DAY PITNEY LLP

Estate Planning Update
Winter 2022-2023

The following is a summary of some estate planning developments and opportunities that may be of interest to you. We hope you find this helpful and look forward to hearing from you with any questions.

Each year, certain federal gift, estate and generation-skipping transfer (GST) tax figures are subject to inflation adjustments:

- For 2023, the annual exclusion amount for gifts increases to $17,000 (from $16,000 in 2022). The annual exclusion amount for gifts made to a noncitizen spouse in 2023 increases to $175,000 (from $164,000).
- The federal gift, estate and GST tax exemption amount for gifts made in 2023 and decedents dying in 2023 increases to $12,920,000 (from

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MASSACHUSETTS' 'MILLIONAIRES TAX' GOES INTO EFFECT IN 2023

Massachusetts voters approved a 4 percent income tax surtax on Massachusetts taxpayers with a net income in excess of $1 million. The new tax goes into effect on January 1, 2023. For additional information, see our alert (go to bit.ly/MAVoteMMTax).

$12,060,000). These exemption amounts apply to U.S. citizens and those domiciled in the United States.

There are changes to exemptions in three of the states in which Day Pitney has offices:

- The Connecticut gift and estate tax exemption for gifts made in 2023 and decedents dying in 2023 also increases, to $12,920,000 (from $9,100,000).
- The New York state estate tax exemption for decedents dying in 2023 also increases, to $6,580,000 (from $6,110,000).
- The Rhode Island estate tax credit amount also increases with inflation each year. The 2023 exemption has not been announced—the credit amount was $74,300, making the estate tax threshold $1,648,611, in 2022.

Note also some changes to retirement plan contribution limits:

- The contribution limit for 401(k) plans will increase in 2023 to $22,500 (from $20,500). The limit for catch-up contributions to such plans for people over age 50 will increase to $7,500 (from $6,500).
- The limit on annual contributions to an IRA will increase to $6,500 (from $6,000), with the IRA catch-up contribution limit remaining at $1,000.
- For further information on retirement plan contribution limits, see our alert, "IRS Publishes 2023 Pension Plan Limitations" (go to bit.ly/DPIRS2023).

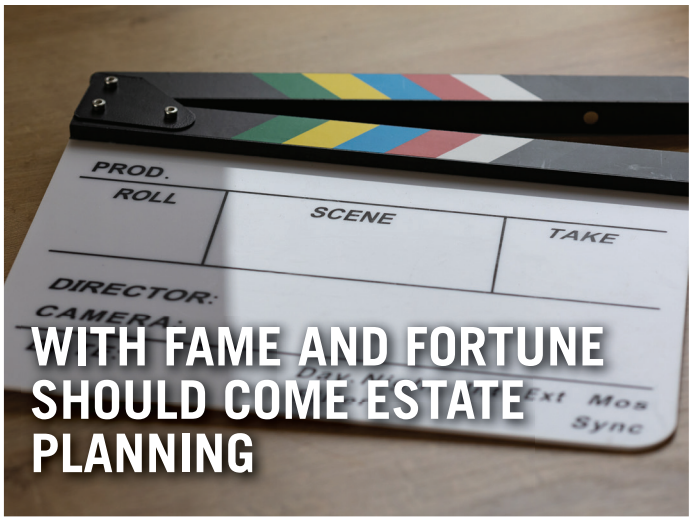
An individual who relinquishes U.S. citizenship or long-term residence status may be subject to a mark-to-market tax on the deemed sale of all assets and other adverse tax consequences if the individual's net worth is more than $2,000,000 or average annual income tax liability is above certain thresholds. A certain amount of gain is excluded from the mark-to-market tax. Note these changes:

- The income tax threshold for triggering covered expatriate status increases to $190,000 in 2023 (from $178,000).

The excluded gain under the mark-to-market tax increases to $821,000 (from $767,000). ■

2023 INFLATION ADJUSTMENTS PROVIDE OPPORTUNITIES FOR ADDITIONAL GIFTS

The federal gift and estate tax exemption amount is adjusted for inflation each year. One consequence of higher inflation is a substantial increase in the exemption amount for 2023—an increase of $860,000 to $12,920,000. An individual who has used their full lifetime exemption of $12,060,000 will, as of January 1, 2023, be able to give away another $860,000 over and above annual exclusion gifts. A married couple will together be able to give away twice that amount. If you are interested in taking advantage of this gifting opportunity, please contact your Day Pitney estate planning attorney.



