



Boston Bar
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FALL 2008

Trusts & Estates Section

Fall 2008 Newsletter

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Calendar of Section Events

Upcoming Presentations

Legal Issues in Same Sex Relationships

Family Law Section

Wednesday, November 5, 2008 - 4:00 pm – 7:00 pm

On November 18, 2008, it will have been five years since the Massachusetts Supreme Judicial Court's landmark decision in Goodridge. Today, the law continues to evolve to deal with the practical aspects of same sex relationships and their legal rights.

This seminar will address the legal issues that same sex couples face regarding their children, their marriage, and estate planning. Attendees will learn what couples must do to protect themselves and their families, as well as the consequences of failing to properly plan for marriage, children and death.

Getting Ready for Year-End Gifts

Estate Planning Fundamentals Committee and New Lawyers Section

Thursday, November 13, 2008 - 12:30 pm

Geoffrey Mason, Ropes & Gray LLP, will lead a discussion of year-end gifts, specifically including a brief overview of the gift tax rules relating to types, timing and valuation of gifts to individuals and charities, as well as a more in-depth discussion of the most common forms of annual exclusion gifts for minors. This discussion will assist both new and more experienced lawyers in devising year-end gifting plans for their clients.

Save the Date! Current Issues with LLC's and FLP's

Trusts & Estates Section

Thursday, January 8, 2008 - 4:00 pm – 7:00 pm

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Review of Recent Section Events

In Case You Missed It:

Long Term Options for Elders

Elder & Disability Law Committee

Wednesday, October 22, 2008 - 12:30 pm

Emily Saltz, Elder Resources, will present an overview of long term care options for elders including:

- Continuum of care for elders – community-based to institutional care options
- Accessing and financing community care options
- Alternative housing options for elders including assisted living and retirement communities
- Coordinating care for elders - What professionals need to know

Nuts & Bolts of International Estate Planning

Estate Planning Committee

Thursday, October 23, 2008 - 12:00 pm

Brian Bassett, Ropes & Gray LLP, will lead a discussion of some of the cross-border estate planning issues most commonly encountered by the estate planning practitioner, including (i) tax considerations presented when planning for the non-U.S. citizen spouse, including qualified domestic trusts (QDOTs), limitations on gifts to a non-U.S. citizen spouse, and joint ownership of property with a non-U.S. citizen spouse, (ii) non-U.S. relatives or friends serving as trustee of trusts, and (iii) the disposition of non-U.S. real estate at death.

BBA CLE: Trust Reformation

Tuesday, October 28, 2008, 4:00 p.m. – 7:00 p.m.

This program will address both the equity issues of trust reformation, as well as trust reformation for tax purposes, or the so-called “Bosch” procedure. Attendees will learn when to consider reforming a trust, how to go about reforming a trust, and specifically, when the SJC needs to be petitioned for reformation so that the reformation is recognized by the IRS for tax purposes. This program is ideal for all estate planning practitioners, trustees or anyone advising trustees.

The Basics of the Generation-Skipping Transfer Tax

Estate Planning Fundamentals Committee

Tuesday, October 14, 2008 - 12:30 pm

Susan L. Repetti, of Nutter McClennen & Fish, LLP, will review the basic principals of the Generation Skipping Transfer Tax. This brown bag lunch will be an excellent introduction to the GST tax for new lawyers, as well as a good refresher for more experienced practitioners.

Use of Nominee Trusts and Other Entities in Estate and Gift Tax Planning for Residential Real Estate

Estate Planning Committee

Thursday, September 25, 2008 - 12:00 pm

Peter Shapland, Day Pitney LLC, presented on how estate plans often involve use of nominee trusts and other entities (particularly LLCs) to hold residential real estate. Participants discussed income, gift tax issues that arise when drafting and implementing these arrangements, as well as the different governance issues that arise under the different entity choices. Also discussed was the reduced, but still important, role of nominee trusts in Massachusetts estate planning for residential real estate.

