ISSUE 01 | SPRING 2011

- LEE ALLEN DISCUSSES CHILD CUSTODY 2
- TRACY STROUD DISCUSSES THE LEGAL STEPS TO CONSIDER BEFORE MARRIAGE....2
- MIKE COLOMBO, WALT KITCHIN, AND DALLAS CLARK NAMED 2011 SUPER LAWYERS 3
- WALT KITCHIN DISCUSSES GIVING REFERENCES FOR FORMER EMPLOYEES 3

COLOMBO KITCHIN

Legal news

ADDRESSING THE LEGAL NEEDS OF INDIVIDUALS AND BUSINESSES IN OUR COMMUNITY

Transfer Tax Provisions of Tax Relief Act of 2010

Author: Mike Colombo, Senior Partner, Board Certified Specialist in Estate Planning and Probate Law

On December 17, 2010, President Obama signed the "Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010" ("TRA 2010") which includes improvements and changes in estate, gift, and generation-skipping transfer ("GST") taxes (the "Transfer Taxes"). Because of these changes in the Transfer Tax laws, we recommend that all our clients review their estate plans and consider whether their personal and tax planning goals are now being met.

Transfer Tax Changes

Significant Transfer Tax changes in TRA 2010 are effective for the years 2011 and 2012, although there are some complicated transition rules for gifts made and decedent's dying in 2010. The most important provisions related to estate planning are summarized herein.

1. **Tax Rates.** The estate and gift taxes are reunified for 2011 and 2012 with an exemption of $5,000,000, indexed for inflation beginning in 2012, and a tax rate of 35%. This exemption and tax rate both apply to the GST tax.
2. **Portability.** For decedents dying in 2011 and 2012, an executor may transfer any unused estate tax exemption to the surviving spouse. This must be done on a timely filed estate tax return.
3. **Extension of Prior Transfer Tax Laws.** Except for specific changes, the Transfer Tax laws and related planning in effect in 2009 will continue to be effective, at least during 2011 and 2012.
4. **Sunset Provision.** If additional legislation is not enacted by January 1, 2013, then the *2001* Transfer Tax provisions will again become effective, including an estate tax exemption of only $1,000,000 and a tax rate of 55%.

"Because of the Transfer Tax uncertainty after 2012, selecting the right plan may be more difficult than ever"

Selecting the Right Estate Plan for You

Because of Transfer Tax uncertainty after 2012, selecting the right plan may be more difficult than ever. In considering estate planning changes, it is important to clearly identify goals and then consider how to best accomplish them.

For example, for deaths during 2011 and 2012, it will not be necessary for married couples to use a credit shelter trust solely for the purpose of utilizing the estate tax exemption of both spouses. However, we anticipate that many couples will continue to use these trusts rather than relying solely on portability if their goals include (i) assuring the use of both exemptions beyond 2012 if portability is not extended, (ii) assuring the use of both exemptions even with portability since the unused exclusion will be lost if the surviving spouse remarries and survives his or her next spouse, (iii) protecting future appreciation of assets from Transfer Tax, (iv) maximizing generation-skipping planning since portability does not apply to the GST tax exemption, (v) asset protection, (vi) professional management of assets, and (vii) restricting the transfer of assets by the surviving spouse.

An excellent and flexible alternative to creating a credit shelter trust on the first death, in appropriate circumstances, is a disclaimer will or trust agreement. This typically involves an outright bequest of most or all of a decedent's estate to the surviving spouse who is given an option to disclaim part or all of the estate into a credit shelter trust. The surviving spouse then can take a "second look" and implement the tax planning which works best at the time.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication.

LIFE INSURANCE

Have you reviewed your policy beneficiary information lately?

A Primer on Child Custody

Author: W. Lee Allen, III, Attorney
Certified Family Financial Mediator by the North Carolina Dispute Resolution Commission

Q. My spouse and I have separated. When can I see my child?
A. If you and the other parent can agree, then you can be as creative and flexible as you like. In addition, an agreement gives both parents some input into a custodial schedule.

Q. What happens if we cannot agree?
A. If the parents cannot agree, litigation becomes necessary. Ultimately, a Judge will decide on the issue of custody (assuming the parents remain unable to reach an agreement) and the parents will have much more limited input into what the custodial schedule looks like.

Q. How do Judges decide the issue of child custody?
A. Under North Carolina law, a Judge will base his or her decision about child custody on what the Judge believes is in the child's best interest. Therefore, the Judge has a great deal of discretion. Typically, the history of parental involvement plays a great role in determining the custodial arrangement. In addition, judgment, maturity, and the ability and willingness of one parent to set aside differences with the other parent in order to do what is right and best for the child also play a role.

Q. What is "joint custody?"
A. When both parents have authority and responsibility to make major, important decisions for the child, such as medical/dental care and education, they are said to have "joint legal custody." It is not unusual for both parents to be awarded joint legal custody, with one parent having primary physical custody of the child. "Primary physical custody" refers to the rights and responsibilities of the parent with whom the child primarily resides. This would include a good deal of decision-making with regard to the more mundane, every day decisions. "Visitation" refers to the right of a parent to spend time with a child. This is sometimes referred to as "secondary physical custody."

Q. How are holidays dealt with after parents separate?
A. Holidays are most often shared in some fashion. Holidays can be divided equally, or they can be rotated from year to year. That is, one parent might have, for example, Thanksgiving in odd-numbered years, and the other parent would enjoy time with the child at Thanksgiving in even-numbered years; while the parent having the first part of the Christmas holiday one year would have the second part of Christmas the following year. Creativity and flexibility are especially important when dealing with holiday time.

Questions about Child Custody Mediation?

Visit www.nccourts.org/support/faqs/faqs.asp for more information.