WITH FAME AND FORTUNE SHOULD COME ESTATE PLANNING

Anne Heche, the actress who rose to fame after her role in the 1997 film *Donnie Brasco*, died on August 11, 2022, following a tragic car crash. Despite her fame and the complexities of her blended family, Heche died without a will. Her untimely death and the ensuing litigation over control of her estate is yet another reminder of the critical importance of estate planning.

At its most basic level, proper estate planning includes a will, and in many cases, a revocable trust. These documents work in tandem to provide parameters for the distribution of property, identify desired beneficiaries, and appoint the persons or entities to carry out key roles in the estate and trust administration process, including:

- an executor, or personal representative, who is responsible for managing the estate;
- a guardian, who cares for children if both parents die while a child is a minor; and
- a trustee, who invests, manages and distributes trust property in accordance with the terms of the trust agreement.

When a person dies without a valid will, state law dictates who manages the estate as fiduciary and who receives the assets as beneficiary. This is called intestacy. Although the rules of intestacy vary depending on the state in which the deceased person lived, intestacy generally results in dividing the estate assets among a spouse and children or other related individuals, who receive assets outright at age 18. It also entitles individuals to serve as administrator based on how closely related they are to the decedent. For instance, a spouse may manage an estate payable to children who are not hers, or multiple children have equal rights to manage an estate even if one is estranged from his deceased parent. These "default" rules can wreak havoc on an already mourning family.

As Heche's case illustrates, intestacy can be a particularly poor outcome in the context of blended families. Heche was divorced at the time of her death. She is survived by an adult son, Homer, 20, from her prior marriage, and a minor son, Atlas, 13, whom she shared with her longtime partner, James Tupper. Litigation ensued almost immediately after Heche's death between Homer, who petitioned a California court to be appointed as administrator of the estate, and Tupper, who argues that a 2011 e-mail from Heche, in which she states that her assets are to "go to the control of Mr. James Tupper," constitutes a will naming him as executor. Ultimately, the court appointed Heche's adult son as the estate's administrator over Tupper's objections.

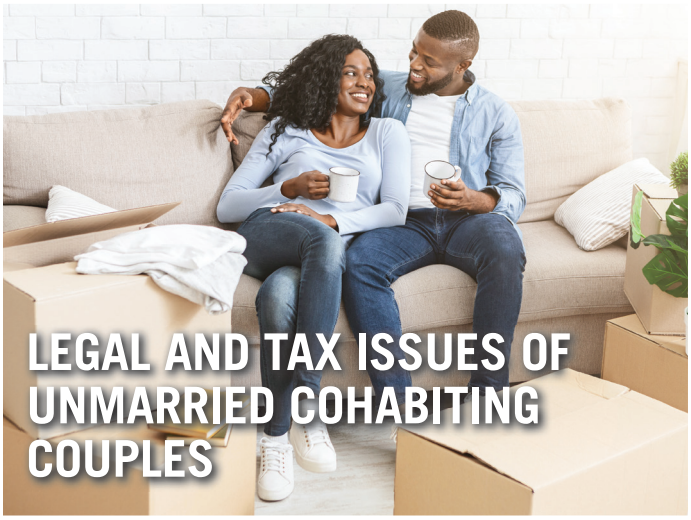
State laws vary on whether a document constitutes a will when it is not executed with certain requisite formalities. For instance, a "holographic will" can be valid in some states if the material terms and signature are in the decedent's handwriting. Other materials can qualify as wills in some states if they are proven to be intended by the decedent as a will. It remains to be seen whether Heche's e-mail qualifies as a will under California law, but what is evident is that much family acrimony—not to mention expense—could have been avoided had Heche worked with a trusts and estates lawyer to create a customized estate plan tailored to her particular family dynamics and goals.

