Keeping You Informed

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TO THE POINT

Spring 2015

Popular Estate Planning Techniques Under Attack

Not surprisingly, the 2015 proposed budget aims to restrict popular estate planning techniques:

The grantor retained annuity trust or GRAT. This device allows someone to put assets into an irrevocable trust and retain the right to receive distributions back over the trust term. The annuity is equal to the value of what's been contributed plus interest at a rate set each month by the Treasury called the Section 7520 rate.

If the value of the trust assets increase by more than the hurdle rate, the GRAT will be economically successful. In that case, the excess appreciation will go to family members (the remainder beneficiaries) or to trusts for their benefit when the GRAT term ends.

For the moment, it is possible to form what's called a zeroed-out GRAT, in which the remainder is theoretically worth nothing so that there is no taxable gift. The President's proposal would require that the remainder interest have a value greater than zero at the time the interest is created and would also require that a GRAT have a minimum term of 10 years, compared with the current two-year minimum. These requirements would apply to only new GRATS, so existing ones would be grandfathered.

This greatly accentuates what is called the "mortality risk" of a GRAT: If the grantor dies during the trust term, all or part of the trust assets will be included in his estate for estate tax purposes.

Dynasty trusts. Some states allow trusts to continue in perpetuity (or for a very long time) and pass wealth through multiple generations without incurring estate, gift or generation-skipping transfer taxes. The President's proposal would do away with dynasty trusts, limiting the generation-skipping transfer tax exemption to 90 years.

Grantor trusts. This is not a single variety of trust, but a set of characteristics that can be incorporated into various types of popular trusts. The term refers to the fact that the person who creates the trust, known as the grantor, retains certain rights or powers. As a result, the trust is not treated as a separate entity for income tax purposes and the grantor, rather than the trust or its beneficiaries, must pay tax on trust earnings.

A 2004 Revenue Ruling made it clear that paying the tax is not considered a gift to the trust beneficiaries. Yet this tax, on income that the grantor probably never receives, shrinks his estate. At the same time, assets can appreciate inside the trust without being depleted by ordinary income or capital gains taxes.

Until now, another attractive feature of these irrevocable trusts is that assets placed in the trust are removed from the senior family member's estate. From an estate and gift tax perspective, the transfer is treated as a completed gift. The value of the assets is frozen at the time of the transfer.

The proposed budget would include these trusts as a taxable part of the grantor's estate. And distributions from the trust to beneficiaries during the grantor's life would be subject to gift tax.

Dirk M. Simpson

Dirk M. Simpson is a principal in the Estate Planning & Administration, Corporate & Business Planning and Tax groups. His practice concentrates on trust and estate planning, business planning for closely-held companies, taxation and representation of tax-exempt entities. Mr. Simpson can be reached at 610.941.2544 or by email at dsimpson@kaplaw.com.

Philadelphia Enacts Paid Sick Leave Law

After years of political debate, last week the Philadelphia City Council enacted and Mayor Michael Nutter signed into law legislation requiring paid sick leave for employees. The law becomes effective 90 days from February 12, 2015. Under the law, employers with 10 or more employees must give those employees at least one hour of paid sick leave for every 40 hours worked. Employees may use their paid sick leave to tend to their own illness, the illness of a family member, or to seek support and/or medical care related to domestic violence or sexual assault. The law exempts certain employees from coverage: workers hired for fewer than 6 months (i.e. seasonal workers), interns, government employees, adjunct professors, employees covered by collective bargaining agreements, and independent contractors (who are not "employees" by definition but nonetheless are exempt under the law).

Kimberly Russell

Employers that already provide paid sick leave equal to or more generous than that dictated by the law do not need to revise their existing policies. Employers who do not provide an equivalent amount of leave must revise and publicize a new policy complying with the law or face fines, penalties, and restitution. For more information or help in drafting a compliant paid sick leave policy, please contact **Kimberly L. Russell, Esquire at (610) 941-2541 or krussell@kaplaw.com.**

KS News

☛ **Freezin' for a Reason:** In honor of Jax Utain, Kaplin Stewart will be putting our money where our mouth is. . . . Team Double Jax KS dippers were: Dan Utain, Mike Coughlin, Loretta Shepherd, Kristin Florkowski, Janet Flood, Julie McAllister, Jennifer Leister and Lisa LaPenna. They took the plunge on Saturday, February 7, 2015 in Long Branch, New Jersey. All funds raised went to help send children with life-threatening illnesses and their families to Camp Sunshine.

☛ **Maury B. Reiter, Esquire** will be the Program Coordinator, Moderator and a Presenter at the PBI *"Estate Planning for the Family Vacation House"* course which is being given in Mechanicsburg, PA on May 6th, Pittsburg, PA on May 14th, and Philadelphia, PA on May 21st.

Congratulations to Our New Partners:

☛ **Marc A. Snyder, Esquire.** has been named a partner of Kaplin Stewart. Mr. Snyder concentrates his practice in the areas of Real Estate and Corporate Transactions. Mr. Snyder represents buyers and sellers, landlords and tenants, developers and investors, and lenders throughout the country. He also represents closely held businesses and startup companies in their day to day business operations, advising them on various contract-related issues and assisting them in finding practical solutions to their legal problems.

