MOSES & SINGER LLP

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In the Spotlight:

Carole M. Bass was quoted in The New York Times Women Super Lawyers insert "Where There's a Will, There's a Way"

Carole M. Bass, Lori Anne Douglass, Arlene G. Dubin, Kerrie C. Horrocks, Laura V. Levy, Rebecca A. Provder and Kara Rademacher are listed as New York Metro Women Super Lawyers

Gideon Rothschild and Daniel S. Rubin are the recipients of the Bloomberg BNA 2016 Estates, Gifts and Trusts Author of the Year Awards

Upcoming Events:

Gideon Rothschild will present, "A Global Perspective on Taxation and Business Entities" in Chicago on May 25, 2017 for the International Academy of Estate and Trust Lawyers.

Daniel S. Rubin will be presenting "Asset Protection Inside and Out of Life Insurance" at the Advanced Personal Financial Planning Conference on June 12, 2017 at the MGM Grand— Las Vegas, NV.

Gideon Rothschild and **Rebecca A. Provder** will be presenting a webinar on "Trusts: Planning and Drafting for Divorce " on June 15, 2017 at 4PM.

Carole M. Bass will be the Program Moderator for "Building Your Practice Through Blogging and Podcasting" for the American Bar Association's webinar on June 21, 2017.

Tax Reform Update

By: Ira Zlotnick

As many of you know, President Donald J. Trump recently outlined his tax reform plan and while the outline was short on details the current plan provides for various significant changes to the tax code. In particular, the plan calls for:

- A reduction in the corporate tax rate to 15%;
- A reduction of the top individual tax rate from 39.6% to 35% and the consolidation of the tax brackets into a total of three brackets (10%, 25% and 35%);
- The elimination of (i) the 3.8% tax on net investment income, (ii) the Alternative Minimum Tax (AMT), and (iii) various deductions including those for state and local taxes; and
- The repeal of the federal estate tax.

While the proposal targets the federal estate tax, it is silent with respect to both the federal gift tax and a possible capital gains tax at death which was suggested by the President when he was running for office and which would significantly alter the "stepped-up" basis landscape to which we have grown accustomed.

Given the President's difficulty in moving his agenda through Congress in the first few months of his administration, it is difficult to imagine his tax reform plan not being heavily debated and negotiated as details are released and thus we suspect that this proposal may change over the next few months. We will, of course, continue to update our clients as developments occur but you should feel free to reach out to us in the interim.

The Surrogate's Court Corner

By: Carole M. Bass

At Moses & Singer our trusts and estates practice is more than just estate planning. Our attorneys are experienced in all facets of trust and estate litigation and administration. We regularly represent corporate and individual executors and trustees, family members, beneficiaries and others in both contested and uncontested matters, involving substantial assets, high-profile clients and complex family dynamics.

Beginning in this issue of our *Wealth Advisory* Newsletter, we will highlight some recent cases of interest from our local Surrogate's Courts.

Reforming a Will for Tax Savings

When changes in the law occur it is important to revisit your estate plan to make sure that those changes do not adversely impact formula provisions in your will. While a court may permit a will to be reformed to correct such adverse consequences, the wiser course is to avoid the necessity for court intervention.

"Reformation as a general rule is only sparingly allowed . . .

however, the courts have been more liberal in their regard for petitions seeking reformation when that relief is needed to avert tax problems caused by a defective attempt to draft a will provision in accordance with the then tax law or instead caused by a change in law, subsequent to execution of the will, that renders a tax-driven will provision counterproductive." Matter of Brecher, 206-1971, New York Law Journal (Surr. Ct. NY County, Jan. 11, 2017).

In *Brecher*, the decedent died with an estate valued at approximately eight million dollars. The decedent's will contained formula provisions designed to minimize estate taxes by dividing the estate between a credit shelter trust and a marital bequest to the surviving spouse. The marital formula provided, in essence, for an amount necessary to reduce the decedent's federal estate tax to zero. The residuary was left in the credit shelter trust for the benefit of the decedent's wife and descendants.

