

ESTATE PLANNING & PROBATE LAW UPDATE

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I. INTRODUCTION

What a wild and crazy year 2010 is shaping up to be! For estate planners, this is about as exciting as it gets. Can it really be that the estate tax and generation-skipping transfer tax have been repealed in 2010? Are they coming back and if so, when and how? Will they be retroactive? What does this mean for our clients? Unfortunately, the inaction of Congress has left us in what the Senate Finance Committee Chair, Max Baucus (D – MT), called a state of “massive, massive confusion.”

By now everyone knows the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) has made dramatic changes to the transfer tax system by dropping the maximum gross transfer tax rate from 55% in 2001 to 45% in 2009; increasing the unified credit, or “applicable exemption amount” if you prefer, for estate and generation-skipping transfer (“GST”) tax purposes (but not for gift tax purposes) from \$1.0 Million to \$3.5 Million, on a back-loaded basis, through 2009; for 2010, repealing the estate tax and GST tax, freezing the gift tax at 35% with a \$1.0 Million exemption and eliminating basis step-up for inherited property (with some exemptions); and finally, in 2011, sunseting all of these provisions and restoring the estate, gift and GST tax to their 2001 levels. This is the substantially abbreviated version of the transfer tax provisions of EGTRRA. For a visual (and perhaps easier to comprehend) overview of these changes, see a “Summary of Transfer Taxes 2001-2010” attached as an Exhibit hereto.

The Florida legislature has also been busy making annual changes that impact estate planning and probate and trust matters in Florida, some even addressing the confusion of estate and GST tax repeal. In many cases, new Florida law has added well-intended gloss (good or bad depending upon your viewpoint) to existing estate planning documents and those to be drafted. Therefore, one needs to be aware of these changes when drafting and explaining various options to clients.

II. ESTATE TAX REFORM (REPEAL) UPDATE

“The estate tax isn’t dead. It’s resting.”¹

A. Introduction.

When EGTRRA passed in 2001, everyone (then President Bush, Congress and the estate planning community) believed that estate tax reform would occur before 2010. We had hoped it would be well in advance of December 31, 2009, but Congress often seems more reactive than proactive on this issue.

In January of 2009, Representative Earl Pomeroy (D – ND) introduced a bill, HR 436, that would have extended the \$3.5 Million estate tax exemption indefinitely and kept the 45% tax rate in effect, but would impose a surcharge for taxable estates exceeding \$10 Million. Although HR 436 received a lot of publicity, it appeared that Rep. Pomeroy was acting alone and without much Democratic support. Senate Finance Committee Chair, Max Baucus (D – MT), a person with a somewhat larger DC footprint as a Democrat, later introduced a bill, S. 722, which seemed to have potential. There was also talk of Congress adopting a one-year extension of 2009 levels (\$3.5 Million exemption and 45% rate) rather than a permanent fix. Even President Obama supported a freeze of the estate and GST tax at 2009 levels and factored this seemingly inevitable outcome into his budget. We held our breath until December 2009, when the impossible actually happened.

For the first time in over ninety-five (95) years, there is no estate tax on estates of decedents dying this year. For the first time in over thirty-five (35) years, there is no GST tax on generation-skipping transfers. In addition, the traditional estate tax value basis rules (i.e. beneficiaries receive a stepped-up basis at death) have been replaced by a modified carryover basis regime. The top gift tax rate of 35% this year is the lowest in decades.

Do you have an obligation to notify your estate planning clients of these changes? Many estate planners are taking different approaches. Some are sending a one-page bulletin to all estate planning clients notifying them of the change in the law and urging them to come in for a review of their estate planning documents. That is certainly a safe approach, but what if the vast majority of your clients will be unaffected by these changes, even if they died this year? Will you charge every client for the 20-minute phone call to explain the changes and the subsequent review of their documents? What if no changes are warranted?

As a sole practitioner, most (if not all) of your clients may be unaffected by these changes, and you may not feel the need to reach out to all of them this year. That may be the best approach for you. Hopefully your engagement letters provide that your relationship with the client will terminate upon the execution of the documents and that you have no ongoing duty to them.

B. Possibility of Retroactive Changes.

Before we get too excited, let’s keep in mind that Congress may try to make retroactive changes to the transfer tax rules. Of course, retroactivity could be viewed as unfair to

¹ Conrad de Aenlle, *That Fog Still Hasn’t Lifted From The Estate Tax*, The New York Times, February 14, 2010.

beneficiaries of decedents who have died in the interim (and even more unfair for people who make gifts thinking they are subject to a 35% gift tax) and could be politically difficult to get through Congress in an election year.

The bigger question is whether retroactive changes would be unconstitutional. While there have been a handful of cases (including U.S. Supreme Court cases) that have upheld the constitutionality of retroactive changes to the transfer tax system, those cases have generally involved retroactive tax rate increases. It may be more difficult to uphold the constitutionality of a retroactive application of a new tax, but then, the estate and GST tax aren't really new, they just don't "apply" for 2010. Some commentators believe that the longer Congress waits, the more difficult it will be to make any changes retroactive. One thing is certain: if Congress does try to make retroactive changes, someone who is wealthy enough will die in the interim, and the constitutionality of such changes will be litigated by the decedent's beneficiaries.

There has also been talk of giving beneficiaries the option between no estate and GST tax with carryover basis or estate and GST tax with stepped-up basis.

C. Changes to Existing Estate Planning Documents.

When I attended the Heckerling Estate Planning Institute in January of this year, this was the big question on everyone's mind: what should I be doing with my clients' existing documents?² Perhaps you think this isn't an issue for you. Perhaps your typical estate planning client is a happily married young couple with 2.2 children with a combined net worth of \$200,000. For this couple, you may have drafted a simple will (or a pour-over will with a revocable trust) leaving everything to surviving spouse, or if spouse is deceased, to children in trust until they reach a certain age. Do you need to revise their documents in light of the estate tax repeal? Probably not. This is even true if the estate tax returns in 2011 with \$1 Million exemption.

However, I suspect that many of you have drafted documents that are a bit more complex, maybe using one of the many available software programs for estate planning. Your revocable trusts (or wills with testamentary trust provisions) may provide that upon the death of the first spouse, the deceased spouse's assets will be used to fund a "credit shelter trust" (a/k/a "family trust" or "bypass trust") with his or her remaining applicable exemption amount, and a marital trust funded with the balance of the deceased spouse's assets, if any. Sound familiar?

Let's use a hypothetical. Your client, Jane Smith, is married to John Smith (her second husband) and has two adult children from a prior marriage, Alex and Brian. Assume Jane and John entered into a valid prenuptial agreement wherein John waived his rights in Jane's estate as a surviving spouse. Jane has individually owned assets having a value of \$5.0 Million. John has some assets of his own, but if Jane predeceased him, he would need some support to live in the lifestyle to which he is now accustomed. Jane wants to provide for her sons and John in the event of

² The University of Miami's annual Heckerling Estate Planning Institute is the country's premier educational program for estate planners, and we are fortunate enough to have it take place in Orlando. Estate tax repeal was, of course, the hot topic at this year's Institute, and the majority of your author's comments were gleaned from the presentations of the rock stars of the estate planning world, including Steve R. Akers, Ronald D. Aucutt, Carlyn S. McCaffrey, Bruce M. Stone and Dennis I. Belcher.

her death. She has not made any lifetime gifts that would have used part of her applicable exemption amount.