Heche may be the most recent example of this unfortunate trend, but she is far from the only celebrity whose family has endured protracted and public litigation due to an absence of basic

estate planning. Other high-profile figures who died without estate planning include:

- **Prince**, whose $156 million estate was settled in 2022 after six years of litigation among his half-siblings and others claiming to be heirs;
- **Howard Hughes**, one of the wealthiest men of his time, integral to the development of modern aircraft and whose life was portrayed by Leonardo DiCaprio in the 2004 film *The Aviator*, died intestate in 1976 with billions of dollars, allegedly unwed and with no children, and an estate disposition that cost millions of dollars and more than 30 years of litigation to resolve dubious claims by many and that ultimately went, in part, to multiple cousins whom he allegedly did not know or want to benefit;
- **Aretha Franklin**, who died in 2018 leaving unsigned drafts of wills, which led to years of bitter litigation among her heirs;
- **Amy Winehouse**, whose parents inherited her entire estate following her death in 2011 at age 27 only to face litigation involving Winehouse's ex-husband, who filed a claim against her estate in 2019;
- **Jimi Hendrix**, whose death without a will at age 27 in 1970 led to legal battles lasting for decades; and
- **Pablo Picasso**, whose intestate estate took six years and $30 million in legal fees to resolve following his death in 1973, all because—according to his lawyer—Picasso was superstitious and believed avoiding estate planning was a way of avoiding death itself.

Not updating an estate plan could have similar devastating effects. For example, Heath Ledger died unexpectedly in 2008 with a will that predated the birth of his daughter, Matilda, and purported to leave his estate to his parents and siblings. Litigation ensued that settled with Ledger's estate being paid to his daughter. Although many states have laws that would protect children born after the date of a parent's will, they do not come without the cost of court actions and the loss of proper trust planning. The litigation and negative publicity caused by stories like the foregoing could have been significantly reduced, if not avoided altogether, had appropriate estate planning been undertaken and kept current. Estate planning would have allowed the person to designate their fiduciaries, identify their beneficiaries and establish trusts to help privately guide the use and distribution of assets in tax-efficient and creditor-protective ways. While not many people are in the spotlight like celebrities are, the experiences of the famous illustrate the need to take control to establish and maintain an estate plan reflective of desires and protective of intended beneficiaries. ■



A successful Hollywood love story comes to mind when you hear about Kurt Russell and Goldie Hawn. They blended their families and have been together for 39 years. Despite the years, they never married. They are not alone. The number of unmarried couples choosing to cohabit, whether prior to or instead of marriage, has increased greatly in recent years. While cohabiting can be beneficial to a couple on both a personal and a financial level, there are legal and tax issues that couples should consider as they build their lives with each other.

Tax Considerations

It is no secret that marriage plays a crucial role in the tax regime of the United States. Different rules apply to taxpayers depending on their marital status.

Income Taxes

While married couples may choose whether to file their income taxes "jointly" or "separately," unmarried individuals must generally file separately, regardless of their living arrangement. An exception may exist for couples enjoying a "common law marriage" if the couple resides in a state that legally recognizes or respects such a marriage. None of the states in which Day Pitney has offices permit common law marriages, although they may recognize common law marriages established in other states that allow them.

Unmarried couples, however, may have opportunities to make strategic decisions on their income tax returns. For example, unmarried couples with children can arrange for the higher-income-earning parent to file as "head of household," claiming the children as dependents to receive additional tax deductions. Because the higher-earning parent is in a higher income tax bracket, that parent will typically gain a greater benefit from the tax deduction.

A benefit may also be realized in connection with a mortgage on the shared residence. When both partners are named on the mortgage and contribute toward the payments, they can choose to share the mortgage interest deduction on their income tax returns or one partner can claim the entire deduction. If only one partner is obligated on the mortgage, only that partner can claim the mortgage interest deduction for the payments, even where the other partner contributes.

Gift Taxes

When it comes to transferring assets between spouses, married individuals can make unlimited gifts to their U.S. citizen spouses with no tax consequences. Tax-free gifts between unmarried individuals, on the other hand, are subject to limitations. Each partner can transfer up to $16,000 (in 2022, increasing to $17,000 in 2023) to the other partner annually. This is called the "annual exclusion" gift and does not require filing a gift tax return. Unmarried couples also can pay for certain tuition and medical expenses for one another, which, if paid properly, do not constitute gifts and can be unlimited in value. Each partner can give additional amounts to the other partner, but those transfers will be counted against the lifetime gift and estate tax exemption of the partner making the gift. The lifetime exemption for federal transfer tax purposes is $12,060,000 in 2022, increasing to $12,920,000 in 2023. A gift tax return has to be filed to report any gifts that do not qualify as annual exclusions. Additional limitations apply to unmarried couples with a 37-1/2-or-more-year age difference or married partners with noncitizen spouses. State inheritance tax consequences of gifts prior to death should also be considered.

