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WE'RE GROWING

Over the past two years, Fenster & Lazenski has added attorneys, support staff and space.

Attorneys

Beverly A. Lewis (Dave F.'s wife), will be rejoining the firm on a part-time basis. Bev will be helping out in our Estate Planning Department, concentrating on "family" wills and elder law.

Douglas R. Trumpler, who handles real estate and general legal matters for the firm, is now "of counsel" to the firm. Doug will be working out of our new space on the third floor.

Staff

Monica Venditti started in November, 1998, as a student intern. Monica, who continues to be a full-time college student, assists with real estate, corporate and estate administration.

Sandy Rizzo joined our Estate Administration Department in April, 2000. Sandy handles small to medium estates and assists MaryAnn with the larger and more complex estates.

______________ just joined the firm this month. She will be handling reception, client service and assisting with Estate Planning.

Office Space

In a move that should give us all some exercise, we recently expanded to the third floor (we are now on *all three* floors of the building). The third floor will house our Estate Administration Department (MaryAnn, Sandy and Monica).

LEGISLATION

New York State Estate/Gift Tax Repealed: On January 1, 2000, New York's gift tax was repealed. And, on February 1, 2000, New York's estate tax was repealed.

Federal Exemption Increased: On January 1, 2000, the federal estate tax "Exemption" was increased to $675,000. The Exemption stays at this level until January 1, 2002, when it increases to $700,000.

BUSH VICTORY PROVIDES HOPE FOR REPEAL OF FEDERAL ESTATE TAXES

The presidential victory for George W. Bush may have a profound impact on the direction of future estate and gift tax legislation.

This past year, a Republican proposal to repeal the federal gift and estate tax (more accurately, to *phase-out* the taxes over a ten-year period) was vetoed by President Clinton on August 31, 2000. President-elect George W. Bush, however, is on record as *favoring* repeal, and his victory in the hard-fought presidential election could spell relief for clients wrestling with estate and gift tax issues.

As originally proposed, however, there were two potential drawbacks to the legistlation to repeal the estate tax. First, to say the repeal is "phased-in" over ten years is generous. In fact, there is little relief (to other than the very wealthy) until 2010. (The interim relief comes by reducing the highest tax bracket, which produces no benefit for estates under $2,500,000.)

Second, repeal of the estate tax may also do away with the so-called "stepped-up basis" for income tax purposes. For some families, the increased income tax that would result from using "carry-over basis" rules would take back a portion of the estate tax savings. As tax planners (like us) put pencil to paper, it will be interesting to see exactly who is helped — and who is hurt — by this horse-trading.

Regardless of who wins the White House, it is likely that farmers and small business owners will see some estate tax relief for passing their farm/business on to family members.

While much of the current interest in the estate tax is the result of election-year posturing and rhetoric, it is likely that the estate tax will receive substantial continued attention in the coming year.

Please call us if you have any questions on how these changes may affect your plan. Or, if you like, we can schedule an appointment to review your estate plan.

Straight Talk on Living Trusts

We have recently seen a lot of advertisements and seminars promoting "Living Trusts." The sales pitch for Living Trusts usually starts with the claim that "probate" is very expensive and time-consuming, and therefore "avoiding probate" is an important estate planning goal for everyone. The promoters claim that, because a Living Trust avoids *probate*, it will also avoid executors fees, legal fees, accounting fees, court costs, etc. For most families, these claims are simply not true.

To understand Living Trusts, it is necessary to distinguish between the "probate" of a Will and the "administration" of an estate.

Probate: If a person dies with a Will, "probate" is the *first step* in the administration of the estate. Simply put, probate is the court proceeding whereby an Executor is appointed. In New York State, a simple, uncontested probate can be accomplished in *one day*. It is only when there are probate *problems* (*e.g.*, a Will contest, lost Will, unknown or disabled heirs) that the procedure can take longer (and cost more).

Estate Administration: These are the various tasks which are required in order to properly administer *either* a "probate estate" *or* a Living Trust. We have identified ten administration "areas":

1. Identify and value assets
2. Prepare income tax returns
3. Pay debts and expenses
4. Prepare estate tax return
5. Keep books and records
6. Transfer assets to beneficiaries
7. "Post-mortem" planning
8. Prepare "Accounting"
9. Sell assets (if necessary)
10. Settle (or "close") the estate or trust

With this in mind, we see that many Living Trust promotions are misleading in two ways:

- First, the promoters exaggerate the desirability of avoiding probate. For many families, the probate of a Will is neither expensive *nor* time-consuming. In such a case, there is very little advantage to "avoiding" it. (If, however, the probate proceeding will likely be difficult, then the Living Trust can be advantageous.)
- Second, many promotions inaccurately suggest that, following the creator's death, the Living Trust is "self-administering" (thus avoiding legal and accounting costs). Absurd! In most cases, the other administration areas must still be completed for the trust.