You previously drafted a revocable trust for Jane providing that upon her death, the trustee shall allocate “the applicable exemption amount under Internal Revenue Code Section 2010 (c)” to the family trust for the benefit of Jane’s children, Alex and Brian, with any remaining assets allocated to a marital trust for the benefit of Jane’s husband, John.

Assume that sadly, Jane died on December 31, 2009. In accordance with the terms of Jane’s trust and factoring in the 2009 estate tax laws, Jane’s trustee allocates \$3.5 Million to the family trust and \$1.5 Million to the marital trust. Jane’s estate owes no estate tax, and Alex, Brian and John are all happy.

Now assume that Jane died on January 1, 2010. How much is the “the applicable exemption amount under Internal Revenue Code Section 2010 (c)”? Zero! There is no applicable exemption amount in 2010! What does this mean for Jane’s trust? Jane’s entire \$5.0 Million estate is allocated to the marital trust, and the family trust receives no assets at all. John may be very happy with this result, but you can bet Alex and Brian are furious.

This hypothetical illustrates how formula clauses may be nonsensical if there is no estate tax. For example, what does a bequest of “property qualifying for a marital deduction up to a certain amount” mean, when there is no marital deduction because the estate tax law does not apply to the estate of a decedent who dies in 2010? What if Jane’s trust had instead provided that the family trust be funded with “the largest taxable estate I can have without any estate tax”? The family trust would be funded with Jane’s entire \$5.0 Million estate. Hooray for Alex and Brian! Tough luck, John.

If you know your estate planning documents have these types of formula clauses, you should review them in light of the 2010 estate tax repeal. You may find that if those documents were interpreted under the 2010 estate tax laws, the outcome would be dramatically inconsistent with the testator or grantor’s intent.

Some planners are using simple codicils or trust amendments to fix these ambiguities, providing generally that if the client dies at a time when the estate and GST tax do not apply to the client’s estate and if the taxes are not retroactively reinstated to apply to the client’s estate, then notwithstanding any contrary provisions in the document, it will be interpreted as though the client had died on December 31, 2009. So, you’re back to a \$3.5 Million family trust with the remaining trust assets used to fund the marital trust.

Do you need this fix for every client’s will or revocable trust? Probably not. Most of our firm’s pre-2010 wills and revocable trusts provide that if there is no estate tax at the time of the testator or grantor’s death, the entire trust estate will pass to the family trust. The surviving spouse is often the income beneficiary during his or her lifetime, and discretionary principal distributions may be made to the spouse or the testator or grantor’s descendants, with instructions to make such distributions liberally in favor of the surviving spouse. This language will still work for the majority of our clients, and if and when the estate tax does return, the formula clause will still work to fund the family trust with the applicable exemption amount,

whatever it may be. However, if you have a more complex situation (particularly plans that provide for both a second spouse and children or grandchildren from a first marriage), be sure to do a thorough review of their dispositive estate planning document(s).

Given the likelihood of the reinstatement of the estate and GST tax in 2011 or sooner, the new documents we're drafting in 2010 are similar to those drafted in years past. We still include a formula clause directing the funding of a marital trust and a family trust if appropriate for the client, as well as GST allocation language for certain clients. However, we are also asking clients, "What would you want to happen if you died with no estate or GST tax consequences?" We had been asking this question since EGTRRA passed in 2001, but this year, it is no longer a hypothetical. For some high net worth clients, we are including a separate article entitled, "Alternative Plan of Distribution for 2010" to insure that the client's plan maximizes the use of the exceptions to the carryover basis rule as discussed below. This alternative plan could also be added to existing documents as a codicil or trust amendment.

D. Modified Carryover Basis.

For decedents dying in 2010, the basis of property acquired from the decedent is the lesser of the decedent's adjusted basis or the fair market value of the property on the decedent's date of death. (Note that while no step-UP in basis is allowed, the basis of property can be stepped-DOWN.) There are two exceptions to the carryover basis rule: (1) the personal representative of the decedent's estate may allocate up to \$1.3 Million to increase the basis of the decedent's assets; and (2) the personal representative may also allocate up to an additional \$3.0 Million to increase the basis of the decedent's assets passing to a surviving spouse, either outright or in a qualified terminable interest property (QTIP) trust. The basis increase is allocable on an asset-by-asset basis.

Note that this is an increased basis of \$1.3 and \$3.0 Million, not assets having a value of \$1.3 or \$3.0 Million. In today's economy, the majority of your clients may not even use the entire \$1.3 Million basis adjustment, much less the additional \$3.0 Million basis adjustment for property passing to the surviving spouse. However, for every decedent dying in 2010, you must take these basis considerations into account.

In a sad twist of fate, there may be many estates negatively impacted by these carryover basis provisions even though they would not have been subject to estate tax had the decedent died before 2010. House officials have estimated that an extension of the 2009 estate tax levels (\$3.5 Million exemption and 45% rate) would have impacted 6,000 estates in 2010, but the new carryover basis provisions will affect more than 70,000.

Before you begin tearing your hair out over carryover basis, determine whether this is even an issue for your client. The basis adjustment allowed to every estate will be \$1.3 Million. Typically, an estate would have to be considerably larger than \$1.3 Million to have unrealized appreciation in excess of \$1.3 Million. If a client's estate in 2010 will likely have appreciation of well under \$1.3 Million, there are no issues at all. All of the decedent's assets can be stepped up to their fair market value on the decedent's date of death, and all of the carryover basis complexities can be ignored.

However, if there will still be carryover basis on some of the estate assets, the personal representative must be very careful when allocating the basis adjustments. Some beneficiaries may be less than pleased to learn that cousin Bobby's inheritance received a step up in basis but theirs did not. The PR might want to get beneficiary consents or court approval for the proposed basis allocation.

Thinking ahead, a client might want to update his or her will or revocable trust with language guiding the personal representative on how to allocate the basis adjustments. Absent a contrary direction, the personal representative would have a fiduciary duty to treat the beneficiaries impartially. With properly drafted documents, the client can decide whether the beneficiaries should be treated equally, or whether some should be favored over others.

The will or revocable trust might want to favor particular specific bequests. For example, if the client contemplates that a highly appreciated closely held business would be sold relatively soon after the client's death, the client might want to specifically express that the basis adjustment should be allocated among the beneficiaries of that interest.

The client may want the personal representative to favor allocating the adjustments to assets passing to high tax bracket beneficiaries, especially if the income tax brackets of the beneficiaries are dramatically different. The client might even make some additional bequest to low tax bracket beneficiaries to account for this difference.