Because of these rules, unmarried couples should take care in arranging ownership of their assets and paying expenses in order to avoid the unexpected consequence of making a gift that could trigger an obligation to file a gift tax return.

Estate and Inheritance Taxes

Transfers at death may be subject to federal or state estate or inheritance taxes. Similar to gift taxes, the Tax Code favors married couples when it comes to estate and inheritance taxes. When the first spouse dies, no tax will apply when assets pass to the surviving spouse who is a U.S. citizen. With proper planning, the couple's assets will only be taxed once, on the death of the surviving spouse.

Unmarried couples, however, have to take estate tax into account. For instance, if Kurt made $5,000,000 of gifts while alive and passes away in 2022, Kurt can give Goldie up to an additional $7,060,000 at death before a federal estate tax is incurred since the lifetime exemption is currently $12,060,000. If the value of property given to the surviving partner

and others is more than what is left of the lifetime exemption, a 40 percent federal estate tax will apply. State estate taxes should be considered as well. Careful estate planning is essential in order to minimize tax on the death of the first partner and to avoid a second round of estate tax on the death of the second partner.

If the unmarried couple resides in a state that has an inheritance tax, such as New Jersey or Pennsylvania, assets transferred to an unmarried partner would trigger an inheritance tax as well.

Legal Considerations

Tax implications aside, unmarried couples must keep other important practical considerations in mind.

Retirement Accounts

Retirement accounts such as IRAs and 401(k)s are often among an individual's most valuable assets. As a result, planning is particularly important for unmarried couples holding retirement accounts. When a retirement account pays to a surviving spouse, that spouse can roll over the account into his or her own name to preserve potential tax benefits, including deferring payments, spreading them over a longer period of time and maximizing tax-free growth of the account. An unmarried partner, however, is a "non-spouse," and under the SECURE Act, which came into effect on January 1, 2020, with certain exceptions, a non-spouse beneficiary must generally withdraw all account funds within 10 (or in some cases five) years.

Beneficiary Designations

How an asset is titled will control how it is distributed when a person dies. Some assets, such as retirement accounts and life insurance, require beneficiary designations. Other assets do not require such designations but may nonetheless have a "transfer on death" designation that will have the same effect. These assets pass to those designated beneficiaries regardless of the provisions of a will. When a beneficiary designation is missing or faulty, applicable laws or account terms will identify "default" beneficiaries, which often mirror intestate disposition. Accordingly, unmarried couples must review and update beneficiary designations to name each other where desired.

Wills and Trusts

Unlike married couples, unmarried partners have no legal rights when it comes to the deceased partner's estate. If one partner dies without a will, the intestacy laws of the decedent's state of residence will identify who receives the deceased partner's assets. Those recipients will be determined by relationship to the decedent. An unmarried partner will not be among those recipients. If unmarried partners intend to benefit one another, proper estate planning documents are imperative.

Incapacity Documents

Living together will not give partners automatic rights to make financial and medical decisions for one another. A power of attorney is required for one partner to continue paying bills if the other cannot. Similarly, a health care proxy or medical power of attorney is necessary for one partner to speak with treating physicians about status, assess prognosis or authorize important medical care for the other partner in the event of incapacity. Hospital policies vary regarding visits from nonfamily members if the patient cannot verbalize desires. A guardianship proceeding may be required if incapacity documents do not exist, and state laws favor the appointment of related family members as guardian, to the exclusion of a cohabiting partner. Proper planning is required in order to implement the partners' wishes.

Conclusion

Dealing with tax and legal issues as an unmarried cohabiting couple can create additional complications beyond basic estate planning.

