GUNSTER'S

Family Wealth Compass

Charting A Course For Your Family's Future

October 2015
ADVERTISEMENT

Gunster.com

Attorneys

Nicole K. Atkinson
Darlene Barron
Kenneth S. Beall, Jr.
Debra Boje * † §
Jane W. Brown
Elaine Bucher § ** †
John P. Cole
Matthew Comiter *
Alyse Reiser Comiter * ∞ **
Linda Conahan
Susan Copeland
Nick Curley
James B. Davis § **
Jamison Evert
Daniel J. Glassman *
Grace Gutierrez * §
Daniel A. Hanley §
William T. Hennessey †
Aaron J. Horowitz
Robert F. Jacobowitz
Kevin A. Kane * §
Mary Karr
Thomas M. Karr †
Thomas C. Lee, Jr. **
Laura Leslie-Schuemann ∞
Steven A. Lessne
Robert MacDonald
John C. Moran †
Cristina Papanikos
Adi Rappoport * §
Mark J. Scheer § ∞
Matthew Scheer *
Mitchell D. Schepps * **
Lisa A. Schneider § **✓
Michael D. Simon †
Timothy Nicholas Thomes
Jason P. Van Lenten **
Stephen G. Vogelsang * §
Andrew J. Wieseneck *
Alexandra M. Woodfield **

* LLM
** Multi-State License
∞ CPA
§ Board Certified
† ACTEC Fellow
✓ NAEPC

Selection of Trustees

In a prior newsletter, we discussed the benefits of utilizing trusts in connection with your estate plan. As you may recall, some of the benefits include creditor and divorce protection, maintaining assets within your family, development of a business succession plan, and tax savings. This article will focus on the selection of an appropriate Trustee for the trusts to be created under your estate plan.

Typically, the estate plan for a married couple will consist of one or more trusts to be created for the surviving spouse upon the death of the first spouse. Upon the death of the surviving spouse, or upon the death of an unmarried individual, the estate plan would typically provide for the creation of separate trusts for your children and grandchildren.

Before discussing the identity of an appropriate Trustee or Trustees for these trusts, it may be helpful to first briefly describe the duties and responsibilities of a Trustee. The main responsibilities of the Trustee include investing the trust assets in a suitable manner and making distributions to the beneficiary or beneficiaries of the trust as authorized under the trust instrument. Additional responsibilities include the filing of annual tax returns and keeping all beneficiaries (which would include both current beneficiaries and remainder beneficiaries) informed of all trust activity.

Some of the most common options in selecting a Trustee include the naming of the beneficiary of the trust, naming a family member, (other than the beneficiary), naming a professional advisor (such as an accountant or attorney) or naming a bank or trust company as Trustee.

With regard to selecting a suitable Trustee for a trust that names the surviving spouse as a beneficiary, a common option is naming the surviving spouse as a Trustee. Although the spouse could act as the sole Trustee of the trust under certain circumstances, this may limit the types of distributions he or she would be permitted to make to the beneficiaries. Also, the surviving spouse may lack the business acumen or sophistication to act as the sole Trustee, which could potentially jeopardize the trust assets.

If it is not appropriate for the surviving spouse to act as the sole Trustee, a co-Trustee (such as a professional or a bank or trust company) can be named to act with the surviving spouse as Trustees. If a co-Trustee is to be named, it is often advisable to allow the surviving spouse to remove a Trustee and replace the removed Trustee with another Trustee. For example, if a bank or trust company is named as a co-Trustee with the surviving spouse, the surviving spouse could be granted the ability to remove the bank or trust company but only if he or she appoints a substitute bank or trust company in its place.

Another option would be to name one or more of your children as a co-Trustee with the surviving spouse. However, before naming a child, it is important to

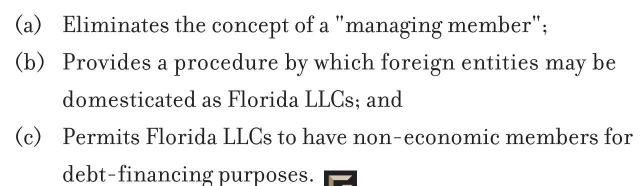
continued on page 3

Florida Legislature Significantly Changes the Limited Liability Company Act

The Florida legislature recently passed the Florida Revised Limited Liability Company Act (the "Revised Act"), which significantly changed state law governing existing and new Florida limited liability companies ("Florida LLCs"). Anyone who owns interests in a Florida LLC or is otherwise responsible for the management of a Florida LLC should be aware of these changes and take appropriate actions to respond to them.