Married clients may want to review their estate plan to insure that sufficient assets pass to the surviving spouse to utilize the \$3.0 million spousal basis adjustment.

In light of the fact that a permanent repeal of the estate tax, with a continued carryover basis system, seems highly unlikely, all of the carryover basis rules (and the ensuing complexity on the planning side) will likely apply only to estates of persons who die in 2010. Do you need to revise all of your clients' estate planning documents to address the carryover basis issue? Probably not. In all likelihood, your client will live until 2011, when stepped-up basis will return automatically or through action by Congress. However, if you have a client in poor health with a family business or other asset with lurking capital gains, you should be thinking about this issue.

E. Administration of Estates and Trusts in 2010.

The reality of no estate or GST tax and modified carryover basis presents new challenges in the administration of estates and trusts in 2010. It may involve construction of ambiguous wills and trusts, and many fiduciaries will find it difficult to establish the decedent's adjusted basis in his or her property. We always encourage our clients to keep well-maintained records, but unfortunately, this is not always the case.

The possibility of retroactive reinstatement further complicates the matter. For example, under the 2009 rules, the personal representative or trustee might have decided to sell assets soon after death to ensure adequate cash to pay estate tax, debts and other expenses, especially if the estate or trust held highly volatile assets. Now, the personal representative or trustee must decide whether to hold or sell assets without knowing when or if estate tax will be due. To be safe, we would recommend that the personal representative or trustee calculate the estate and GST tax

that would be due assuming the 2009 rules are reenacted retroactively effective January 1, 2010, and that any constitutional attack is unsuccessful. These calculations will allow the fiduciary to assess the extent to which additional cash not already on hand may be needed. Of course, the fiduciary should not distribute all of the assets of the estate or the trust if such assets may be needed for estate or GST tax at a later date.

The Florida legislature has recently provided both guidance and protection for personal representatives and trustees in Fla. Stat. §733.1051 (Limited judicial construction of will having federal tax provisions) and Fla. Stat. §736.04114 (Limited judicial construction of irrevocable trust with federal tax provisions). These statutes are discussed in detail in Article III below.

F. The Future of the Transfer Tax System.

It is unclear when (or whether) Congress will enact future legislation addressing the transfer tax system. As you know, they've been a little busy of late bickering over the economy, two foreign wars, health care reform, etc. Estate tax reform may seem like a low priority, and many commentators do not expect to see any action on this topic until after the midterm elections. Of course, that would leave very little time for a new Congress to act before 2011. Estate planners are therefore hoping for the best but expecting the worst i.e. the restoration of the estate, gift and GST tax to their 2001 levels.

More specifically, Section 901 of EGTRRA provides that for decedents dying, gifts made, or generation skipping transfers after 2010, "[t]he Internal Revenue Code of 1986...shall be applied and administered...as if the provisions and amendments [of the Act] had never been enacted." The applicable exclusion amount will be \$1.0 million (as scheduled beginning in 2006 under the pre-EGTRRA law) for both estate and gift taxes. The GST exemption will be approximately \$1.12 million (or \$1.0 million indexed for inflation since 1997). The carryover basis provisions will expire, and we will return to a step-up in basis at death.

If EGTRRA does sunset as planned, you may suddenly find yourself with many clients (both current and former) with estate tax exposure, and perhaps this is the best time to reach out to them. Be sure that your initial contact with former clients states that this contact does not reopen the attorney-client relationship if that is not your intent.

III. RECENT DEVELOPMENTS IN FLORIDA STATUTORY LAW

What follows is a summary of selected bills that passed during the 2010 regular session.³

A. HB 1237 – Probate Procedures.

The effective date of the bill is October 1, 2010, with the exception of Fla. Stat. § 733.1051, which shall have an effective date of January 1, 2010.

Safe-Deposit Boxes. The bill amends Fla. Stat. § 655.935 (Search procedure on death of lessee) to require an officer of the lessor (i.e. the bank where the safe-deposit box is located) to make a complete copy of any document removed from the decedent's safe-deposit box, together with a record of who took the document, and place that copy back in the decedent's safe-deposit box. The lessor may charge reasonable fees to cover costs involved in the supervision and copying.

Caveats. Current law provides that a caveat may not be filed until after death, making a caveat filed prior to death invalid. The bill amends Fla. Stat. § 731.110 (Caveats; proceedings) to provide that the caveat of an interested person (other than a creditor) may be filed prior to death. A caveat filed before the death of the person for whom the estate will be administered expires two (2) years after filing. The bill also removes the requirement that a caveat include the decedent's social security number, last known residence address, date of birth, and a statement of the interest of person filing the caveat.

Notice Requirements. There are two basic forms of notice under the Florida Probate Code: formal and informal. Formal notice is defined by Fla. Prob. R. 5.040 (a) (Notice) and requires delivery of two separate documents: a copy of the initial pleading seeking relief (analogous to a civil complaint) and a separate form notifying the recipient that he or she has 20 days to reply or may lose by default if no reply is made (analogous to a civil summons). Unlike in civil procedure, formal notice under the Florida Probate Code may be made by certified mail, return receipt requested. Informal notice is defined by Fla. Prob. R. 5.040 (b) and 5.041 (b) (Service of Pleadings and Papers) and may be made by mail or hand delivery. This bill amends the definitions of formal notice and informal notice in Fla. Stat. § 731.201 (General definitions) to specifically refer to the related Florida Probate Rules.

Devise and Descent of Homestead Property. Sect. 4(c), Article X, of the Florida Constitution attempts to protect the surviving spouse's interest in the deceased spouse's homestead property. The applicable portion of that subsection reads: "The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there be no minor child."

In many instances, this provision does not affect the parties because the homestead is owned by the husband and wife as tenants by the entirety, and therefore, the homestead passes to the surviving spouse outright by operation of law.

³ See the enrolled version of each bill attached as an Exhibit hereto. For staff analysis of each bill, visit either www.flsenate.gov or www.myfloridahouse.gov and search for the applicable bill.

However, if the deceased spouse owned the homestead in his or her individual name, Fla. Stat. § 732.401 (1) (Descent of homestead) currently provides that “the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death per stirpes.” In splitting the present and future property interests of the homestead, the benefits and burdens of ownership are split between the spouse’s life estate and the descendants’ remainder. The spouse has the exclusive right of occupancy and is responsible for all of the ordinary expenses of ownership, such as repairs, association fees and taxes; the interest portion of mortgage payments; recurring insurance premiums; and most special assessments. The descendants are responsible for principal mortgage payments and may be protected from any waste of the spouse.

With recent changes in home values, property insurance and property taxes, the current law regarding the descent of the decedent’s homestead can create great burdens on the surviving spouse and the lineal descendants regarding the expenses and upkeep of the property, which may result in the life estate becoming a burden on the very people the law is designed to protect.

