Zolla Law Firm
December 2010 Newsletter

ZOLLA LAW FIRM

I know... I know... the newsletter is late the year. But, I have an excuse! I've been waiting for Congress & Pres. Obama to finish their compromise on the tax bill. Although the estate tax generates relatively little money (about 1% of the US revenue), it has sure generated a lot of press over the past few weeks. Please see my first article for a brief discussion of the new estate tax law. I plan on placing a detailed summary of the law on my website early next year.

I hope you enjoy this edition of my newsletter. Please feel free to forward it to anyone you think may be interested.

I'm really happy that "The Trustee's Legal Companion" has helped de-mystify the trust administration process. We've gotten a lot of positive reviews and I'm sure that people who use the book will minimize their attorney's fees. It is fun to check our reviews and rankings on Amazon and hope that one day our book will sell as many copies as the "Dummies" guide on trusts & estates.

It's been about 5 months since I moved my office to Los Gatos. I miss Willow Glen and the lawyers I worked with, but I am pleased with the new environment and the ample space. If you're in the neighborhood, please drop by and say "hi".

Finally, like everyone, I've been experimenting with social media. On the right side of the newsletter, I've included links to my Facebook and LinkedIn pages, and would love to have more friends and followers. On Facebook, I've started linking to interesting articles about estate planning and the estate tax. It's not quite a blog or Twitter feed, but the information should be helpful to many of my clients.

Happy Holidays!

Carol

Estate Tax Update

Just a few hours ago, President Obama in a "new spirit of political compromise" signed the 2010 tax bill. Most people in the US are interested in the maintenance of 2010 income tax rates and the reduction in the Social Security Tax next year. But for me, and my fellow estate tax nerds, the focus has been on the future of estate and gift taxes.

The last few years have been exciting in the world of estate taxes: In 2008, there was no estate or inheritance tax if a person died with a net worth of less than $2 million. In 2009, there was no tax if a person died with a net worth of less than $3.5. And, this year, there was no tax at all. (A good year to throw Mama from the train, right?) But, the law that granted these huge estate tax exemptions also had a strange provision at the end: in 2011 there was scheduled to be a tax on all persons who died with an estate greater than $1 million. And the tax rate on assets greater than $1 million was going to be 55%!

But, the new tax law changes all of that. Effective immediately, there will be no estate taxes if a person dies with less than $5 million, and the tax rate on assets greater than $5 million has been reduced to 35%. Married couples can double the exemption to $10 million by either using an A/B trust or through a special election after the first spouse dies.

The gift tax law has changed as well. Previously, if a person gave over $1 million to non-charitable beneficiaries during his lifetime, that gift would be subject to gift taxes. Now, the exemption for gift taxes and estate taxes is the same. A person can give his money away during his life or at death, and the first $5 million will be free of any transfer tax.

As an estate planner, I'm happy that we can skip over the craziness of 2010 (I don't even want to talk about the carry-over basis rules and how it affected capital gains taxes this year) and go back to some certainty with a clear exemption amount and tax rate. But, all is not entirely rosy for my wealthy clients. This law is only scheduled to last two years. So, before the next election cycle we'll have to go through all of the debate again. Hopefully by then the economy will have recovered, and we'll have some honest talk about the deficit, revenue, and spending... Don't bet on it.

If you are wondering how the changes in the estate tax law will affect your planning, please contact me to schedule a one hour consultation. I think it will be well-worth the time to have an honest review of whether your existing plan meets your needs.

How to Refinance with a Trust

Many of my clients have decided to refinance their homes this year. Why not? Interest rates are at historic lows!

Legally, if you are the trustee, settlor, and current beneficiary of your revocable trust, you can sign a mortgage on behalf of your trust. But for practical purposes, if your home is in your trust, lenders usually will make you do one of the following to make sure that you will be responsible for paying back the loan:

1. Execute and record a deed to move your property out of the trust. Once the refinance is complete, you can then execute a new deed to put the property back into the trust. Lenders tend to prefer this method, because they then have a chain of title showing that you are personally responsible for the loan.

Recently, I have seen quite a few title companies who are willing to prepare and take care of recording both deeds as a part of the refinance process. However, some lenders who charge low closing costs are demanding that the clients take the property out of the trust before they will even accept the refinance paperwork for underwriting. Just be aware: if the title company does not prepare the deed to move the property back into the trust, you will need to take care of it! You do not want your home to be outside of your trust at your death.