Fundamental Principles of the Gift Tax

Estate Planning Fundamentals Committee

Tuesday, September 9, 2008 - 12:30 pm

Amiel Weinstock, K&L Gates LLP, reviewed the basic principles and relevant Internal Revenue Code sections governing lifetime gifts. In his hour-long survey of this important part of the transfer tax code, Amiel helped clarify fundamental gift tax concepts and provided tips on issue spotting. This brown bag lunch was an excellent introduction to gift tax planning for new lawyers, as well as a good refresher for more experienced practitioners.

Fall Transfer Tax Exclusion and Exemptions Chart

	2008	2009
Gift tax annual exclusion	\$12,000	\$13,000
Gift tax exemption	\$1,000,000	\$1,000,000
Federal estate tax exemption	\$2,000,000	\$3,500,000
Generation-Skipping Transfer tax exemption	\$2,000,000	\$3,500,000
Non-citizen spouse gift tax annual exclusion	\$128,000	\$133,000
Massachusetts filing threshold	\$1,000,000	\$1,000,000

Please note that, in light of the national budgetary shortfalls, we anticipate the IRS will increasingly scrutinize transfer tax valuation discounts.

Changes to Exclusion of Gain on the Sale of Personal Residence

By **Matthew R. Hillery, Co-Chair, Public Policy Committee, Trusts & Estates Section**

In recent legislation, Congress tightened the rules allowing the exclusion of capital gain from the sale of a principal residence. The new rules may affect taxpayers who convert second homes to principal residences after 2008 and later sell those residences for gain, but will not affect taxpayers who own only one residence at a time.

Section 121 of the Internal Revenue Code allows a taxpayer to exclude up to \$250,000 of gain on the sale or exchange of a home (or up to \$500,000 for certain married couples filing joint returns). To be eligible, the taxpayer must have owned the property and used it as a principal residence for 2 years of the 5-year period ending on the transaction date.

The Housing and Economic Recovery Act of 2008, Public Law No. 110-289, now limits the Section 121 exclusion in some circumstances. Specifically, the new rules provide that the exclusion amount will not apply to gain that is allocable to periods of “nonqualified use”, which are periods after 2008 in which the taxpayer does not use the property as a principal residence (with some exceptions). Gain is allocated to these periods

based on the ratio that the taxpayer’s aggregate periods of nonqualified use bear to the total period the taxpayer owned the property.

Assume an individual purchases a vacation home on January 1, 2009, converts it to a principal residence on January 1, 2011 and sells it on January 1, 2014 realizing a gain of \$250,000. 40% of the gain (from two years out of five), or \$100,000, is allocated to a period of nonqualified use. The remaining \$150,000 of gain is eligible for the exclusion.

The Quarter in the Courts

By Mark E. Swirbalus, Esq.

In the past quarter, the Massachusetts appellate courts answered a question of first impression in a will construction action and expanded on the burden-shifting analysis from *Cleary v. Cleary* in an undue influence action.

***Hershman-Tcherepnin v. Tcherepnin* – Will Created Tenancy In Common With Protection Against Removal**

In *Hershman-Tcherepnin v. Tcherepnin*, 452 Mass. 77 (July 31, 2008), the Supreme Judicial Court was confronted with a question for which no authority existed in Massachusetts or elsewhere.

The testator, who had four children from a previous marriage, married for a second time approximately three and one-half months before his death. Approximately one month before his death, he drafted his own will using a computer software program. In the will, the testator granted one-fifth interests in certain real property – his house in Watertown – to his wife and four children, and also granted his wife the “right to remain there for as long as she desires.”

After the will was probated, the wife filed a petition for partition, moving for the appointment of a commissioner and an order that the property be sold. The four children responded to the petition and counterclaimed for a declaratory judgment. They asserted that the will granted the wife and each child a one-fifth present possessory interest in the property, i.e., concurrent interests as tenants in common, and that the “right to remain” language granted the wife a mere right of occupancy and a defense against ouster and partition, rather than a life estate.

The parties filed cross-motions for summary judgment on the issue of what interests had been created under the will. The trial court granted the wife’s motion, finding the “right to remain” language to mean unambiguously that the wife had been granted a life estate in the property, with the wife and children each receiving a one-fifth remainder interest.

The Supreme Judicial Court disagreed, finding the “right to remain” language to be ambiguous. The Court explained that although the testator clearly granted the

wife and each of his children a one-fifth ownership interest in the property, it is not clear whether those interests are present estates or future (remainder) estates, in light of the additional language granting the wife the right to remain on the property.

Based on the surrounding facts and circumstances known to the testator, as gleaned from the undisputed record, the Court held that the wife had not been granted a life estate, in part because the will did not include the typical verbiage used to create a life estate, i.e., a “conveyance to B during his life” or “to B until his death” or other similar words. Instead, the testator granted his wife and children one-fifth present possessory interests in the property as tenants in common, and, through the “right to remain” language, also granted his wife protection against being removed from the property by partition.

Because the wife herself had already filed a petition for partition, however, seeking a sale of the property, the Court further held that she had terminated her own protection against removal and thus relinquished her “right to remain there for as long as she desires.”

***Germain v. Girard* – Burden Of Proof In Undue Influence Action Shifted To Fiduciary’s Wife Where The Fiduciary Himself Was Not A Party**

In *Germain v. Girard*, 72 Mass. App. Ct. 409 (August 21, 2008), the Appeals Court addressed an unusual burden of proof question relating to an undue influence claim.

The decedent died from mesothelioma in November 2004. At the time of his death, the most valuable asset in his estate was thought to be the anticipated proceeds from a lawsuit he had filed seeking damages for the personal injuries he had suffered from his exposure to asbestos.

Approximately two weeks before his death, from his hospital bed, the decedent executed a will to replace his previous will, executed in 1983, under which he was to leave his entire estate to his wife outright.

Under the terms of the 2004 will, the decedent was to leave the bulk of his estate to a trust, which designated

his wife as the primary beneficiary during her lifetime and one of his stepdaughters as the trustee. Under the terms of the trust, the stepdaughter was to exercise discretionary control over distributions to the wife and held a significant remainder interest in any trust assets remaining upon the wife's death.

The stepdaughter's husband, who enjoyed the decedent's trust and confidence, had arranged for the decedent's execution of the 2004 will, conducting all of the communications on the decedent's behalf with the drafting attorney, and he stood to benefit from the 2004 will by virtue of his wife's (the stepdaughter's) remainder interest in the trust.

Following the decedent's death, the stepdaughter filed a petition to probate the 2004 will. The wife filed a petition to probate the 1983 will and an equity complaint seeking to have the 2004 will declared null and void, claiming that it was the product of undue influence by the stepdaughter's husband. After a six-day trial, the trial court approved and allowed the 2004 will as the decedent's final will, ruling that the wife had failed to meet her burden of proving that the decedent was unduly influenced by the stepdaughter's husband.

The Appeals Court reversed and remanded, holding that the trial court had placed the burden of proof on the wrong party. Because the stepdaughter's husband stood in a fiduciary relationship with the decedent and oversaw the preparation of the 2004 will, the burden of proof should have shifted to the stepdaughter to establish a lack of undue influence by her husband. The stepdaughter's husband was not himself a party to the petition to probate because he was not a beneficiary under the will.

The Court explained that it saw no reason why the burden shifting prescribed by *Cleary v. Cleary* should not be applied to the stepdaughter as the direct beneficiary from whom the indirect benefit to be enjoyed by her husband, the fiduciary, would derive.

Mark E. Swirbalus is a partner in the Boston office of Day Pitney LLP and a trial lawyer in the firm's Probate Controversies Practice Group. Mark publishes e-mail updates reporting on new T&E-related decisions of note in Massachusetts. If you would like to receive these free updates, please contact him at meswirbalus@daypitney.com or 617-345-4753.

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ARTICLES WANTED

You are all invited and encouraged to contribute an article on any subject of interest, particularly if you find yourselves dealing with an unusual or undecided issue in Massachusetts. Please contact, **Bradley Van Buren** at bradley.vanburen@hklaw.com or **Christopher Perry** at cdp7@ntrs.com to pursue this further.