The bill amends Fla. Stat. § 732.401 to provide that instead of taking a life estate, a surviving spouse may elect to take an undivided one-half interest as a tenant in common, with the other half being divided among the decedent’s descendants in being at the time of the decedent’s death per stirpes. The election must be made within 6 months after the decedent’s death and is irrevocable once made. The election shall be made by filing a notice of election (the form of which is contained in the statute) containing the legal description of the homestead property for recording in the official record books of the county in which the homestead is located.

Disclaimer of Homestead Property by Surviving Spouse. The bill further amends Fla. Stat. § 732.401 to provide that a disclaimer may not be used to divest remainder beneficiaries of their right to a remainder estate. The bill also amends Fla. Stat. § 732.4015 (Devise of homestead) to provide that if an interest in homestead property has been properly devised to the surviving spouse, and the surviving spouse disclaims the property, the disclaimed property interest shall pass in accordance with Chapter 739 (the Florida Uniform Disclaimer of Property Interests Act).

Certain Lifetime Transfers of Homestead Property. Two Florida appellate cases have invalidated attempted dispositions of homestead property made by lifetime conveyances in which the transferors retained certain rights in the homestead property either by deed or by trust. Although in each case the trust or deed terms provided for a specific disposition of the homestead property upon the settlor’s death, the settlor retained the right to direct a conveyance of the title and the entire beneficial interest to other persons (including the settlor) at the settlor’s pleasure during his or her lifetime. Thus the interest in the homestead property that was conveyed was not a vested right in the property, but a contingent interest subject to the right of the settlor to direct the trustee to convey the property to others during the settlor’s lifetime. Because of the retention of the entire beneficial estate in the settlor during life, in each case the trust instrument was in effect an attempted testamentary disposition of homestead property in contravention of the restrictions set forth in the Florida constitution. This has resulted in some uncertainty as to how and when homestead property may be transferred during the owner’s lifetime.

The bill creates Fla. Stat. § 732.4017 (Inter vivos transfer of homestead property) to address lifetime transfers of homestead property. So long as the transferor of the property does not retain the power to revoke the transfer or retake title to the property, a transfer of property will not be an impermissible devise of real property. If the transfer is to a trust, the transfer will not be a devise so long as there is no right of revocation. The bill specifies that a power to alter a trust or its beneficiaries is not a right of revocation.

The bill also provides that a transfer of homestead property will not be considered a devise of the property even if the transferor retains a separate interest in the property, the interest transferred does not become a possessory interest until some date in the future (whether specific or contingent), or the interest transferred may lapse.

Spousal Rights Procured by Fraud, Duress or Undue Influence. The bill creates Fla. Stat. § 732.805 (Spousal rights procured by fraud, duress, or undue influence), which provides a means for the decedent's family members or other would-be beneficiaries to challenge the decedent's marriage. If the court finds that the marriage was procured by the surviving spouse through fraud, duress or undue influence, the surviving spouse is not entitled to the statutory rights and benefits available to a surviving spouse under the Florida Probate Code such as the elective share, family allowance, exempt property, rights in the decedent's homestead property, inheritance by intestacy, rights as a pretermitted spouse and preference in appointment as personal representative. In addition, the surviving spouse would not be entitled to rights or benefits under a bond or life insurance policy or rights or benefits under a decedent's will, trust or power of appointment unless the surviving spouse is specifically named in the document.

Where the court finds that the marriage was procured by fraud, duress or undue influence, the probate court must distribute the property of the decedent as if the surviving spouse had predeceased the decedent spouse.

The person contesting the marriage has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress or undue influence. The surviving spouse has the burden of proving the defense of ratification, if appropriate. The bill specifically references the standard for ratification of the marriage by providing that ratification includes situations where the husband and wife lived together as husband and wife with full knowledge of the facts constituting the fraud, duress or undue influence. The prevailing party is entitled to attorney's fees.

The bill creates a four (4) year statute of limitations, starting from the decedent's date of death, to bring an action alleging fraud, duress or undue influence in the procurement of the marriage.

Construction of Wills with Ambiguous Federal Tax Provisions. Wills sometimes contain provisions designed to eliminate, minimize, or defer payment of the federal estate tax and the federal generation-skipping transfer tax, and these provisions are often based on statutory formulas. With the sunset of EGTRRA, there is a lack of guidance when interpreting a decedent's intent if provisions of the will were based on and referred to the estate tax or GST tax. The bill creates Fla. Stat. § 733.1051 (Limited judicial construction of will with federal tax

provisions) to address the repeal of the federal estate tax and the federal generation-skipping transfer tax. Fla. Stat. § 733.1051 permits the personal representative or would-be estate beneficiaries to petition the court to construe the terms of the decedent's will. The petitioner may request the court to define the respective shares or determine beneficiaries in accordance with the decedent's intent, if the will contains provisions that include specific formulas and other tax related provisions. Fla. Stat. § 733.1051 also permits the personal representative to delay or refrain from making any distributions while any uncertainty remains. The statute applies retroactively and is effective January 1, 2010.

B. SB 998 – Relating to Trust Administration.

The effective date of the bill is July 1, 2010, with the exception of Fla. Stat. § 736.04114, which shall have an effective date of January 1, 2010.

Trustee's Duty to Pay Expenses and Obligations of Settlor's Estate. If a decedent's probate estate assets are insufficient to pay expenses of administering the estate and other obligations, Fla. Stat. § 733.607 (2) (Possession of estate) provides that the personal representative may demand that the insufficiency be paid from the decedent's revocable trust, if one existed at the time of his or her death. The bill amends Fla. Stat. § 733.607 (2) by providing that payment from the trustee is subject to the provisions of Fla. Stat. § 736.05053 (Trustee's duty to pay expenses and obligations of settlor's estate) and Fla. Stat. § 733.805 (Order in which assets abate).

Similarly, Fla. Stat. § 733.707 (3) (Order of payment of expenses and obligations) also provides that the personal representative may require the decedent's revocable trust to pay expenses and obligations of the probate estate. The bill amends Fla. Stat. § 733.707 (3) to provide that the expenses and obligations of the decedent's estate shall be paid from the decedent's revocable trust pursuant to Fla. Stat. § 736.05053 when there are insufficient funds in the estate with which to pay them.

The Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) has said that these revisions are necessary to fully implement the intent of reading the decedent's will and revocable trust as one coherent plan.

Compensation of Trustees and Persons Employed by Trustees. The compensation of any person employed by a trust, including trustees and persons employed by trustees, is subject to court supervision and review. Fla. Stat. § 736.0206 (Proceedings for review of employment of agents and review of compensation of trustee and employees of trust) currently requires that all interested persons must be given notice of an application for compensation. The bill eliminates the notice provisions of Fla. Stat. § 736.0206 (1) and (6). Notice requirements in trust proceedings are already governed by the Florida Rules of Civil Procedure as provided in Fla. Stat. § 736.0201 (1) (Role of court in trust proceedings).