Broadly stated, the Revised Act contains three categories of changes to Florida law governing Florida LLCs:

1. New mandatory provisions. The Revised Act expands and modifies the list of provisions that cannot be waived by Florida LLC operating agreements. Provisions of existing operating agreements that are contrary to a non-waivable provision will be unenforceable.
   For example, among other non-waivable provisions, the Revised Act provides that an operating agreement may not:
   (a) "Vary a [Florida LLC's] capacity . . . to sue and be sued in its own name";
   (b) "Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law"; or
   (c) "Vary the power of a person to dissociate" from a Florida LLC.
2. Changes to default rules. The Revised Act also changes numerous default rules with respect to Florida LLCs. Default rules are rules that govern the management of a Florida LLC if its operating agreement is silent on a particular matter. Unless a Florida LLC's operating agreement provides otherwise, the Revised Act, among other revised default rules:
   (a) Provides that unanimous consent of a Florida LLC's members will be required to amend the Florida LLC's operating agreement or articles of organization or to add a new member;
   (b) Revises the circumstances in which someone has the power to bind a Florida LLC; and
   (c) Expands the list of events that will cause members of a Florida LLC to be entitled to appraisal rights. For instance, among other events, interest exchanges will entitle Florida LLC members to appraisal rights.
3. Additionally, the Revised Act contains other notable provisions that pose new challenges or opportunities for Florida LLCs. For example, the Revised Act:
   (a) Eliminates the concept of a "managing member";
   (b) Provides a procedure by which foreign entities may be domesticated as Florida LLCs; and
   (c) Permits Florida LLCs to have non-economic members for debt-financing purposes.



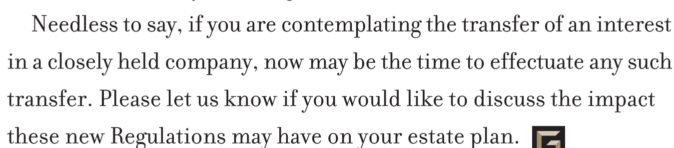
Possible IRS Challenge to Valuation Discounts

Many estate planning techniques involve the transfer (normally through a gift or sale) of a minority interest in a closely held company from one generation to a lower generation. Generally speaking, the lower the value of the transferred interest, the higher the transfer tax savings. Often, because the transferred interest has no market (i.e., the company is not publicly traded) and represents a minority interest in the company (thereby having little or no control over the affairs of the company), the value of the transferred interest can be discounted for federal estate and gift tax purposes. These separate discounts are typically referred to as a "lack of marketability" discount and a "minority interest" discount. The aggregate amount of these valuation discounts typically range between 15% and 45%. The Internal Revenue Service (the "IRS") has scrutinized these transactions over the years by taking the position that a valuation discount should not apply to the transferred assets or that the claimed valuation discount should be reduced.

A few months ago, the IRS informally indicated to the estate planning community that it would likely issue new Regulations under Section 2704 of the Internal Revenue Code to curtail the ability of taxpayers to obtain valuation discounts when transferring an interest in a closely held company. Section 2704 was initially enacted by the IRS in 1990 to limit valuation discounts. However, the IRS has, for the most part, been unsuccessful in challenging valuation discounts under Section 2704. It is anticipated that the new Regulations would expand the scope of Section 2704 to improve the chances of the IRS challenging valuation discounts.

It was widely speculated that these new Regulations would be issued last month. Although no such Regulations have yet to be issued, further informal communication from the IRS indicates that new Regulations may be issued as early as the end of this year or early next year. It is impossible to speculate on the scope of these Regulations, the types of transactions they may affect, and the effective date of any such Regulations.

Needless to say, if you are contemplating the transfer of an interest in a closely held company, now may be the time to effectuate any such transfer. Please let us know if you would like to discuss the impact these new Regulations may have on your estate plan.



Trustees

(continued from page one)

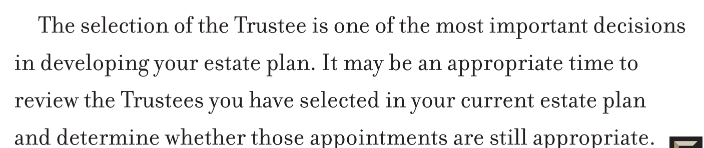
explore your family dynamics to determine which child (if any) would be the most suitable to act as a co-Trustee with his or her parent. Having a parent and child act as co-Trustees could negatively affect family member relationships. For example, a parent and child may disagree on how the trust should be administered. This disagreement could be further complicated if the surviving spouse has the ability to remove the child as a Trustee and appoint a co-Trustee in his or her place. Also, by selecting one child to act as a co-Trustee with the surviving spouse (and thereby excluding others), you could create disharmony among your children.