Before you marry...

Thinking about a Premarital Agreement before a marriage puts you in the driver's seat and allows you to decide on the front end about property and support, instead of relying on North Carolina law.

Popularity of Premarital Agreements

- Couples marry later in life.
- Couples enter marriage with substantial assets.
- Couples marry multiple times with children from prior marriages.

A Premarital Agreement ("Agreement") is simply a contract entered into before two people marry. The Agreement sets out what property and support the parties will be entitled to if they divorce or one or the other of them dies while in the marriage. Premarital agreements are enforceable contracts in North Carolina if the provisions of the Uniform Premarital Agreement Act (UPAA) are observed. The UPAA has been adopted in North Carolina.

Contracting Topics

Under the UPAA the parties may contract about many things including:

- Rights to share or not share in property either or both own;
- Rights to use, buy, sell, mortgage, manage or control property;
- Disposition of property upon separation, divorce, or death;
- Modification or elimination of spousal support;
- Making of a will, trust, or other agreement to carry out the Agreement; and
- Death benefit from life insurance policies.

Requirements

- The Agreement needs to be in writing and signed by the two parties to the Agreement.
- Before entering the Agreement, both parties make a full and accurate disclosure to each other about their income, assets, and liabilities, among other things.
- It is recommended that the parties sign the Agreement in the presence of two disinterested witnesses (i.e. those not receiving anything in the Agreement) and a notary public.
- If one of the parties fails to provide this fair and reasonable disclosure, the Agreement can be deemed invalid under the UPAA.

Author: Tracy Stroud, Attorney

This Edition's FEATURED ATTORNEYS

Only five percent of the lawyers in the state are named by *Super Lawyers*.

Colombo, Kitchin, and Clark Named 2011 Super Lawyers

Michael A. Colombo, W. Walton Kitchin, and Dallas C. Clark, Jr., have been named by *North Carolina Super Lawyers* magazine as three of the top attorneys in North Carolina for 2011.

Michael A. Colombo was named in the area of Estate Planning and Probate. Mr. Colombo is a past president of the North Carolina Bar Association and founding partner of Colombo, Kitchin, Dunn, Ball & Porter, L.L.P. He is a North Carolina Board Certified Estate Planning and Probate Specialist, and also practices in the areas of business planning and taxation law.

W. Walton Kitchin was named in the area of Civil Litigation Defense. Mr. Kitchin is a founding partner of Colombo, Kitchin, Dunn, Ball & Porter, L.L.P. He is certified as a mediator by the North Carolina Dispute Resolution Commission, and practices in the areas of litigation and alternative dispute resolution, employment law, and construction law.

Dallas C. Clark, Jr. was named in the area of Family Law. Mr. Clark is a North Carolina Board Certified Family Law Specialist and is a past Board Member and Chair for the North Carolina Board of Legal Specialization. With more than forty years of experience, Mr. Clark practices exclusively in the area of family law.

Each year, the research team at *Super Lawyers* undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by the attorney-led research staff, a peer review of candidates by practice area, and a good standing and disciplinary check.

Employer CORNER

Employers often get calls requesting a reference for a former employee. Some of these calls are a pleasure to return because the employment relationship with your business and former employee was good. However, what risks do you face if the previous situation was unproductive or unpleasant? Can you, as a former employer, be held liable to the employee for "telling it like it is, or was"? Can you be held liable to the potential employer for failing to disclose the weaknesses or problems of the former employee?

In 1997, the North Carolina General Assembly tried to address the first question by passing a statute that provides in essence: an employer may disclose information about a current or former employee's job history or job performance to a perspective employer upon request without being liable in civil damages for any consequences of that disclosure is the information is true. Job performance is defined in the statutes as the suitability of the employee for reemployment; the employee's skills, abilities, and traits as they may relate to suitability for future employment; and in the case of a former employee, the reason for the employee's separation from you business.

There is an entirely separate statute dealing with the "blacklisting" of employees which provides that it is a criminal offense for any person, agent, company, or corporation after having discharged any employee from its service to prevent that employee, by word or writing, from obtaining employment with any other person, company, or corporation. That statute goes on to say that it does not prohibit any employer from furnishing in writing, upon request, to any other person or company to whom that discharged employee has applied for employment, a truthful statement for the reason of such discharge. Generally speaking, the truth is a defense to any sort of defamation suit, including both libel and slander.

There have been a few cases filed by companies who hired employees after discussing them with their former employer. The theory of these cases generally has been that the former employer intentionally mislead the potential employer by failing to disclose important adverse information or made affirmative untrue statements about the employee's suitability for employment that turned out to be false. If the statements about a former employee are true, then a former employer should incur no liability to a potential employer who is inquiring about the suitability of a former employee for a job.

We have come to the conclusion, based on current North Carolina law and experience with clients, that employers can reduce the risk of being sued under these circumstances by having one person in the business to whom all reference inquiries should be sent. The references should contain only factual information and not conclusions as to whether the employee will be suitable for employment in some other organization.

Author: W. Walton Kitchin, Attorney

Colombo, Kitchin, Dunn, Ball & Porter, L.L.P.

Serving the citizens of Eastern North Carolina for more than 25 years

- Estate and Trust Planning and Administration
- Estate and Trust Disputes
- Business Planning, Organization, and Law
- Collections, Bankruptcy, and Creditors' Rights
- Commercial and Residential Real Estate
- Construction Law
- Family Law
- Employment and Contract Law
- Litigation and Alternative Dispute Resolution
- Tax Planning and Disputes

1698 E. Arlington Blvd.
Greenville, NC 27858
Telephone: (252) 321-2020
Facsimile: (252) 353-1096
www.ck-attorneys.com