In addition, the bill amends Fla. Stat. § 736.0206 (5) to provide that in judicial proceedings to determine reasonable compensation for trustees and persons employed by trustees, the court has discretion to award a reasonable expert witness fee from the assets of the

trust to an expert witness who testifies on the issue of reasonable compensation unless it finds that the expert testimony did not assist the court.

The bill deletes subsections (7) and (9) of Fla. Stat. § 736.1007 (Trustee's attorney's fees), which address how the court determines reasonable attorney compensation in trust administration. This issue is already addressed in Fla. Stat. § 736.0206.

Construction of Irrevocable Trusts with Ambiguous Federal Tax Provisions. As discussed in Article II herein, trust agreements frequently contain provisions designed to eliminate, minimize, or defer payment of the federal estate tax and the federal generation-skipping transfer tax, and these provisions are often based on statutory formulas. With the sunset of EGTRRA, there is a lack of guidance when interpreting a settlor's intent if provisions of the trust were based on and referred to the estate tax or GST tax. The bill creates Fla. Stat. § 736.04114 (Limited judicial construction of irrevocable trust with federal tax provisions) to address the repeal of the federal estate tax and the federal generation-skipping transfer tax. Fla. Stat. § 736.04114 permits the trustee or qualified beneficiaries of a trust to petition the court to construe the terms of a trust that is not revocable at the time of the request. The petitioner may request the court to define the respective shares or determine beneficiaries in accordance with the settlor's intention, if the trust contains provisions that include specific formulas and other tax related provisions. Fla. Stat. § 736.04114 also permits the trustee of a trust with such ambiguous provisions to delay or refrain from making any distributions while any uncertainty remains. The statute applies retroactively and is effective January 1, 2010.

Protections for Certain Charitable Trusts. The bill creates Fla. Stat. § 736.1211 (Protections afforded to certain charitable trusts and organizations), which provides that certain charitable organizations and trusts may not be compelled to disclose the race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of their employees, officers, directors, trustees, members, or owners.

C. SB 926 – Relating to Trusts.

The effective date of the bill is July 1, 2010.

Irrevocable Life Insurance Trusts. An Irrevocable Life Insurance Trust ("ILIT") is a trust created for the primary purpose of purchasing and maintaining life insurance. The ILIT purchases insurance on the life of the settlor, and at the settlor's death, the payout passes directly to the ILIT, avoiding estate taxes. In the case of an ILIT, it is most often the settlor, not the trustee, who selects the insurance policy, names the beneficiaries and provides the funds to pay the life insurance premiums. These choices are often made before the trust is created.

This bill creates Fla. Stat. § 736.0902 (Nonapplication of prudent investor rule), which provides that in the absence of contrary language in the governing ILIT instrument, a trustee does not have a duty to determine whether the trust has an insurable interest in the life of the insured where the insured or the insured's spouse provides funds to purchase the policy. This provision does not apply in three situations: 1) when the trustee has knowledge that the life insurance beneficiary, at the time of the policy's origin, lacked an insurable interest in the

insured; 2) when a beneficiary objects to the application of this statute; and 3) when the life insurance policy was purchased from an affiliate of the trustee or from an individual or entity from which the trustee or an affiliate receives a commission.

In addition, the bill amends Fla. Stat. § 518.112 (Delegation of investment functions). In situations where a trustee must still determine the appropriateness of a life insurance policy, or determine whether an insurable interest exists, these revisions would permit a trustee to delegate the duty to make such determinations. The bill also implements notice requirements with reference to the Florida Trust Code and the Florida Probate Code, which must be complied with in order to inform the beneficiaries when a fiduciary's duty is delegated.

IV. RECENT DEVELOPMENTS IN FLORIDA CASE LAW

If you subscribe to the email version of Florida Law Weekly, you are receiving more case law than you can digest at your desktop. Here's how to stay current in the Florida estate planning and probate area at no cost whatsoever. The Florida Probate & Trust Litigation Blog managed by Attorney Juan C. Antunez of the law firm of Stokes McMillan Maracini & Antunez P.A. (located at 1 Southeast Third Avenue, Suite 1750, Miami, Florida 33131 – Telephone: (305) 379-4008) is terrific and free. If you are not signed up for this free email service, you may subscribe at www.flprobatelitigation.com, where you will find cases by topic with some analysis, news and links to other helpful sites. You can also stay current by subscribing to ActionLine (the quarterly newsletter of the Florida Bar's Real Property, Probate & Trust Law ("RPPTL") Section). Using these sources, I have identified over forty-five (45) reported Florida cases published from June 2009 through May 2010 that are relevant to an estate planning practitioner. Below I have summarized the cases with facts that I believe are the most interesting and/or arise in a trusts and estates practice with the most frequency.

A. Trusts and Estates Administration

Timely Filing of Creditor Claims

Mack v. Perri, 24 So. 3d 697 (Fla. 1st DCA 2009).

Summary: The decedent died on November 18, 2004. The first notice to creditors was published on May 14, 2005. On October 31, 2005, the plaintiffs first filed their claims for alleged medical malpractice in the decedent's estate. The plaintiffs then filed an independent malpractice action against the estate on January 30, 2006. In February 2009, the personal representative filed a petition in the probate court to limit the plaintiffs' claim in the malpractice action to the proceeds of malpractice insurance, noting that the plaintiffs' claims were filed more than three months from the date the notice to creditors was first published. In addition, the plaintiffs did not file a request for an extension of time to file their claims under Fla. Stat. § 733.702(3) until after the running of the two-year non-claim period of Fla. Stat. § 733.710(1). The First District Court of Appeal agreed with the personal representative and ruled that the plaintiffs' claims (including any judgments in favor of the plaintiffs thereon) against the estate were barred as untimely.

Morgenthau v. Estate of Andzel, 26 So. 3d 628 (Fla. 1st DCA 2009).

Summary: The personal representative filed a petition for order striking untimely claim in which he asserted the first notice to creditors was published on March 13, 2008, and the creditor in question did not file his claim until April 13, 2009, well past the three month filing window of Fla. Stat. § 733.702(1). Both the personal representative and the creditor agreed the claim was untimely, though they disagreed as to whether or not the creditor was a known or easily ascertainable creditor of the estate. The First District Court of Appeal found that the creditor's claim was untimely, but more importantly, that the creditor did not file a motion for extension of time to file the claim or otherwise seek an extension. While the statement of claim listed facts upon which a probate court could grant an extension, the statement of claim did not actually request an extension. The creditor's claim was barred as untimely.

Grainger v. Wald, 29 So. 3d 1155 (Fla. 1st DCA 2010).