However, with adequate planning, unmarried cohabiting couples can take control to protect one another and avoid unintended consequences. ■

GET YOUR DUCKS IN A ROW: PLANNING WITH PET TRUSTS

National Pet Day is April 11, but for many people, pets are important members of the family every day of the year. Consequently, pet owners are dismayed to learn that their pets are considered tangible personal property, like clothing or furniture, in the context of their estate plan. The good news is that pet trusts are now recognized in all 50 states and the District of Columbia and can be flexible enough to accommodate varying goals and unique circumstances. From donkeys to birds and everything in between, a person can provide for the continued financial support and physical care of a pet.

Although once a tool for wealthy and arguably eccentric clients, the widespread use of pet trusts reflects the integral role of pets in modern families and the increased legal legitimacy of planning for their future care. Generally, a trust may be established for pets living at the time of the trust's creation with an amount of assets reasonable for the care of the pet for the rest of its life. What is deemed "reasonable" will be pet- and family-specific. For instance, a trust for a tortoise could require funds for 150 years, whereas a trust for a dog may require funds for only 10 years.

A pet trust can be created as a stand-alone trust to which assets can be transferred during an owner's life, or it can be incorporated into a will or revocable trust to be funded at the owner's death. A pet trust can include layered oversight by naming caretakers, trustees and trust protectors with distinct responsibilities to care for the pet, manage and disburse funds, and ensure accountability. Within the trust structure, the owner can specify permitted uses of funds, direct intentions for euthanasia, ensure the disposition of remains and direct to whom excess funds are paid upon termination. Flexibility for designating successor caretakers, trustees or trust protectors can ensure that the trust is managed for the life of the pet. Compensation for those providing services can be authorized as well.

Typically, the trust is funded with a certain dollar amount calculated by multiplying the pet's annual needs by its life expectancy. When calculating the appropriate funding level, owners should consider costs for food, shelter, veterinary care, medication, boarding or pet-sitting, and the pet equivalent of toiletries and entertainment, such as grooming, treats and toys. Ultimately, what is "reasonable" may hinge on applicable state law and the pet's specific lifestyle. On one hand, Leona Helmsley's Maltese, Trouble, was not able to enjoy the full benefit of its $12 million trust when a court ruled that $2 million was sufficient. On the other hand, over the objections of both the estate's fiduciary and charitable beneficiaries, a court preserved a pet trust holding the owner's home and funds transferred to it for the support of the owner's cats. Owners wishing to create trusts for their pets should be specific with their intentions and deliberate with their decisions.

The funds within a pet trust are fully taxable for estate and inheritance tax purposes. This is true even if the trust's remainder beneficiaries are charitable organizations. Because of this, consideration should be given when directing from what funds death taxes will be paid upon death. Moreover, a pet trust will pay the tax on

all its income, in contrast to trusts for individuals, where distributions carry out income to be taxed to their beneficiaries. Although unlikely, it is not inconceivable that federal legislation may lessen the tax burden of pet trusts at some point. Legislation proposed in 2007 failed to gain sufficient traction but would have allowed an estate tax deduction for a portion of a pet trust if the balance of the trust was paid to charity on the pet's death. The public policy behind the proposal was to provide a tax incentive for people to arrange for long-term care of their pets, reduce the societal burden of caring for unwanted animals and encourage charitable giving. With that said, pet owners will not generally let the tax tail wag the dog; they will provide for their pets regardless of the tax consequences.

Pet trusts are permitted in all the states in which Day Pitney has offices. With some variation among states, pet owners can create trusts for their living pets with amounts that are reasonable for the intended purposes. Because of the nuances that each state's law can carry, an owner who wishes to set up a pet trust should consult with their estate planning attorney to discuss how best to provide for their pet(s). ■

For many years, the concept of being "charitable" meant simply making cash donations to trusted charitable organizations and giving those organizations broad latitude to use the money for a particular charitable purpose. The next generation of philanthropists, however, have moved away from this trend and, instead, seek to be more active and engaged in their charitable endeavors. Moreover, these change-makers are focused on using their existing skills, networks and resources to effect social change on a local and even global scale, regardless of whether they derive a tax benefit in the process.

As the mindset of these new philanthropists has changed, traditional 501(c)(3) charitable organizations—such as public charities and private foundations—have been increasingly viewed as inefficient or less desirable. Depending on the choice of charitable entity, qualifying for tax-exempt status can mean limiting activities such as influencing legislation, requiring a minimum level of annual distributions or mandating unwanted disclosure to the public. These restrictions in many ways are a "cost of entry" for an organization to enjoy tax-exempt status and receive tax-deductible donations. Tax deductibility is important for charitable organizations that are dependent on public support. For philanthropists who engage in charitable activity not dependent on public

contributions, however, the tax benefits of a traditional charitable organization may not outweigh these limitations and burdens.