At the time the will was executed, New York State's estate tax consisted of what was commonly referred to as a "sponge tax," meaning that it was tied to the state death tax credit available as an offset against the federal estate tax. Under this tax system, if there was no federal estate tax liability there would automatically be no New York State estate tax. Thus, at the time the will was drafted it would have been pointless to structure the marital formula to provide for it to be funded in an amount necessary to reduce the decedent's federal and state estate tax to zero.

By the time of the decedent's death, the New York State estate tax law had changed to provide for its own estate tax exclusion, independent of the federal state death tax credit (which had also since been repealed), and smaller than the federal estate tax exclusion. As a result, the formula in the decedent's will would result in significant New York State estate tax because it would require the funding of the credit shelter trust in an amount in excess of the New York State estate tax exclusion amount.

In *Brecher*, the Court permitted the reformation of the decedent's will to alter the marital formula so that it would now provide for an amount necessary to reduce the decedent's federal and state estate tax to zero. The Court found the reformation was consistent with the decedent's intent to benefit his wife and descendants and to maximize tax savings.

Summary Judgment in a Will Contest

In a will contest, the proponent has the burden of establishing that the instrument offered for probate was duly executed and that the decedent possessed the requisite testamentary capacity at the time the instrument was executed. If the proponent satisfies that burden, the burden shifts to the objectant to establish with sufficient proof that material questions of fact exist to defeat a petition for summary judgment admitting the will to probate.

Objections to probate typically consist of (i) lack of testamentary capacity, (ii) lack of due execution, (iii) undue influence, (iv) duress, and/or (v) fraud.

In order to have standing to file objections to the probate of an alleged will, the objecting party must have a material or pecuniary interest that would be adversely affected by the probate of such propounded will. For example, a person who would take more under intestacy (if there were no will) than he or she would take under the propounded will would have standing to object to probate.

Where the objectant fails to present any triable issues of fact, summary judgment may be granted in favor of the will proponent. New York courts are increasingly granting summary judgment in probate proceedings where the will proponent makes out a prima facie case and the objectant makes only bare and conclusory allegations. See, e.g., Will of Wagner, 232 A.D.2d 180, 647 N.Y.S.2d 940 (1st Dep't 1996); Matter of Spangenberg, 670 N.Y.S.2d. 48 (2d Dep't 1998).

A recent illustration is Matter of Bellasalmo, 2015-4699, New York Law Journal (Surr. Ct. Queens County, February 9, 2017). The decedent in *Bellasalmo* left a purported will leaving her entire estate to her niece-in-law and nephew-in-law and disinheriting her two daughters. The will proponent made a prima facie showing that the will was duly executed by providing a copy of the will, including an attestation clause and contemporaneous self-proving affidavit, as well as the testimony of the attorney draftsman who supervised the will execution and two attesting witnesses. The court found that the decedent's daughters, as objectants, failed to raise any factual issue with respect to due execution, lack of testamentary capacity, mistake, fraud, duress or undue influence. Evidentiary proof must be more than "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." *See* Zuckerman v. City of New York, 49 NY2d 557 (1980). In a will contest, "opposition to a motion for summary judgment…[must] consist of more than a hope on the part of the objectant that the uncontroverted evidence of the proponent should not be worthy of belief," Estate of Steinman, New York Law Journal (Surr. Ct. Bronx County August 31, 1998).

Bellasalmo can be contrasted with a highly unusual recent case. In Matter of Alini, 2013-1273, New York Law Journal

(Surr. Ct. Richmond County, March 16, 2017) the Court granted summary judgment to the will objectants, denying probate to the purported will, based on a finding of duress. In *Alini*, the attorney draftsman testified that the purported will did not express the decedent's wishes. In fact, the attorney draftsman testified that the decedent declared the purported will not to be her last will and testament, stating that "if she did not leave my office with a document to show her son, that there would be all hell to pay." While *Alini* seems unique in its facts and result, it does reinforce the point that each case is very fact specific and that it is important to consider the circumstances of a will's execution if you suspect foul play.