Summary: The personal representative filed a petition to strike an untimely claim filed against the estate by a judgment creditor in a personal injury suit against the decedent, arguing that she had served notice on the creditor's attorney as required by Fla. Prob. R. 5.041(b), thus triggering the three month window of Fla. Stat. § 733.702(1). The probate court found that service of the notice was ineffective because it was served upon the creditor's personal injury attorney rather than upon his probate attorney. The First District Court of Appeal held that this was error and reversed the probate court's decision. First, Rule 5.041(b) does not make any distinction based on the scope of an attorney's representation of a client. It simply requires that if a creditor is represented by an attorney, service must be on the attorney and not on the creditor. Second, regardless of whether the attorney served was labeled the "probate" or the "personal injury" attorney, the record reflected that the creditor had actual notice and that he received notice in time to file the claim. Any failure was not in the service of the notice, but in the untimely filing of the claim.

Timely Filing of Objections to Final Accounting

Thomas v. Thomas, 26 So. 3d 713 (Fla. 5th DCA 2010).

Summary: The personal representative filed the final accounting on June 19, 2006. Fla. Prob. R. 5.401 provides that the beneficiaries of the estate have thirty days to object to the final accounting and then ninety days from the filing of the objection in which to have a hearing. In this case, two estate beneficiaries objected to the final accounting on October 12, 2006, well after the deadlines imposed by Fla. Prob. R. 5.401. The beneficiaries argued that their objection should not be barred because the accounting was not "complete" and was therefore not a final accounting. The Fifth District Court of Appeal rejected the beneficiaries' argument and ruled that their objection was untimely and therefore waived.

Interpretation of "Slayer Statute"

LoCascio v. Sharpe, 23 So.3d 1209 (Fla. 3d DCA 2009).

Summary: The decedent was murdered by her husband and her brother-in-law. The decedent owned her residence with her husband as tenants by the entireties. The decedent's son argued that under Fla. Stat. § 732.802(1), the residence should have passed in full to him as the decedent's sole heir. The Third District Court of Appeal rejected this argument, noting that Fla. Stat. § 732.802 does not call for the complete termination of the killer's interest in the property but merely the termination of the right of survivorship. The residence was deemed owned 50/50 by the husband and the decedent's estate as tenants in common. The decedent's son also argued that a constructive trust should have been imposed over all of the marital property, including the husband's rights or interests. The Court again disagreed, holding that Fla. Stat. § 732.802 is not a forfeiture statute awarding all of a killer's property to the victim's estate, and the pre-statutory equitable principle that "no one shall be permitted to profit by his own wrongdoing" did not include any such forfeiture of the killer's separate property.

Payment of Creditor Claims

Copeland v. Buswell, 20 So.3d 867 (Fla. 2d DCA 2009).

Summary: The personal representative brought a wrongful death action against the driver and owner of a truck involved in a traffic accident with the decedent. Without informing the personal representative and without approval from the probate court, the driver, the owner, and their insurer reached a settlement with a hospital (and creditor of the estate) to retire the decedent's \$492,224 medical bills from the accident for payment of \$300,000. The Second District Court of Appeal found that, under Fla. Stat. § 768.20, the personal representative has the exclusive right to distribute assets on behalf of the estate. Also, under Fla. Stat. § 733.707, the hospital's claim would have been designated as a class 4 claim, but, by virtue of the action of the driver and the owner, the hospital's claim improperly took precedence over higher class claims. This action also effectively depleted potential assets of the estate. Had the trial court awarded the full measure of damages, the estate would have assets of over \$500,000. By their actions, the driver and the owner improperly usurped the personal representative's duties and obligations to distribute those assets.

Income and Estate Tax Matters

United States v. Guyton, 2010 WL 1172428 (11th Cir. 2010).

Summary: The decedent sold his farm in January of 2000 and died six months later. Before his death, the decedent deposited the sale proceeds into an account held with his son, Blake, as joint tenants with rights of survivorship. Another son, James, was appointed the personal representative of the decedent's estate. As personal representative, James was responsible for reporting the farm sale on the decedent's final 1040 and paying the income tax due upon that sale. If a personal representative does not pay the decedent's taxes (and there were estate assets with which to pay them at some time during the administration), he becomes personally liable for the payment of those taxes. James argued (pro se) that the estate was not liable for the income tax due on the sale of the farm because the sale proceeds had been deposited into a joint account with his brother, Blake. He asserted that this made the sale proceeds "income with respect to a decedent" as defined in Section 691 of the Internal Revenue Code. The Eleventh Circuit Court of Appeals disagreed, explaining that Section 691 is inapplicable for income realized prior to the decedent's death because such income is properly reported on the decedent's final 1040 (and is therefore an obligation of the estate). Although it is not stated in the 11th Circuit's opinion, it seems likely that James distributed all of the estate assets to himself and his siblings without being absolutely sure the estate's tax liabilities were satisfied, and therefore, James became personally liable for the payment of the income tax due.

Boulis v. Blackburn, 16 So. 3d 186 (Fla. 4th DCA 2009).

Summary: The decedent disinherited his spouse, and as a result, the surviving spouse claimed an elective share of the decedent's estate. Ordinarily, amounts passing to the decedent's surviving spouse would not be subject to estate tax because they would qualify for the marital deduction. Although the surviving spouse in this case was not a U.S. citizen and was therefore

not entitled to the marital deduction, she still claimed that her elective share should not be liable for the payment of any estate tax. The Fourth District Court of Appeal disagreed, holding that the purpose of Fla. Stat. § 733.817 is to ensure that all estate taxes are shared on a ratable basis by the beneficiaries receiving the property subject to those taxes. As the surviving spouse was not entitled to the marital deduction, her elective share was subject to estate tax. The net tax attributable to the elective share was apportionable under Fla. Stat. § 733.817(5)(f). The surviving spouse's interpretation added an exclusion that the statute did not provide. Next, the surviving spouse argued that the decedent's Will provides that the decedent "direct[s] [his] Personal Representative to pay out of the property which would otherwise become a part of the Residuary Estate, all estate, inheritance, transfer and succession taxes, including interest and penalties thereon, which may be lawfully assessed by reason of my death." She claimed that the estate tax attributable to her elective share should therefore be paid out of the decedent's residuary estate. The Court held that under Fla. Stat. § 733.817(5)(h)4., the decedent had not effectively directed the payment of taxes attributable to property not passing under his Will from property passing under his Will. The surviving spouse was responsible for the estate tax due on her elective share.

B. Trusts and Estates Litigation

Interpreting Estate Planning Documents

Chin v. Estate of Chin, 15 So. 3d 894 (Fla. 3d DCA 2009).

Summary: The decedent died owning real property as tenants in common with his sister. Both the decedent and his sister lived on the property. The decedent's Will included the following language: "I direct that property held by me in co-ownership with my brother the said Earl Anthony Chin and with my sister, Mary Victoria Chin, shall not be sold as long as my said brother or sister desires to occupy same." After the decedent's death, the decedent's son, who was also named personal representative of the decedent's estate, obtained an order of summary administration transferring to him a one-half interest in the property. He then moved to partition the property and force its sale. However, the probate court ordered the partition action stayed to provide the sister with an opportunity to have her rights in the property clarified. The probate court subsequently entered an amended order of summary administration concluding that the sister had a life estate in the property pursuant to the decedent's Will. The Third District Court of Appeal affirmed, holding that the decedent had devised a life estate to his sister as to the property. The Court did not accept the decedent's son's argument that the Will provision only applied to property co-owned by the decedent and both of his siblings (as opposed to just the decedent and his sister).