2. Have your attorney prepare an "Attorney Certification" or "Opinion Letter" stating that the trust is still in force and the trustees have the authority to borrow money and pledge trust collateral. The title company will also ask for a complete copy of the trust instrument and all amendments.

3. Have you (as trustee) sign a "Certificate of Trust" stating that the trust is still in force and that you have the authority to borrow money and pledge trust collateral.

If you need any help complying with your lender's requests, I'm happy to help.

One more note: If your existing lender offers to help you refinance your loan with no points or fees, you should ask yourself: "What's in it for them?" The bank may not be offering you the lowest available rate, but is hoping you'll stay a customer because the refinance will be free. If you've had your current loan for more than 5 years, they may be hoping you'll sign up for a new 30-year loan, and will continue to pay interest long after the first loan would have ended. I'm not saying these deals are bad, but just look at all of the facts for your situation. You may want to shop around for lower rates (even if you have to pay some fees out of pocket) and you may want to consider a 15-year loan because with historically low interest rates, the monthly payments may be same as your current loan.

When is your Gift Invalid?

For years, the State legislature has been grappling with a very difficult question: Should a bequest be invalid simply because the beneficiary of the gift *may* have taken advantage of an elderly or disabled person in his time of need?

It's natural to be suspicious of any gift that isn't designated toward a person's spouse, children, or grandchildren. But, what if John wants to give something to his neighbor who gratuitously helps with the laundry and handles the groceries? What if John's long-time cleaning lady starts coming in three times a week instead of once every other week, and drives him to his doctor's appointments? After John's death, his kids may wonder if John included his neighbor and cleaning lady in his will out of gratitude for their acts or because they manipulated him into changing his estate plan.

The Governator just signed into law a new bill that somewhat clarifies when a gift in a will or trust is presumed invalid. First, the donor has to be a "dependent adult" -- unable to care for his personal needs and/or suffering from a mental defect. (If the adult is 65 or older, then only one criteria is necessary; if he's between 18-64, then both criteria is necessary.) If the donor is a stable 45-yr. old who wants to make a gift to his secretary (who happens to pick up the groceries and pay the bills) in his will, that's perfectly fine.

Next, we have to look to the category of the person who receives the gift. With minor exceptions, if the beneficiary drafted the will or trust for the donor, the gift is simply invalid.

If the beneficiary is a "care custodian" of the donor, the gift is just presumed to be invalid, and the beneficiary can show that the gift is okay by proving, by clear and convincing evidence, that the donor's decision to make the gift was not the product of fraud or undue influence. In the previous version of this law, a person would be considered a care custodian if he provided health or social services (such as the administration of medicine, wound care, companionship, housekeeping, shopping, cooking, and assistance with finances) to a dependent adult, even if he was acting without pay to help out a friend or neighbor.

Effective January 1, 2011, a person is not considered to be a care custodian if he helps the donor without pay and had a personal relationship with the donor (a) at least 90 days before helping the donor, (b) at least six months before the donor's death, and (c) before the donor was admitted to hospice care, if admitted. So, in our example, the gift to the neighbor would be fine. The gift to the housekeeper would still be suspect, unless the bequest fit into another exception (such as a relatively small gift) or the housekeeper could somehow prove that the donor wasn't manipulated into making the gift.

Another way to validate the gift is for the donor (during his lifetime) to get a Certificate of Independent Review from an independent attorney. If, after meeting with a donor and reviewing the estate plan documents, an independent attorney determines that the gift wasn't procured by fraud or undue influence, then it's fine. In the previous law, it wasn't clear if the drafting attorney could also execute the Certificate of Independent Review, and many clients were unwilling to hire a second attorney (and pay a second set of fees) to subject themselves to another interrogation regarding their motivation behind the gift to the caregiver. But, now the legislature has stated that the same lawyer can write the document and be the independent attorney, provided she has no relationship with the beneficiary and will not receive any benefit due to the gift.

For additional information about this issue, you may find it helpful to read the article I wrote in my 2006 newsletter about the prior version of this law.

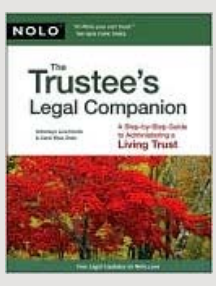
**This Newsletter is for information and discussion purposes only. Before any action is taken, professional advice, based on your specific situation, should be obtained.

Carol Elias Zolla

My Website

Zolla Law Firm

My Book



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