There are other misleading claims made by the Living Trust promoters: For example, they claim that a Living Trust saves estate taxes, whereas a Will does not. *FACT: The Living Trust offers no income or estate tax advantages over a Will.*

For the right client, the Living Trust can be a valuable estate planning tool. But — like so many things in life — it is simply not for everyone. Deciding whether the Living Trust is right for *you* requires a careful review of your planning goals, family circumstances, asset ownership, and (most importantly) planning alternatives.

The Five Myths . . .

"Probate" takes months, even years. In New York State, a simple, uncontested probate can be accomplished in as little as one day.

No distributions are allowed for 7 months. No. In most cases, partial distributions can be made *immediately* upon the appointment of an Executor.

Settlement takes years. While there may be valid reasons to keep an estate open (*e.g.*, tax savings), many estates can be settled in several *months*.

The attorney who drafted the Will automatically becomes the attorney for the estate. Not true. An Executor has the right to retain *any* attorney (or other professionals) he or she wishes. A clause in a Will to retain a certain attorney has no effect.

Legal fees are based on a percentage of the estate . . . usually 4% to 5%. An attorney's fee should be based on several factors: First and foremost is the amount of legal *work* required. Of less importance is the value of the estate. A fee based *solely* on the value of an estate is — in many cases — excessive.

Note also that it is not necessary to have an attorney involved in every aspect of the administration. Using other advisors (or doing the work yourself) can save time and money.

If you would like more information about probate, estate or trust administration, or Living Trusts, just call us at 685–4167.

Trusts Can Provide Estate Planning Flexibility

In the movie "The Graduate," the hot investment tip for the future was summed up in one whispered word: "plastics." If the hot *estate planning* tip had to be summed up in one word, it would probably be: "trusts." Sure, trusts have been around longer than powdered wigs, but today they are as useful as ever for implementing an effective personal and estate tax plan.

A trust is created when a "Grantor" transfers property to a "Trustee," who then manages the property according to the terms stated in the trust "agreement." For certain types of trusts — for example, a "QTIP" trust for the benefit of a surviving spouse — the trust may have to conform to certain legal requirements. For most trusts, however, the terms are limited only by the Grantor's imagination.

A trust which is created during life is called an "*inter-vivos*" trust; one created in a Last Will is called a "testamentary" trust. For an *inter vivos* trust, the trust instrument is usually a written agreement between the Grantor and the Trustee (or Trustees). For a testamentary trust, the trust instrument is the decedent's Last Will.

A trust can be "revocable" or "irrevocable." The irrevocable trust is usually (though not always) created to achieve some gift or estate tax advantage. In contrast, the revocable trust (usually called a "Living Trust") does not offer any income, gift, or estate tax advantages, nor does it provide any protection for the assets held in the trust. By definition, a testamentary trust is irrevocable.

The following are some common types of trusts:

- A "Minor's Trust" manages property for a child who is less than 18 years old.
- A "Spendthrift Trust" manages property for a person who may need the financial management and discretion a trust can offer.
- For married persons, a "Credit Shelter Trust" (or "By-Pass Trust") can shelter assets from estate tax.
- A "QTIP Trust" allows a decedent to defer (or avoid) estate tax, while also providing control over property that is held for the benefit of a surviving spouse.
- A "Living Trust" can be useful in some circumstances — for example, avoiding probate or asset management.

There are many other types of trusts which can be used in an estate plan. This article will briefly describe two lesser-known — though equally important — trusts.

The Supplemental Needs Trust.

The parents of a child who has special needs due to a physical or mental disability may have unique concerns about their child's long-term care. For example:

- Should the State be financially responsible for my child's care or should I?
- How can the cost of long-term care for my child be funded and protected?
- Will my child be adequately cared for after my death?

A simple estate plan for the support of a child with special needs can yield unsatisfactory results. For example, an outright bequest to a person who is mentally impaired may result in a loss of governmental assistance until the amount of the inheritance is "spent down." In addition, such an outright bequest could require the appointment of a guardian, since such a person may not be able to own property in their own name.

At the other extreme, some parents simply disinherit their child, relying instead on governmental programs to provide needed support. In light of recent budget-cutting at both the Federal and State levels, this "plan" may not provide the level of care that the child needs or deserves.

In contrast to such simple planning, a Special Needs Trust can "step into the parents' shoes" ... providing money when it's in the child's best interest to do so. At the same time, the child's eligibility for governmental assistance (S.S.I., Medicaid, etc.) will not be jeopardized. The assets of the trust can also be protected from the claims of most creditors.