Doe v. Doe, 20 So. 3d 892 (Fla. 2d DCA 2009).

Summary: Certain trusts administered by co-trustees included class gifts to the grandchildren of the settlors. However, the class gifts were limited to "only children and descendants by blood." When one descendant was born, the settlors' son was married to her mother. On the descendant's birth certificate, the son was listed as her father. Nevertheless, because DNA testing performed after the descendant was an adult had shown that the son was not the descendant's biological father, the trial court ruled that she was not a "descendant by

blood” of the settlors and thus had no beneficial interest under the trusts. The Second District Court of Appeal reversed, holding that the descendant was not excluded as a beneficiary of the trusts’ class gifts by the limitation to “only children and descendants by blood.” The Court explained that the disputed section of the trusts appeared in “legal instruments, not in a technical paper on genetics” and that “[t]he phrase “descendants by blood” is a legal term of art, not a scientific one.” As a legitimate child of one of the settlors’ sons, the descendant qualified as one of the settlors’ “descendants by blood.”

Pajares v. Donahue, ---- So. 3d ----, 2010 WL 934101 (Fla. 4th DCA 2010).

Summary: The decedent died with no surviving spouse or minor children, and therefore, her homestead was freely devisable and unrestricted by Sect. 4(c), Article X, of the Florida Constitution, Fla. Stat. § 732.401 and Fla. Stat. § 732.4015. Article III of the decedent’s Will included the following language: “[f]rom the sale of: 202 N.W. 18 Street[,] Delray Beach, Florida 33444,” the decedent bequeathed specific dollar amounts to five persons: “Robert Kuhnreich, \$5,000; Lane Abbot, AKA Orlando Abad, \$10,000; David Mears, AKA David Abad, \$10,000; Connie Abad, AKA Conchita Abad, \$30,000; and Maria De Cuenca, \$5,000.” Article IV of the decedent’s Will (entitled “Homestead or Primary Residence”) stated: “I will, devise and bequeath all my interest in my homestead or primary residence, if I own a homestead or primary residence on the date of my death that passes through this Will, to *see above primary residence*. If I name more than one person, they are to receive the property [X] equally, after all estate taxes, debts are satisfied.” The probate court granted the personal representative’s request for permission to sell the decedent’s homestead to satisfy the specific bequests in the decedent’s Will. The decedent’s sister appealed, arguing that the decedent’s Will should have been strictly construed in favor of retaining the homestead exemption contained in Sect. 4(c), Article X, of the Florida Constitution. The Fourth District Court of Appeal rejected the sister’s argument and held that it was clearly the decedent’s intent that the homestead be sold to satisfy her specific bequests. (Note: The Will in this case was apparently drafted by the decedent herself using a form she found on the Internet...a cautionary tale for those clients who are inclined to do so!)

Limitations Period for Will Contests

Aguilar v. Aguilar, 15 So. 3d 803 (Fla. 2d DCA 2009).

Summary: The personal representative served the notice of administration of the estate on the surviving spouse of the decedent on September 27, 2006. On November 3, 2006, the surviving spouse filed a motion to contest the will and remove the personal representative and served it by regular U.S. mail to counsel for the personal representative. It was not until March 22, 2007 that the surviving spouse served the motion to contest the will with formal notice. The probate court dismissed the wife’s motion on the grounds that it was not served by formal notice within three months of service of the notice of administration as required by Fla. Stat. § 733.212(3). The Second District Court of Appeal reversed. The Court held that although formal notice was required, Fla. Stat. § 733.212 (3) only requires the “filing” of a petition or other pleading requesting relief within the three month period. Accordingly, the surviving spouse’s motion was timely filed.

Fees and Costs in Estate Litigation

Geary v. Butzel Long, P.C., 13 So. 3d 149 (Fla. 4th DCA 2009).

Summary: The personal representative employed a succession of attorneys in administering the decedent's estate. She retained a law firm to object to the fees sought by her prior attorney and to have the prior attorney disgorge fees previously paid. The probate court found in favor of the prior attorney, but the dispute over the fees continued. During the pendency of the litigation, the personal representative paid herself a commission and paid her new attorneys. The probate court concluded that she should have obtained prior court permission before paying those fees and that incurring the fees was not reasonable. The probate court found that the fees incurred in pursuing the fees on fees litigation constituted frivolous litigation and were unreasonably incurred. The Fourth District Court of Appeal held that the probate court acted within its discretion to apportion the fees for that litigation to the personal representative's share of the estate.

C. Asset Protection

Robertson v. Deeb, 16 So. 3d 936 (Fla. 2d DCA 2009).

Summary: The creditor sued the debtor on an unpaid promissory note and obtained a judgment against him in excess of \$188,000. The creditor served a writ of garnishment on RBC Wealth Management, the custodian of an IRA that the debtor had inherited from his father. The debtor argued that the IRA was exempt from creditor claims under Fla. Stat. § 222.21(2)(a). However, the trial court held that the inherited IRA was not exempt from garnishment. The Second District Court of Appeal agreed, holding that the plain language of the statute references only the original "fund or account" and does not exempt inherited IRAs, such as the one here, which were separate funds or accounts that were created when the original fund or account passed to a beneficiary upon the death of the participant. Furthermore, the "fund or account" that was exempt under Fla. Stat. § 222.21(2)(a) was identified by its tax-exempt status. When IRAs are distributed upon the death of the owner and become inherited IRAs, their tax-exempt status under Section 408 of the Internal Revenue Code changes dramatically. Unlike original IRAs, inherited IRAs are not vehicles to defer taxation on income in order to preserve money for retirement. Instead, they are liquid assets that a beneficiary could access at any time without penalty and that the beneficiary must take as income without regard to retirement needs.

Miller v. Kresser, ---- So. 3d ----, 2010 WL 1779899 (Fla. 4th DCA 2010).

Summary: The creditor sought to invalidate the spendthrift provision of an irrevocable trust of which the debtor was a beneficiary, claiming that the beneficiary was exercising complete dominion and control over the trust. However, the trust gave the trustee absolute discretion over whether or not to make distributions. The trial court ruled that the beneficiary's control over the trustee, his brother, effectively terminated the spendthrift provision, which allowed the creditor to reach the trust assets. The Fourth District Court of Appeal reversed, holding that under Fla. Stat. § 736.0502(2), a creditor cannot reach any interest in a spendthrift

trust until the beneficiary receives a distribution. Under Fla. Stat. § 736.0504(2), when a trust provides a trustee with complete discretion over distributions, a creditor can only reach the distributions made by the trustee, and a creditor cannot compel distributions even if the trustee abused his discretion in managing the trust. As there had been no distribution to the beneficiary, and as the trustee had complete control over trust distributions, the Court concluded that the trial court erred in invalidating the spendthrift provision and permitting the creditor to reach undistributed trust assets.