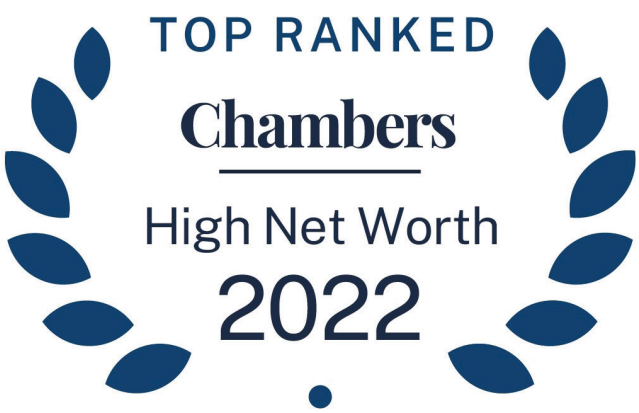
For example, Mark Zuckerberg and his wife, Dr. Priscilla Chan, opted in 2015 to establish the Chan Zuckerberg Initiative LLC (CZI) as a limited liability company (LLC), rather than forming a traditional charitable organization. Without an expectation of ever seeking tax-exempt status, the Zuckerbergs transferred Facebook (now Meta) stock to CZI to help fulfill their promise to donate 99 percent of their stock to charity during their lives. The decision to use an entity that is not tax exempt allowed the Zuckerbergs to retain complete control over CZI and its holdings. The LLC can invest, distribute or retain funds as the Zuckerbergs see fit. It can support causes the Zuckerbergs deem worthwhile through distributions or direct activities, whether or not those causes could be supported by a traditional charity. The Zuckerbergs can also get their stock back, to be used for any purpose, which would not be possible with a traditional charity. This added control and flexibility came at a cost, however: Contributions to CZI do not qualify for a charitable income tax deduction.

More recently, Patagonia's billionaire founder, Yvon Chouinard, his wife, Malinda Pennoyer, and their two children made headlines when they announced that they transferred all the company's voting stock (which comprises 2 percent of the total company stock) to a trust named the Patagonia Purpose Trust and the remaining 98 percent of the company stock, valued at roughly $3 billion, to a 501(c)(4) social welfare organization called the Holdfast Collective. A 501(c)(4) organization is a tax-exempt, nonprofit organization that operates exclusively to promote social welfare. With this new arrangement, the Patagonia Purpose Trust will oversee the company's operations while the Holdfast Collective will use the company's profits to combat climate change.

The tax implications of this arrangement were not ideal. Donations to a 501(c)(4) social welfare organization like the Holdfast Collective receive no charitable income tax deduction. Moreover, since the Patagonia Purpose Trust is not tax exempt, the transfer of stock to it resulted in more than $17 million in gift taxes. The Chouinard family was willing to pay this price in order to continue to have control of the company, even though its future profits are irrevocably committed to the Holdfast Collective for social welfare purposes. This is in stark contrast to CZI, over which its founders retain full control.

For the Chouinard family, the permanency of the arrangement was part of its appeal. Yvon Chouinard concluded, "Now I could die tomorrow and the company is going to continue doing the right thing for the next 50 years and I don't have to be around."

Of course, different philanthropists will have different desires with respect to philanthropic activities, level of control and tax benefits. It is important to consider the options available and to understand the benefits and burdens of the choice that is made to fulfill charitable intentions. ■



Day Pitney LLP

CHAMBERS HIGH NET WORTH RECOGNIZES 20 DAY PITNEY ATTORNEYS FOR PRIVATE WEALTH LAW

Day Pitney LLP is pleased to announce that the firm and 20 attorneys in its Private Client Department have been ranked in the *2022 Chambers High Net Worth (HNW) Guide,** a Chambers and Partners publication specifically aimed at the international private wealth market. The guide covers private wealth management work and related areas around the world, featuring in-depth editorials about the leading professional advisers to wealthy individuals and families in each market.

