This form of ownership is much like joint tenancy in that it creates a right of survivorship between the owners, but unlike joint tenancy has significant creditor protection benefits for the owners.

4. Illinois Estate Tax.

Illinois residents are subject to Illinois estate tax on all assets except for real and personal property physically situated in a different state. Illinois exempts the first \$2,000,000 of an estate from estate taxation. As a result, a decedent subject to the Illinois estate tax will be able to have an estate of \$2,000,000 of assets before the Illinois estate tax will be imposed. After the \$2,000,000 threshold is reached, unless it qualifies for the marital deduction or another deduction, the Illinois estate tax is imposed at a graduated rate beginning at 8% with a top rate of 16%.

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It is generally anticipated that the surviving partner of an Illinois civil union will qualify for the unlimited marital deduction for Illinois estate tax purposes. As a result, assets in excess of \$2,000,000 can be passed to the surviving partner without the imposition of an Illinois estate tax until his or her subsequent death.

C. Limitations of the Civil Union Act.

In direct conflict with the Civil Union Act is the federal Defense of Marriage Act (“DOMA”), which became law in 1996. DOMA defines “marriage” under federal law as exclusively limited to a legal union between one man and one woman - as husband and wife - and the word “spouse” is limited to a person of the opposite sex who is a husband or a wife. In addition, DOMA provides that a state is *not* required to give legal effect to a relationship between two persons of the same sex, even if the relationship is treated as marriage under the laws of another state. It should be noted that several federal court decisions have declared the federal DOMA statute unconstitutional. These cases may well have to be resolved by the United States Supreme Court.

The members of an Illinois civil union will therefore not be entitled to the federal benefits of marriage, which include, for example, social security survivors’ and spousal benefits, federal veterans’ spousal benefits, immigration rights in conjunction with marriage, and federal spousal employment benefits to name a few. Importantly, the Civil Union Act also does not affect the federal individual tax laws which, in their current state, will continue to treat civil union couples as unmarried. Therefore, for federal purposes, members of a civil union may not file joint income tax returns, may not make unlimited gifts to one another without the possibility of gift tax liability, and may not avail themselves of the federal estate tax unlimited marital deduction.

Even though other states allowing civil unions have permitted their residents to file joint returns for state income tax purposes, it is not presently clear as to how the Illinois statute will impact that possibility. Additionally, since other states are not required to recognize an Illinois civil union, the rights, benefits and protections which are afforded under an Illinois civil union will not always be recognized in another state.

D. Other Opportunities created by the Civil Union Act.

As previously noted, opposite-sex unmarried couples as well as same-sex couples, may enter into an Illinois civil union. Many elderly individuals whose spouses have predeceased them, but who have developed companionships later in life, are often reticent to remarry due to the potential risk of losing survivor benefits they are receiving from Social Security. Entering into an Illinois civil union will not currently impact these federal benefits while providing the same rights, benefits and protections afforded to a married couple in Illinois. These benefits and protections include hospital visitation, cohabitation in care facilities, access to a deceased partner’s safe deposit box, notice of any guardianship proceeding instituted with regard to the other partner,

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right to bring certain civil actions such as wrongful death, and the right not to testify in court as to what would be spousal communications.

E. Continued Need for Appropriate Estate Planning Documents.

Validly executed Wills, revocable trusts and powers of attorney are the only way to ensure that intentions regarding who should be responsible for medical and financial management in the event of incapacity and the proper disposition of assets at death are honored. Although the Civil Union Act provides same-sex or opposite-sex unmarried couples with the same rights, benefits and protections afforded to a married couple in Illinois, civil unions are not required to be recognized by other states. Even if another state recognizes civil unions, there is no certainty as to how that other state will interpret the Civil Union Act. There is a need, therefore, to remove that uncertainty through the implementation of appropriate estate planning documents.

CAUTION: Even though a civil union is now available to both same sex-couples and opposite-sex unmarried couples, many couples may choose not to enter into the formalities of a civil union. As a result, none of the benefits made available under the Civil Union Act which are discussed above will be available. We strongly recommend that those couples who choose to cohabit without the benefit of a civil union or marriage consider entering into a cohabitation agreement to protect and clarify their property rights.

II. Illinois Statutory Power of Attorney Forms.

The Illinois statutory power of attorney forms for property and health care allow an individual (the “principal”) to appoint an agent to make financial and health care decisions on the principal’s behalf. These power of attorney forms are very important estate planning documents that provide the appointed agents with specified powers and directions that are to be applied on behalf of a principal by the agent.

The Illinois legislature has amended the Illinois Power of Attorney Act. These amendments introduce a number of revisions to the statutory power of attorney (“POA”) forms for property and health care. All statutory POA forms for property and health care executed on or after July 1, 2011 must incorporate these revisions if the principals and the agents are to have all of the powers and protections provided under the new statute.

It is important to note that even though POA forms executed after June 30, 2011 must comply with the new Illinois statute, Illinois POA forms executed prior to July 1, 2011, if executed in accordance with the applicable Illinois law on the execution date, will remain valid. Similarly, POA forms executed in states other than Illinois will be honored in Illinois so long as the forms were prepared and executed in accordance with the then current applicable state law.

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The new Illinois Statutory Short Form Power of Attorney for Property and the new Illinois Statutory Short Form Power of Attorney for Health Care will reflect a number of formatting and substantive changes, including the following:

A. Illinois Statutory Short Form Power of Attorney for Property.

- The Illinois POA for Property will now have three separate parts: (i) a Notice to the Principal which explains the POA in large print on a separate page, (ii) the Statutory Short Form, and (iii) a Notice to the Agent, which explains the agent's powers, responsibilities and the consequences of breaching those responsibilities.
- The agent's standard of care is increased from "due care" under the current statute to a duty to "act in good faith for the benefit of the principal using due care, competence and diligence".
- The agent's liability for a breach of the standard of care is expanded to include reasonable attorneys' fees and costs.
- The principal may now authorize another person to designate one or more successor agents.
- Co-agents are prohibited in the statutory POA form for property. If desired, however, our office can include language that requests the acting agent to consult with any designated successor agents prior to taking any actions. Although this language is not binding upon the acting agent, the principal's intent is thereby clearly memorialized.
- **It is important to note that a POA for Property only governs assets in the individual name of the principal and actions taken personally on behalf of the principal, such as dealing with the Social Security Administration, etc. Assets held in a Revocable Trust are controlled by the acting Trustee or successor Trustee of the Revocable Trust and not by the agent.**

B. Illinois Statutory Short Form Power of Attorney for Health Care.

- The Illinois POA for Health Care will now have two separate parts: (i) a Notice to the Principal which explains the POA in large print on a separate page and (ii) the Statutory Short Form. Unlike the new POA for Property, the POA for Health Care does not require a separate Notice to the Agent.
- The new form incorporates Health Insurance Portability and Accountability Act ("HIPAA") language, permitting the agent to act as the principal's personal

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representative to access the principal's health information. Since 2004, however, it has been our general practice to include HIPAA language on all Illinois POA for Health Care forms prepared by our office. Please contact our office if you are uncertain as to whether your current Illinois POA for Health Care form incorporates appropriate HIPAA language.

- The new form allows the principal to specifically decline the granting of authority to the agent to make anatomical gifts.
- The new form allows the principal to name an individual other than the agent to make decisions regarding the disposition of the principal's remains.
- The current form changes the circumstances under which it is specifically requested that life be terminated from a state of irreversible coma to a state of "permanent unconsciousness" or suffering from an "incurable or irreversible condition" or "terminal condition", as more fully defined by the statute.
- As with the new POA for property, co-agents may not be named. Once again, however, if desired, our office can include language that requests the acting agent to consult with any designated successor agents prior to making any health care decisions. Although this language is not binding upon the acting agent, the principal's intent is thereby clearly memorialized.

Our office will begin implementing the new forms when the Illinois statute becomes effective on July 1, 2011.

Please feel free to schedule an appointment with us to discuss how these new Illinois laws can be utilized for your benefit.

Kindest personal regards,

Rothman Law Group

Rothman Law Group is a Chicago-based law firm specializing in estate planning, business planning and trust and estate administration. We combine the most sophisticated planning techniques with the ability to find practical solutions to individual problems. Our legal expertise coupled with strong relationship skills enables us to effectuate our clients' goals while providing tax and other cost-saving strategies.