State Income Taxation of Trusts: How to Navigate the Maze

By: Edward Becker

The federal income tax brackets for nongrantor trusts are markeindividuals. The top marginal rate of 39.6% applies to trusts upon reaching $12,500 in taxable income. The net investment income tax (3.8%) is imposed on the lesser of net investment income or taxable income above the $12,500 threshold. Finally, the top rate of 20% for net long-term capital gains and qualified dividends goes into effect when a trust's taxable income exceeds $12,500. In addition, trusts may also face taxation at the state level, where tax rates sometimes reach double digits. Fortunately, with the right planning, opportunities may be available to reduce or eliminate the tax burden levied at the state level.

Trusts can be classified for income tax purposes as either a grantor trust or nongrantor trust. Taxes are of no independent consequence to grantor trusts as all income tax items (gains, losses, deductions, credits, etc.) are reportable on the grantor's personal income tax return. With nongrantor trusts, taxes can be of great independent significance as all of its accumulated income (income not distributed to beneficiaries) is taxed at the trust level. States may tax nongrantor trusts on (i) accumulated income that is generated from source income (i.e., real estate or business activities located in that state); and (ii) nonsource income such as interest, dividends or gains on intangible property. The taxation of nonsource income by a state typically hinges upon whether that state deems a trust to be a resident trust or a nonresident trust.

The factors that states use to determine trust residency include one or more of the following factors:

- the residence of the grantor when the trust is formed;
- if the trust is established under a Will, the residence of the decedent at death;
- the residence of the trustee(s) and other fiduciaries;
- the residence of the trust beneficiaries; and
- the state in which the trust is administered.

The relevant factors that classify a trust as a resident trust vary from state to state. In most states a combination of factors is typically required. The states that rely solely on the grantor's residence at the time the trust was created continue to invite challenges to this method under the Due Process and Commerce clauses of the U.S. Constitution. Thus far, lower courts have reached differing conclusions and the U.S. Supreme Court has yet to directly address the issue.

Tax planning may not be of singular importance when a trust is setup. State creditor protection laws, perpetual trust provisions and investment rules typically have some role to play for many clients establishing trusts. Nevertheless, given the lack of uniformity at the state level, planning professionals, fiduciaries, as well as those that utilize their services, should, and may even have a duty to, investigate opportunities to alleviate a trust's state income tax burden. If you would like to explore such opportunities, please contact one of our attorneys.

Lesson Learned: The Role of the Family Counsel & Our Dialogue With Clients Transferring Family Business Interests

By: Roy Kozupsky

I once asked a new client why she had decided to switch attorneys. Her answer was candid. "After a meeting with my attorney he sent me an engagement agreement stating what documents needed to get drafted. Upon reflection, the documents had little to do with the impact my wealth had on my family other than its transference. Tellingly, he never asked a question that he already didn't know the answer to."

For attorneys, the problem with this one-dimensional dialogue with clients - being too focused with strategies or outcomes, before understanding family - is likely to be of very little long-term value to clients who walk into our offices with complex family and business affairs. Failing to elicit a probing dialogue will also do little to help build a deep trusting relationship-one that is certainly needed if counsel is going to help a family navigate the tough decisions surrounding the transfer of its wealth and family business interests to the next generation.

So, why is this element of communication so critical in the attorney-client relationship, especially when the legal services revolve around money and family owned enterprises?

Invariably, part of the answer can be found in the commonality of family business disputes. Inevitably, in discussions with these families, it is revealed that some of the estate planning worked - the tax planning hit the basic objective, or so it seems, by having the business interests pass to the next generation, thus reducing the estate tax bite. But unfortunately, such planning fails the more critical test of keeping the family aligned around its purpose and mission, and focused on the growth of their businesses. Upon reflection, it is invariably revealed that prior services lacked any understanding of the family itself and instead fostered entitlement and conflict.