A Special Needs Trust can be created and/or funded either during life or at death. If the trust is created during life, the parents can serve as trustees. In addition, a trust created and funded during life can be structured to provide certain income and estate tax advantages.

Alternatively, the Special Needs Trust could be created in a Last Will and Testament, which would also set forth the amount of funding. The Will would appoint a trustee, which could be a family member, friend, bank, etc.

A third possibility is to create and partially fund the trust during life, with additional funds being added at death.

Another planning option for parents who do not have the cash or other resources to fund a Special Needs Trust is to create the trust now and fund it with life insurance policies. Upon the death of the one or both parents, the trust would receive the insurance proceeds and begin to manage them for the child's benefit.

The Life Insurance Trust.

If a decedent possessed any "incidents of ownership" in a life insurance policy at death, then the proceeds from that policy are taxable for estate tax purposes. The question of what constitutes an "incident" of ownership is a complex one, and there are many circumstances where ownership can be found to exist. The most common situation, however, is where the decedent had the power to name (or change) the beneficiary. (A common misconception is that a policy payable directly to a beneficiary — as opposed to "estate" — will avoid taxation. While naming a beneficiary may keep the policy out of one's *probate* estate, it does not keep it out of the *taxable* estate.)

Insurance proceeds can be one of the largest assets a person owns. Unfortunately it is not an asset which we can "enjoy" during our lifetimes. For this reason, an insurance policy is oftentimes an "asset" which can be given-away — thus removing it from the taxable estate.

As a general rule, there are two ways to remove life insurance from a taxable estate: First, the ownership of the policy can simply be transferred to the beneficiary (or beneficiaries). Where the beneficiary is a spouse, however, there is no estate tax benefit, since the proceeds can pass tax-free to him or her anyway. For married couples, the goal is to have neither spouse own either the policy or the proceeds.

The second way to avoid having a life insurance policy subjected to estate tax is to transfer the policy during life to an Irrevocable Life Insurance Trust (or, "ILIT"). As with any irrevocable trust, the Grantor must give up all rights to the assets held in the trust — including the right to serve as Trustee — in order to avoid taxation. The primary advantage of the life insurance trust is that it can remove the insurance proceeds from both the husband's *and* wife's estate, while at the same time allowing the surviving spouse to receive a benefit from the proceeds.

Typically, the Grantor of an ILIT wants to pay the premiums to assure that the policy remains in force. The Grantor should not pay the premiums directly to the insurer, however. Rather, he or she can make *gifts* to the trust, which gifts can then be used for maintaining the insurance coverage.

The renewed interest in life insurance trusts can be traced to 1987, when Congress began its crackdown on so-called "estate freezes." Fortunately — and I suspect due in part to a powerful insurance industry lobby — the ILIT has survived all of the "anti-freeze" legislation unscathed.

The trusts described in this article are just a few of the many which can be used in an estate plan. Whether for avoiding estate tax, managing property, protecting assets, or avoiding probate problems, the trust is an essential "tool" for building an estate plan which accomplishes all of a client's personal and financial goals.

Legal Briefs

A Power of Attorney and Health Care Proxy are two simple, yet very important estate planning documents. This month's article will discuss the Power of Attorney. Next month, I will discuss the Health Care Proxy.

In a Power of Attorney, you appoint an "agent" to make financial decisions for you. The authority granted in a Power of Attorney can be limited to certain matters (for example, banking transactions) or can include a broad range of powers. A Power of Attorney can avoid the need for a court-appointed guardian if you become unable to manage your financial affairs. Here are a couple of important points about the Power of Attorney:

(1) In a Power of Attorney, you can appoint one or more agents. If more than one agent is appointed, you must state whether they are required to act together ("jointly") or whether they can act individually ("separately").

(2) A Power of Attorney can be effective immediately, or it can be become effective upon some future event (for example, incapacity). The latter type is called a "Springing" Power of Attorney.

(3) If you want your agent to be able to transfer assets to others (for example, your children), then *you must include the power to make gifts in the Power of Attorney*. (A "plain" Power of Attorney does <u>not</u> authorize an agent to make gifts.) This extra authority is generally desired to protect assets from long-term nursing costs.

(4) On October 1, 1994, New York State changed the law regarding Powers of Attorney" *It is very important that any Power of Attorney signed after October 1 must be on a form that complies with the new law.* (A Power of Attorney signed before October 1, 1994 continues to be effective.)

(5) Under the new law, an agent under a Power of Attorney does *not* have the authority to make medical decisions. To authorize someone to make medical decisions, a Health Care Proxy must be used. The Health Care Proxy will be discussed next month . . .

(6) An agent under a Power of Attorney has *very* broad authority. Do not appoint a person as your agent unless you have 110% confidence in that person.