Finally, with regard to second marriages, it is rarely a good idea to name the spouse from the second marriage as a Trustee of his or her trust. Similarly, it is rarely a good idea to name the children from the first marriage as a Trustee for a spouse's trust. In these situations, we would normally encourage the selection of an independent Trustee, whether it is a professional or a bank or trust company, to act as the Trustee of such a trust.

With regard to selecting a suitable Trustee for a trust for a child or grandchild, many of the same issues discussed above need to be analyzed (i.e., whether to name the child or grandchild as a sole Trustee or to name a co-Trustee to act with him or her, whether to grant the child or grandchild the ability to remove and replace a trustee, etc.).

Another factor is the age of the child or grandchild. Obviously, a minor could not act as a Trustee of his or her trust. However, a young adult may also be too young to act as a Trustee. Often, it makes sense for the child or grandchild to act as a Trustee upon attaining a more mature age (i.e., at age 30 or age 40). Furthermore, it may make sense to stagger the ages by allowing a child or grandchild to become a Trustee at a certain age and allowing him or her to remove a Trustee at a later age. For example, a child may be permitted to act as a co-Trustee at age 30, but may only remove a Trustee upon attaining age 35. This will allow the child to be educated on the responsibilities of acting as Trustee before permitting him or her to have too much control over his or her co-Trustee.

The selection of the Trustee is one of the most important decisions in developing your estate plan. It may be an appropriate time to review the Trustees you have selected in your current estate plan and determine whether those appointments are still appropriate.



Steinberg v. Commissioner 145 T.C. No. 7

If you make a taxable gift and pass away within three (3) years of the gift, the gift tax you paid gets brought back into your taxable estate. There is, therefore, always a risk this could happen causing an increased estate tax liability. What if you could somehow compensate for this risk by reducing the value of the gift upfront by having the donee agree to assume the liability of the estate tax payable if you pass within three (3) years of the gift? This technique was blessed in a recent Tax Court case (Steinberg v. Commissioner, 145 T.C. No. 7, 9/16/2015).

In Steinberg, the taxpayer (age 89) entered into a negotiated binding gift agreement with her daughters in which she gifted properties to her daughters in exchange for her daughters' promise to pay (i) the associated gift tax liability and (ii) any associated estate tax liability imposed in the event that she passed away within three years of the gifts. The taxpayer filed a timely gift tax return (Form 709) reporting the gifts at the then fair market value (the amount by which the value of the property transferred exceeded the value of consideration received in money or money's worth). An appraiser determined the fair market value of the gifts by reducing the value of the gifts by (i) the amount of gift tax payable by the daughters in connection with the gifts and (ii) an amount representing the value of the daughters' assumption of the potential associated estate tax liability. The IRS then issued a notice of deficiency claiming that the reduction for the daughters' assumption of the potential associated estate tax liability (but not for the amount of the gift tax payable) was inappropriate because such liability did not constitute money or money's worth. However, the Tax Court concluded that a hypothetical willing buyer and willing seller would take into account the daughters' assumption of the possible estate tax liability in arriving at a sale price and, thus, such liability did constitute money or money's worth. Therefore, the Tax Court ruled that the value of taxpayer's gifts to her daughters was appropriately reduced by an amount representing the value of the daughters' assumption of the potential associated estate tax liability.

Based on the Tax Court's ruling, there may be an opportunity to achieve an additional discount on the value of a gift if the donor and the donee enter into a negotiated agreement whereby the donee assumes any estate tax liability imposed as a result of the gifts in the event that donor passes away within three (3) years of such gift. You should discuss this technique with your advisor before entering into such a transaction.

1. All references to available/allowable estate tax exemptions and credits relate only to persons who are U.S. citizens; references to gift tax exemptions/exclusions generally apply to U.S. citizens and U.S. Lawful Permanent Residents (i.e., "green card" holders). While most transfer tax savings techniques discussed can be fine-tuned to benefit non-U.S. citizens, the results will differ and must be addressed on a case-by-case basis.

2. **The 2015 Annual Exclusion** is an aggregate of $14,000 per donee, from each donor; or $28,000 per couple, if a husband and wife file a "split gift" Gift Tax Return on gifts made from either of their assets this year. **Medical/Tuition ["ed/med"] Exclusion Gifts** allow a donor to pay an unlimited amount for anyone's medical or tuition expenses (including health insurance premiums), if paid directly to the service provider, without incurring any gift tax or use of their unified credit; and, if properly structured, ed/med gifts should not reduce the $14,000 amount available to be given to the same person by a donor each year.

This publication is for general information only. It is not legal advice, and legal counsel should be contacted before any action is taken that might be influenced by this publication.
Tax Advice Disclosure: To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including any attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein.