Window Closing On Gifting to Reduce Estate Taxes

By: Lee T. Poteracki

Over the years, the federal estate and gift tax laws have featured a once-in-a-lifetime exemption enabling taxpayers to make tax-free gifts to reduce their estate tax liability in varying amounts. While the exempt amount was once as little as $60,000, and for quite a few years has been pegged at $1 Million, the gift tax exemption has recently risen dramatically so that, in 2012, the exempt amount (“Exemption”) is $5,120,000 for each taxpayer, meaning a married couple together can gift or leave their beneficiaries up to $10,240,000 without gift or estate tax exposure. Unfortunately, it is highly likely that this opportunity is soon to be drastically curtailed.

Unless Congress acts to provide otherwise, the estate and gift tax laws will automatically and dramatically change effective January 1, 2013. Not only is the Exemption scheduled to shrink from $5.12 Million per taxpayer to $1 Million, but also the estate tax rate is scheduled to increase from 35% to 55% of each taxpayer’s taxable estate assets.

Estate taxes are not typically paid by surviving spouses due to an unlimited marital deduction. However, when there is not a surviving spouse, the decedent’s assets above and beyond the Exemption are subject to estate tax. Due to the impending tax law change, a husband and wife whose estates total $10.24 Million who died prior to 2013 would pay no federal estate or gift tax, while the same family dying after 2012 would incur estate taxes of over $4.5 Million. The immediate reaction of many of our clients to this development is to: (i) become irate and (ii) ask how to avoid this result.

Whether any action should be considered naturally depends upon the size of our clients’ estates, their age, earning expectations and anticipated family and retirement expenses. If it can be projected with confidence that well over $2 Million will remain after both spouses have died, their beneficiaries are faced with the estate tax issue. Because our clients are able to gift up to $5.12 Million at any time prior to December 31, 2012, it may be wise to gift assets to their beneficiaries this year in order to reduce their taxable estates before the gifting window closes on January 1.

The primary consideration for our clients as to whether they should gift substantial amounts in 2012 is whether they foreseeably might need the gifted assets in the future. Such gifts are not reversible, so access to the gifted assets is lost. Appreciated assets often are not the best types of assets to gift for these purposes because the donee is limited to the basis of the donor rather than receiving the step-up in basis as with an inherited appreciated asset, and the gift will require a full appraisal of the asset at the time of gift, which can be costly. Thus, it is often wise to use cash or cash equivalents for gifting purposes.

Clearly, our clients who have net worth well over $2 Million, and especially if they are older, are more likely to be able to safely gift to their beneficiaries. If any gifts to a single donee exceed the annual exempt amount of $13,000, then a gift tax return must be filed by April 15 of the next year.

Some of our clients have taken advantage of a technique which allows them to “give away” their cake and “have it, too.” A spouse can gift assets of up to $5.12 Million into an irrevocable trust for the benefit of his or her spouse and family for the life of the spouse, at which time the trust would be distributed to the family. Because the donee spouse only has a lifetime interest in the trust which expires at his or her death, and because the donor spouse has no further interest in the distributed assets, they are not taxed upon the death of the donee spouse.

The upcoming estate and gift tax law changes and the startling difference in the potential amount of death taxes make the evaluation of gifting opportunities quite important for our higher net-worth clients. If your circumstances fit into the categories mentioned in this article, please contact your Di Monte & Lizak, LLC attorney soon, as the gift transfers must be made prior to January 1, 2013 in order to take advantage of this expiring tax-reduction opportunity.
Firing Due to Facebook Post Found Lawful

By: Jordan A. Finfer

If you took my advice, and I’m sure you have, then there is no reason to read further because you have remained diligent in staying up to date with the National Labor Relations Board’s (hereafter “NLRB”) rulings regarding social media and the law. To the few of you that overlooked the significance of my prior article on social media and the law, allow me to recap. With a story coming from Lake Bluff, Illinois. The story serves as a good example of what is, and is not, considered to be protected activity, particularly within the framework of Facebook posts.

