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THE LISSNER & LISSNER LLP NEWSLETTER

"Your Trusted Elder Law, Estate Planning & Administration and Tax Information Source"

Winter 2011

FIRM NEWS:

The Firm is proud to announce that in addition to partners Michael D. Lissner and Barbara H. Urbach Lissner and Of Counsel Robert J. Epstein, Stanley J. Yellin, and Marc E. Savoy are now Of Counsel to our Firm. Their backgrounds and expertise further enhance our legal representation in the areas of elder law, estate planning and administration, tax planning and preparation, asset protection, guardianship proceedings, Medicaid planning and applications, litigation, real estate, business matters and our assistance with personal book keeping and bill paying.

Stanley J. Yellin earned his J.D. degree from the University of Connecticut, School of Law and his LL.M. (in Taxation) from the New York University School of Law. He has taught, lectured and published articles in numerous professional publications and is admitted to practice in the U.S. Tax Court. Marc E. Savoy earned his J.D. in Lansing, Michigan before returning home to New York to begin his law career. Both Stan and Marc are admitted to practice in the courts of New York, New Jersey and Connecticut. Along with Michael D. Lissner's Florida license, we are now a 'four state firm.

Sadly, our associate of 5 years, Patrick S. Rogers, Esq. lost his battle with pancreatic cancer on February 11, 2011, just 2 days before his 51st birthday. We will miss him.

On a happy note, we are thrilled to announce that Woody Raymond recently had his first son, Elzbieta Kosier recently had her first daughter and Agnieska Bak is about to give birth to her second child.

INSIDE THIS EDITION:

There has been a great deal of 'talk', some of which has created a great deal of confusion, about recent changes to the tax law, we hope that the information provided herein entitled **"Estate Planning Under The New Tax Law"** provides a clear summary of the highlights and clarifies some of the main points of the current law.

We also address some important issues regarding trusts, tax preparation, household employees and charitable giving.

ESTATE PLANNING UNDER THE NEW TAX LAW

On December 17, 2010 President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. The new law contains several provisions modifying the gift tax, estate tax and generation skipping tax. However, these modifications are not permanent. The new legislation is effective only for the years 2011 and 2012. With that in mind, let's take a look at the new provisions and how they may affect your estate planning.

Under the new law, the unified credit or exemption from estate tax is $5 million per person and the maximum estate tax rate is 35%. In addition, there is now portability between spouses. This means if the first spouse uses only $2 million of their credit (out of the maximum amount of $5 million), the unused $3 million portion can now pass to and be utilized by the surviving spouse. For this couple, the surviving spouse would now have the ability to transfer up to $8 million tax free. Under prior law, preservation of the first spouse to die's credit was usually accomplished by use of a "family trust" (which is also known as a "bypass trust") where the amount of the credit would be placed into a trust for the benefit of the surviving spouse (and possibly other family members as well). Upon the death of the surviving spouse the assets in the trust would then pass to the couple's beneficiaries. One benefit of a family trust, among several others, is that these protected assets would be sheltered from estate tax by the first spouse's credit and would then not be included (for tax purposes) in the surviving spouse's estate. Does this new portability provision (assuming it were to become permanent) do away with the need for a family trust? Not necessarily.

There are at least four good reasons why a family trust may still make sense.

One reason is to protect assets. When our firm drafts a family trust we usually include spendthrift provisions which shield the assets of the trust from the reach of a beneficiary's creditors. For example, where both spouses are professionals who are subject to malpractice suits, the surviving spouse's creditors would not be able to attach assets in the family trust. This would not be the case if each spouse had left their entire estate to the survivor (all amounts left to a surviving spouse are exempt from estate tax) and relied on the portable credit to shield the survivor's estate from tax.

A second reason for use of a family trust is state estate taxes. New York's estate tax exemption is $1 million while New Jersey's is $675,000.00, and neither state has portability. So by leaving everything to the surviving spouse without a family trust, a married couple will lose the first spouse's state credit. That amount can be taxed as high as 16% in the estate of the surviving spouse.

Protecting the appreciation of assets is a third reason why family trusts remain relevant. While the $5 million credit is indexed for inflation for years after 2011, the deceased spouse's unused exclusion is not. For example, if the first spouse to die transfers $5 million of assets directly to the surviving spouse (as opposed to utilizing a family trust) the survivor would have a $5 million carryover credit. If those assets appreciate to $6 million prior to the death of the survivor, and assuming the survivor has additional assets in excess of the exclusion amount, there would be a $350,000.00 estate tax on the appreciation of those assets. However, if those assets had been sheltered in a family trust they would have passed to the couple's beneficiaries estate tax free and the beneficiaries' basis in those assets would be their $5 million value on the date of the first spouse's death. Therefore, if the beneficiaries sold these assets immediately on the survivor's death (as opposed to retaining them) they would realize a $1 million capital gain. At the current 15% rate on capital gains the tax would only be $150,000.00 as opposed to $350,000.00, which is a $200,000.00 savings and thus justifies the use of a family trust.

A fourth reason why a family trust is an excellent way to avoid or minimize gift tax and the generation skipping tax. As we previously noted, there was no federal estate tax in 2010. However, the quid pro quo in the law was that beneficiaries received a modified carry over basis. For example, for example, consider an unmarried individual who died in 2010 with an estate of $6 million consisting of assets which had a basis of $1 million. Their beneficiaries' basis in those

assets would be $1 million plus an additional $1.3 million which the law allowed to be allocated among those assets any way the executor elected. If the beneficiaries sold those assets they would have a capital gain of $3.7 million which would result in a $555,000.00 tax. The new law allows the executor to elect subject to the new provisions. Therefore, there would be a $350,000.00 estate tax but the full step up in basis to $6 million would result in no capital gain.