☛ **Amee S. Farrell, Esquire** of the Land Use & Zoning Group has been named a partner of Kaplin Stewart. Ms. Farrell concentrates her practice in the areas of land use, land development and zoning of commercial, public and residential real estate, as well as matters related to procurement of building permits and certificates of occupancy under the Pa Construction Code Act. Ms. Farrell represents private developers throughout Pennsylvania and New Jersey before municipal boards, state and federal agencies, and in state courts.

Welcome to New Member of the Kaplin Stewart Family:

June P. Singh, Esquire an Associate in the Land Use, Zoning & Development group. Her practice consists of land use, land development and zoning of both commercial and residential real estate. Ms. Singh received her Juris Doctorate from Villanova University School of Law.

Meet Our Estate Administration & Planning Professionals

Steve focuses his practice on estate and trust planning, estate and trust administration, business transactions, general corporate and tax matters.

Steve grew up in Montgomery County, Pennsylvania, the second of four children. He attended the University of Michigan for his undergraduate studies and went on to attend Villanova University for law school. While in law school, Steve served on the Villanova Sports and Entertainment Law Journal, first as a staff writer and later as a managing editor.

Stephen P. Taylor

In law school, Steve developed an interest in tax law while spending the summer after his first year as a research assistant researching executive compensation tax policies. Steve's interest in tax law grew as he took more and more tax classes. Eventually, he enrolled in Villanova's Graduate Tax Program, studying wealth transfer tax, corporate tax, partnership tax, tax policy and other interesting tax topics. After obtaining a masters of law in taxation, Steve entered the legal profession.

Prior to joining Kaplin Stewart in 2014, Steve spent the initial part of his career at a law firm in Philadelphia where he focused his practice on estate and trust matters, general corporate work, and retirement plan qualification and administration. At Kaplin Stewart, Steve assists clients in developing estate plans, represents clients in estate and trust administration matters before the Orphans' Court of Pennsylvania and Surrogate's Court of New Jersey, and counsels clients on business transactions and general corporate matters. He enjoys working with individuals and their families, especially planning for the security and welfare of younger generations, and in the management and succession of a family business.

When not in the office, Steve spends his time playing softball, golf, and rooting for the local Philadelphia sports teams. He frequently travels to visit his siblings up and down the east coast or heads to the beach in Ocean City, New Jersey. Steve is very excited for Michigan football's recent head coach hire and anticipates a national championship in the near future.

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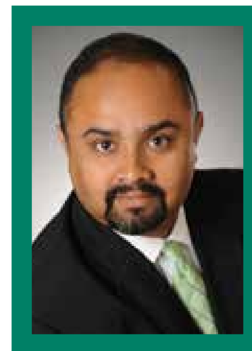
Kaplin Stewart is a member of:

Do You Know…

…that a surety does not typically owe a fiduciary duty to its principal, under Pennsylvania law? In a recent opinion highlighting the nature of principal-surety relationships in the context of construction projects, *Reginella Const. Co., LTD v. Travelers Casualty & Surety Co.,* 568 Fed. Appex. 174 (3d Cir. 2014), the Third Circuit Court of Appeals affirmed the dismissal of a contractor's claims against its surety for breach of fiduciary duty, along with other associated tort claims. The surety provided bonding on two of the contractor's projects and as a condition, the contractor and surety also entered into a "general indemnification agreement" giving the surety certain rights if the contractor defaulted on a bonded project, including the right to take possession of funds owed to the contractor. After subcontractors made bond claims on one of the projects, the surety demanded that the project owner make future payments directly to the surety in light of the contractor's alleged defaults on the subcontracts. The surety also allegedly informed subcontractors that the contractor would be terminated from the project, allegedly causing the subcontractors to stop work. The contractor also claimed that it was harmed by the surety's refusal to provide a lien-over bond after a subcontractor filed a lien on another project. The Court held that the contractor's claims did not arise from a fiduciary duty, and that the contractor and surety instead had only a "typical arms-length relationship between a contractor and surety."



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Follow us on:

Legal Perspectives

CONTRACT WARNING

Contracting parties often rely on boilerplate language for their default clauses. The Pennsylvania Superior Court's decision in *Newman Development Group of Pottstown, LLC v. Genuardi's Family Market,* 98 A.3d 645 (2014), should change that. In this breach of contract case, the Court held that a landlord who was entitled to an award of future lost rents for a twenty-year lease term was not required to discount that award to present value.

Newman entered into a "build to suit" lease agreement with Safeway for a shopping center located in Chester County. Before Newman obtained the necessary approvals to construct the store, Safeway terminated the lease and Newman sued for anticipatory breach. Newman mitigated its losses by leasing the space to Michael's and PetSmart, but at a lower rental rate and for only a ten-year term. Newman claimed that it was entitled to over $10 million in future rents from Safeway. This amount included the offset for rents collected from the substitute tenants for the first ten-year term. On appeal, Safeway contended that the award should have been discounted to present value. The Superior Court disagreed, holding that because the lease agreement did not explicitly provide for such a reduction, Safeway was out of luck.

Pam Tobin

This case brings home a valuable lesson, namely that default clauses must be negotiated like every other material term in a contract and at a minimum; the parties appreciate the ramifications in the event of breach.

Pam Tobin is a member of the Business & Commercial Litigation group. She can be reached at 610.941.2543 or by email to ptobin@kaplaw.com.

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Unless otherwise expressly stated herein, all discussions and opinions are based upon the law of the Commonwealth of Pennsylvania and the State of New Jersey. **Your comments or suggestions are welcome... Phone: 610.260.6000 • Fax: 610.260.1240 • www.kaplaw.com**

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