On June 14, 2010, Knauz BMW employee Robert Becker took to his Facebook page to share his thoughts about work, with his “friends”, family, and the world. The first story Becker shared was about the meager refreshments being offered to customers for Knauz’s big “Ultimate Driving Event”, where customers would have an opportunity to test drive the new BMW Series 5 automobile. Becker felt the hotdogs and potato chips being offered were not on par with the BMW luxury brand. Becker expressed his frustration by posting pictures on Facebook of the refreshments that were offered at the Ultimate Drive Event, supported by a few sarcastic comments. For example Becker noted, “I was happy to see that Knauz went “All Out” for the most important launch of a new BMW in years…”

Becker’s second work story posted on Facebook was about an accident that occurred at the Knauz’s Land Rover dealership, across the street from the BMW dealership. On June 14, 2010, a customer allowed his 13-year-old son to sit in the driver’s seat of a car while the salesperson was in the passenger’s seat. According to the court record, the customer’s son inadvertently stepped on the gas pedal, causing the car to roll down a small embankment, over the foot of the customer and into an adjacent pond, where the salesperson was thrown into the water (although unharmed otherwise). Becker took photos of the incident, posted them on his Facebook account with the caption, “This is your car: this is your car on drugs.” In addition to the caption, Becker posted a brief synopsis of the event, where he divulged the salesperson had been fired and indicated the event was an “OOOPS!”

The next day Becker’s supervisor was made aware of the June 14, 2010, posts and requested that Becker meet with him to discuss the posts. Becker’s position was that the posts were his own and none of his employer’s business. Becker’s employer disagreed. Seven days later, after a management meeting, it was decided that Becker would be terminated.

Becker brought a claim against Knauz for the firing, arguing that he had engaged in protected, concerted activities, thus making the firing a violation of Section 8(a)(1) of the National Labor Relations Act. Becker also brought a claim against Knauz challenging certain provisions of its handbook. The Administrative Law Judge (“ALJ”) found the firing lawful, a finding that was upheld by a three-member panel of the NLRB on September 28, 2012.

The ALJ’s findings relevant to the Facebook post were two-fold. First, the ALJ found that the Facebook posts about the Ultimate Driving Event were protected, concerted activity. The ALJ admitted that the activity of Becker was not ostensibly protected. However, the ALJ noted that comments regarding food for customers could relate to customer satisfaction and as a result, commissions.

The ALJ’s second finding was that Becker’s Facebook post regarding the Land Rover accident was neither protected nor a concerted activity. In making this finding the ALJ stated, “it was posted solely by Becker, apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employee’s terms and conditions of employment.

There are lessons from the case of Karl Knauz Motors, Inc. d/b/a BMW and Robert Becker, case number 13-CA-046452, for both employers and employees alike. First, be careful what you post on Facebook. I know you have heard this before, but as Robert Becker learned the hard way, Facebook is not just personal, it is also professional. Second, and this is for Employers, know your rights. Although a recent NLRB decision found that Employers cannot prohibit the use of social media at work, it does not mean you have to allow your employees to disparage you on public forums. You can take action when an employee acts in a way that is inconsistent with the qualities of your business. However, please consult with an attorney before you consider taking any action against an employee.

To conclude we will go back to the beginning: be diligent, be aware, and understand that social media matters.

Inheritance

By: Linscott R. Hanson

A primary motivation in estate planning is leaving to our beneficiaries, the assets we have accumulated over a lifetime. Clients focus on the monetary value of inheritance, most seeking equal treatment for their beneficiaries, some wishing unequal treatment or disbursement of some, and most concerned about having their wishes respected and carried out.

Very few of our clients have gone beyond this to consider how an inheritance can be used to further their non-monetary objectives for the recipients. What do I mean by this? Let me share some examples.

I had a client who considered a staged distribution of his assets, 1/3 to his children at the ages of 25, 30 and 35. He said “I have enough money, I haven’t saved near enough for my retirement. I don’t want my kids, when they approach retirement age, to be in the spot I’m in right now.” He then proceeded to instruct me to prepare his trust permitting his children to withdraw their inheritance in thirds, 1/3 each at 25, 30 and 65. I thought that was a very creative approach.