Although the estate tax has disappeared for now, the gift tax remained in 2010. For gifts in excess of the annual exclusion amount ($13,000.00, $26,000.00 for gifts by couples) the first $1 million was sheltered by a credit. Amounts above $1 million were subject to a 35% tax. The $1 million gift tax exclusion was in place even in earlier years when the unified credit was $3.5 million (use of the gift tax exclusion reduces the unified credit available against estate taxes). For the next two years the new law reunifies the estate, gift and generation skipping tax credits at $5 million. This means that gifts of up to $5 million in excess of the annual exclusion amounts can be made by each spouse during their lifetime. A surviving spouse can also use the deceased spouse's unused credit for gifts. For those that can afford to make such large gifts there may be two reasons for doing so. The first reason is that any appreciation of the gifted assets will escape estate taxation. However, the basis of those assets in the hands of the donee will be the donor's basis rather than the date of death stepped up basis. The second reason relates to the generation skipping tax, which is a second tax at the highest estate tax rate for transfers to grandchildren (or trusts for their benefit) whose parent is still alive. As noted above, there is also a $5 million exclusion from this tax. However, it is not portable. Therefore, by making a large gift to a grandchild and electing to apply the generation skipping exemption to the gift, it will not be lost. Therefore, a family trust that includes provisions for grandchildren will minimize or avoid generation skipping tax.

As with any new tax law, there are always loose ends that Congress leaves for the IRS to tidy up. For example, in order to claim a deceased's spouse unused credit, the deceased spouse must file an estate tax return, even if one isn't otherwise due. So should a return be filed where each spouse has, for example, $2 million in assets? Those assets may grow after the first spouse's death or there may be an unexpected windfall so the surviving spouse may need that additional credit. As to the election to have the new rules apply to decedent's dying in 2010, Congress simply punted leaving it up to IRS to determine how and when to make the election. They did, however, extend the deadline for filing a return for any decedent dying in 2010 until August 17, 2011 at the earliest (it would be later for someone who died at the end of the year). Every situation involves different needs, so please call us to discuss how we can best help you and your heirs.

TAX PREPARATION

It is never too late to consult our tax team which consists of CPAs, tax attorneys, accountants and preparers to assist you with both tax planning and preparation of personal, fiduciary, estate, gift and corporate tax returns.

While most individuals are well accustomed to Federal filing requirements for Form 1040 Individual Tax Returns, many are not aware of other instances where Federal tax returns are required. For example: trustees of trusts with any amount of taxable income are required to file a Form 1041: Fiduciary Tax Return; executors of estates in excess of $5,000,000.00 (in addition to NY estates over $1 million and NJ estates over $675,000.00) are required to file a Form 706: Estate Tax Return (although as noted in the article above executors may want to file for smaller estates to preserve a spouse's unused credit) and, individuals making gifts of present interests with a value in excess of $13,000.00 to one individual or couples wishing to split gifts regardless of amount are required to file Form 709: Gift Tax Returns.

A Trust Is Not A Trust Until it is Funded!

There are a many reasons to create a trust and there are many different types of trusts, however, until a trust is properly funded, the trust is not a trust. To create a trust document alone is not enough. In fact, it is of no value until the appropriate assets become assets of the trust, that is, assets owned by the trust.

We assist our clients by drafting many types of trusts. Some of these include family trusts (as discussed above), Special Needs Trusts (which preserve public assistance income), **Victim of Nazi Persecution Restitution Trust®** (which protect assets against the rising cost of long-term health care for Survivors of the Holocaust) and Life Insurance Trusts. Living Trusts and Third Party Trusts are also oftentimes appropriate to create in order to shield assets and avoid probate. However, the intent of this article is not to create a 'laundry list' of the different types of trusts that can be created but rather to stress the importance of funding these trusts.

When we draft trusts for our clients we provide instructions and transfer forms so that they are best positioned to begin the process of properly funding their trusts. If asked to do so we will review assets and further assist with the transfer of assets into their trusts by helping our clients complete transfer instructions and documents.

Whether the trust creator handles these transfers by themselves or with the help of trusted individuals does not really matter - what matters is that assets should be reviewed periodically to be certain that they are properly owned and that the transfers into the trust are completed to accomplish the goals set forth in creating the trusts in the first place. A trust that is not properly funded will not accomplish the goals for which it was established.

Paying Your Household Employees

We cannot stress enough the importance of properly paying domestic employees in accordance with the State and Federal rules that establish payroll withholdings for social security, workers compensation, disability etc. To expose yourselves and your loved ones to possible penalties for non-compliance and potential lawsuits and complaints by your employees just isn't worth it. If you need assistance with your payroll please let us know.

Charitable Giving

So many of our clients demonstrate their belief in supporting charitable causes by making gifts during their lifetime and through their estate planning. However, if you feel that it is important to you to have your gift acknowledged in a certain way, for example, the placement of a plaque, we strongly suggest that you consult with the charity in advance of making the gift to determine if your request for recognition will be fulfilled.

Good plans shape good decisions. That's why good planning helps to make elusive dreams come true.

Lester Robert Bittel (b. 1918), writer