V. ESTATE PLANNING TIPS AND TECHNIQUES⁴

A. Top Traditional Estate Planning Mistakes.⁵

1. Wasting the Estate Tax Exemption of the First Spouse to Die. The estate tax exemption of the first spouse to die is wasted when all assets are left outright to the surviving spouse. Instead, each spouse's Will or Revocable Trust should create a bypass trust upon his or her death to be funded with assets having a value equal to the deceased spouse's then estate tax exemption. **WARNING:** Naming the surviving spouse as beneficiary of life insurance or retirement plans prevents such assets from going into the bypass trust, although disclaimer planning after the death of the first spouse is possible. Also, if the residence goes outright to the survivor, the decedent's portion cannot be used if needed to fully fund the bypass trust.

2. JTROS ("Joint Tenants with Right of Survivorship") Ownership Designation on Brokerage or Bank Accounts. This designation prevents such accounts from being funded into the bypass trust when the first spouse dies. This also applies to "POD" (pay on death) accounts and "Trust" accounts payable to a named beneficiary (example: "A, Trustee for B"). Multiple party accounts should be set up as tenants in common as necessary.

3. Failing to Protect a Child's Inheritance. If a child's inheritance passes outright to the child, it will not be protected from creditors, a divorcing spouse, or estate tax at the child's death. To protect the inheritance, it may be better to leave assets in trust (with a spendthrift clause) for such child's benefit. If desired, the child can be named as the trustee (or co-trustee) of the trust.

4. Failure to Make Gifts To Reduce Estate Taxes. Easy gifting options include the \$13,000 annual exclusion, \$1.0 Million lifetime gift exemption, and tuition/medical gifts. In a 55% estate tax bracket, each \$13,000 gift saves \$7,150 in estate tax. A dollar of tax saved produces a 55% return on your money.

5. Life Insurance Policies Owned by the Insured. The proceeds of life insurance are subject to estate tax when the insured owns the policy. For example, \$1.0 Million of coverage taxed at 55% leaves only \$450,000 coverage after estate tax. Transferring ownership of life insurance to an irrevocable life insurance trust (or having the trust buy new coverage) removes the proceeds from the insured's estate, provided the insured lives for three years after the transfer of an existing policy. Establishing the ownership of the life insurance by the Trustee of an irrevocable trust at the outset avoids the three year rule altogether.

6. Failure to Plan for Lifetime Contingencies/Disability. This may result in a court-supervised guardianship. Plan ahead by executing a power of attorney, medical power of attorney, directive to physician, declaration of guardian, and living trust. Be wary of "standard form" documents.

⁴ These tips and techniques assume that the estate tax and GST tax will return in 2011 as scheduled.

⁵ Based on a similar list by Blum, Marvin E., *Top Ten Mistakes In The New Age Of Estate Planning*, Partners Financial Spring Conference, February 25, 2007, The Blum Firm, P.C., Forth Worth, Texas.

7. Poor Timing of Retirement Plan/IRA Distributions. Penalty taxes arise if retirement plan/IRA distributions are too small, too early, or too late. Devise a distribution strategy and beneficiary designations to maximize income tax deferral, but with due consideration of these penalty taxes. Consider designating a charity as beneficiary to avoid both estate tax and income tax, assuming you can afford to part with such assets while still caring for your family.

8. Failure to Pursue Sophisticated Estate Planning Tools. Explore techniques to reduce estate taxes and/or protect assets. Consider a family limited partnership, charitable trusts, qualified personal residence trust, and sale of assets to children or trusts (intentionally defective grantor trusts) for their benefit.

9. Lack of Liquidity to Pay Estate Taxes. Illiquidity can result in a forced “fire sale” of real estate or a family business within nine months of death in order to pay taxes. In this situation, it is advisable to explore life insurance and plan for the orderly sale of assets.

10. Wasting the GST Exemption. This may result in needless estate taxes at the deaths of children. Instead, consider segregating assets in generation-skipping trusts for the benefit of children for life and then to grandchildren, free of estate tax at each child’s death and for additional generations as well.

B. Top Mistakes In The New Age Of Estate Planning.⁶ Just when you thought those top ten mistakes were all you had to worry about, here come ten more. These comments are just an introduction of what should be addressed.

1. Failure to Engage in Business Succession Planning. Many family businesses do not survive past the first generation, and only 10% survive the second generation. Estate tax problems? Maybe, but more often the issues center on personal relationships.

2. Family Limited Partnership (FLP) Mistakes. It is probably a failure not to consider an FLP, but it is also a failure to start one and make a mess of it. There are checklists to guide the family, but someone in the family needs to pay attention. The cost of defending an IRS audit or a family fight can be very costly.

3. Failure to Pursue Cutting-Edge Planning Techniques. Every good planner has a toolbox of solutions, some fit, some do not. Sometimes a simple solution is too simple. Take time to listen to all options.

4. Failure to Plan When Death Is Near. Every client has a planning window that closes upon death. However, the planning window closes for some prior to death due to age or incapacity. There is much that can be done before the planning window closes.

⁶ Based on a similar list by Blum, Marvin E., *Top Ten Mistakes In The New Age Of Estate Planning*, Partners Financial Spring Conference, February 25, 2007, The Blum Firm, P.C., Forth Worth, Texas.

5. Failure to Engage in Asset Protection Planning as Part of the Estate Planning Process. This is delicate stuff, but it can be done with care for a proper percentage of one's assets. Remember, it was not raining when Noah built the ark.

6. Failure to Use Retirement Plan Assets to Fund Charitable Bequests. Not every client can afford to part with such assets at death, but when a client does not need a big IRA for a surviving spouse or for family, these may be the best assets to use to fund charitable gifts. The income tax that would have been paid if the assets were distributed from the IRA are never paid if the fund passes to charity.

7. Failure to Aggressively Fight the IRS in Tax Controversy Cases. Much of this topic relates to a proper perspective on risk and reward. If you meet the tax advice standards at the front end, make sure the client has the will to fight if and when the IRS picks a fight.

8. Failure to Do Estate Planning While Waiting on Congress to Act. This takes some courage since no one likes uncertainty. However, sometimes delay is your client's worst enemy. Right now, market values are lower, interest rates are down. This is a terrific time to plan in spite of politics.

9. Failure to Engage Qualified Counsel. This may be hard for a client to measure since most attorneys appear qualified. No one can know everything. Match the need with the expertise. Shop and ask questions.

10. Failure to Start Planning Early. Early means as soon as possible and before values grow rapidly. Sometimes timing is everything for a family.

VI. EXHIBITS

A. SUMMARY OF TRANSFER TAXES 2001-2011

B. SELECTED PORTIONS OF 2010 REGULAR SESSION LEGISLATION

HB 1237 – Probate Procedures

SB 998 – Relating to Trust Administration

SB 926 – Relating to Trusts