We have other clients who want to make sure that their children and grandchildren stay in touch and spend time together, even though our modern society tends to send them in different directions as they pursue their careers. Hence the “Travel Trust.” These parents have created a trust providing children with some withdrawal rights, but also provided a portion of the inheritance is to be held and used by family members as a travel fund, providing cash advances to purchase travel tickets, meals and accommodations, perhaps even car rentals, to facilitate travel to visit other family members.

In the case of a beneficiary with physical challenges, travel costs might also include travel costs of a needed companion for the principal beneficiary. Some Travel Trusts provide for the same sorts of disbursements in aid of travel for personal growth experiences like visits to famed名校, museums in France, or the pyramids in Egypt. They might go so far as to require the beneficiary to study or take courses in a particular country.

Some who provide money for travel want their descendants to visit the country of family origin, culture or religion. Other trusts encourage travel with a philanthropic twist; for instance, the inheritance would need to be used for volunteer work in a Third World country.

It should be noted that an inheritance distributed outright to a descendant is vulnerable to the claims of the recipient’s creditor(s), possible marital break ups and so forth, while a Travel Trust can be protected from such claims by what lawyers call a “Spendthrift Clause.”

Our clients still want to provide for basic needs of their children and grandchildren, but beyond that, those with extra means are becoming increasingly philosophical in their estate planning. Thoughtfully prepared trusts can be used to influence the behavior of their beneficiaries in a positive way.

While in most cases, family members don’t know what has been set up in the will or trust until after their relative’s death, we urge our clients to discuss their intentions and wishes with their children during their lifetime, so that the children will have a better opportunity to really understand the thinking that lead to the creation of such trusts.

Your Di Monte & Lizak, LLC attorney would be happy to discuss your thoughts and wishes with regard to a planned inheritance for your children and grandchildren. While we can never disclose the confidences of one of our clients to another; we can share the knowledge which our experience in planning the estates of others has given us in counseling you.
Construction Contract Extras: Bizarre Trial Court Decision Overturned

By: Alan L Stefaniak

While the trial court held that winter protection was clearly outside the scope of the contract, it found there was nothing to show the general contractor ordered the work to be done nor did it agree to pay extra for the work. There are five factors the courts look to when considering a claim for extra compensation:

1. The extras were outside the scope of the contract;
2. The owner or general contractor requested the extra;
3. The owner or general contractor by words or conduct agreed to pay extra;
4. The extra work was not done voluntarily; and
5. The extras were not necessitated by reason of some default of the general contractor or subcontractor.

The trial court held that the subcontractor should have done the work per the terms of the contract even though it knew that in doing so the work would not have been done in a good and workmanlike manner because it was being performed in the winter months and there would be no winter protection. I think the trial court’s ruling is bizarre because it put the subcontractor in an untenable position. If the work was done without the winter protection, there would be claims for defective performance. If the sub went ahead and did the work with winter protection, then the trial court would say you are doing so for free and in this case the sub would lose $171,000. This would certainly not be a good position to be put in.

Fortunately, the Appellate Court came to the subcontractor’s rescue and overruled the trial court. The Appellate Court held that the subcontractor could not do its work knowing that it would be done in an unworkmanlike manner. The Appellate Court stated, “One who contracts to perform construction work impliedly warrants to do the work in a reasonably workmanlike manner.” In addition, the Appellate Court held that the trial court was also wrong that the sub could do the work in an unworkmanlike manner because the Menard’s building is open to the public and to allow work to be done in an unworkmanlike manner would be unrealistic and contrary to public policy. The Appellate Court ordered the case back to the trial court because it could be found that the general contractor impliedly ordered the sub to perform the winter protection work if in fact doing so was necessary to do the work in a workmanlike fashion. The Appellate Court also noted that the general contractor was informed by the concrete subcontractor that it was going to perform the winter protection work and did not tell the sub to stop.

The lesson to be learned is that if you are placed in a position of being forced to do your work in an unworkmanlike manner do not do it. Do what is necessary to perform the work properly. Inform the owner or general contractor you are doing so and properly document the claim you will be making and the additional costs incurred. You simply should not do the work in an improper fashion as the consequences of doing so are too grave.

Mr. Stefaniak publishes by email a monthly newsletter devoted to topics in his areas of concentration “Construction, Land Use and Development Update.” If you would like to be added to the subscriber list send your email address to mmulvany@dimontelaw.com.
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