The firm again ranked in the *Chambers HNW Guide for Private Wealth Law* in the Nationwide Eastern Region, as well as in Connecticut, Massachusetts, New Jersey, New York, and Rhode Island. Day Pitney was recognized with Band 1 rankings for their practices in Connecticut, Massachusetts, and Rhode Island.

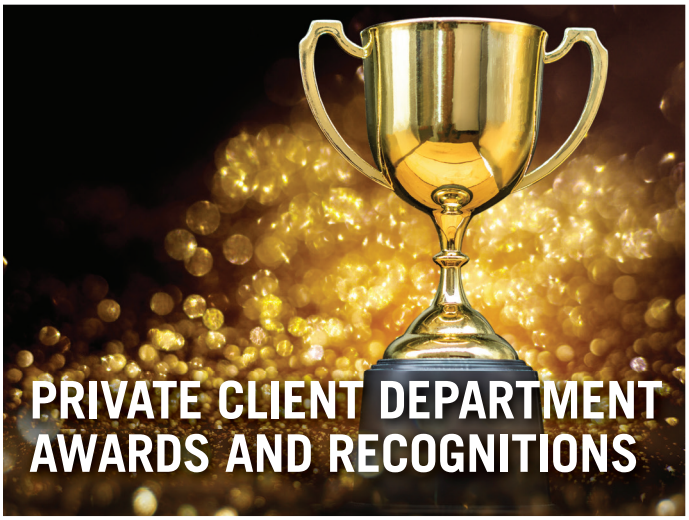
Day Pitney has "a huge amount of experience advising private clients on their wealth planning," according to *Chambers.* "They have a terrific international practice," commented one interviewee. "They are a knowledgeable and capable group," noted another market source.

With nearly 80 lawyers in the firm's Trusts and Estates practice, Day Pitney offers private clients one of the deepest and most experienced practices in the country. The attorneys have hundreds of years of combined experience advising individuals and their families on the full spectrum of matters related to trusts and estates and family offices. In addition, 15 attorneys are elected fellows of the American College of Trust and Estate Counsel (ACTEC), a group of peer-elected trust and estate attorneys across the United States and abroad with more than 10 years of experience in the active practice of probate and trust law or estate planning.

Twenty attorneys were ranked for Private Wealth Law or Family/Matrimonial for *High Net Worth* in their respective states, including eight attorneys who received Band 1 rankings. Three attorneys were also ranked for Private Wealth Law in the Nationwide Eastern Region category. The lawyers recognized are as follows ("1" denotes a Band 1 ranking):

Please visit our website for our complete 2022 rankings at bit.ly/DPChambersHNW2022.

**Chambers High Net Worth* results are issued by Chambers and Partners. A description of the selection methodology can be found here (go to bit.ly/AwardsMethodology). No aspect of this advertisement has been approved by the highest court of any state. Prior results do not guarantee a similar outcome. ■



Over the last few months attorneys in our Private Client Department have been recognized by the media and outside organizations with several prestigious honors. *Boston* magazine selected Alisa H. Hacker, Amy R. Lonergan, Jaclyn S. O'Leary, David L. Silvian and Jordana G. Schreiber for inclusion on the publication's "Top Lawyers of 2022" list. Renée A. R. Evangelista, office managing partner of our Providence office, was honored with a *Providence Business News*' 2022 Leaders & Achievers Award. Jim Ballerano, Brian Thompson and A. Michael Wargon were recognized by the *Boca Raton Observer* as being part of their "Top Lawyers in 2022" list for Wills. Tasha K. Dickinson was recognized by the *Palm Beach Illustrated* as being part of their "Top Lawyers in 2022" list for Trusts and Estates.

In addition, Providence-based Claire Carrabba was selected for the American Bar Association's Real Property, Trust and Estate Law Fellowship Program. Additionally, New Jersey-based Daniela Catrocho graduated from Class II of the ACTEC Mid-Atlantic Fellows Institute and Stamford-based Katherine McAllister graduated from Class I of the ACTEC New England Fellows Institute.

Please visit our website for complete summaries of these awards and recognitions at bit.ly/DPPCDAwards2022.

A description of the selection methodology can be found here (go to bit.ly/AwardsMethodology). No aspect of this advertisement has been approved by the highest court of any state. Prior results do not guarantee a similar outcome. ■

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