The lessons I learned have led me to a general set of criteria that hopefully will be useful for families to employ with their trusted advisors when thinking about family business interests.

First, I have found that nothing in the universe of attorney-client communications engenders more evidence of trust building, more evidence of caring about the families that pay us, than when we as counsel start asking sincere questions about the dynamics of the family.

For the affluent client, some questions that both counsel and client might consider discussing in the context of their estate planning.

> *If one of my main objectives is to leave as much wealth to my children as possible, then what other objectives should be considered?*
>
> *How much is enough wealth for the next generation to have?*
>
> *What non-material opportunities does your family wealth provide for the next generation?*
>
> *What issues, if any, might limit the amount of wealth you want to pass down to your children?*
>
> *Have you communicated your family goals and values to your key advisors?*

THE FAMILY BUSINESS

However, in the more specific context of transferring complex family business interests to the next generation, here are some key questions and strategies to consider thinking through.

The WHY

One of the first questions that all families with business interests need to ask is the big "why". Why do you want to make a transfer of business interests to the next generation? And, just as important, why now? If the answer is merely predicated upon the allowance of some tax objective I would advocate hitting the red pause button.

Rather than focus on the techniques of how something is transferred, the "why" should be the first question the family and their advisors need to address. The answer to this question might be found in an obvious, but often overlooked place. Much research has shown that those business families that have endured and prospered over many years have addressed, in writing, a fundamental sense of purpose and shared vision.

Tackling the "why" question, one well-respected author states:

"Enduring family businesses work very hard at defining a Sense of Purpose… They ask and discuss such questions as: Why are we doing this? Why are we working so hard? Why are we spending the time to develop policies? Why are we exerting so much energy to prepare for the future?"

This sense of purpose, a navigation system if you will, will give meaning and direction to perpetuating your wealth and business interests. Worry about the how thereafter.

The HOW

This overlooked question is not about how a transaction will be structured, or the techniques or strategies employed. The "how" focuses on process. How will the family be making their planning decisions? Closeted away with any one of your advisors? Or, employing a team approach and including other advisory inputs into the process.

The reality is that rarely will one advisor have the multi-dimensional skill set necessary to deal with many of the non-tax issues that saturate family businesses, including financial, governance and often deeply rooted emotional discussions about issues such as what's fair and who is entitled to what. In order to best serve the family, financial advisors must abandon their supply-side, product-centric methods of inquiry in favor of a deep listening and probing approach that focuses on needs identification. Many distinguished family business consultants have long argued and concluded that effective collaboration is an essential ingredient enabling families to perpetuate well-being across generations. However, the family may not appreciate the value of this collaborative opportunity over their tendency to compartmentalize advisors and the value question will be influenced by how the family views a marginally higher investment in getting comprehensive advice.

The WHEN & The Next Generation

When to start a transfer program might be seen as a somewhat self-evident question. But unless the children themselves answer the "why" question in such a fashion that is beneficial to the entire family, then the result might be to simply opt to sell the business.

Which begs a question: Is there a process in place that the attorney and other advisors have employed to carefully speak to and listen to the next generation's views on how the family

enterprise fits into their own personal goals? Has the planning accounted for the fact that there will likely be some who want no part of the business enterprise? Without this process being in place, any planning will be superficial and fragile.

Finally, (at least) one other issue looms large.

If gifts or transfers are contemplated to the next generation, is there a written and clearly defined way for a child, or trustee of that child's interest, to sell said interest back to the enterprise in the future if they no longer want to be part of the business? Being stuck with highly illiquid business interests without a desire to be part of the enterprise will ultimately cause disillusionment and resentment. Too much time is spent in a one directional linear manner of thinking-that of getting something off your balance sheet. But attention also needs to be paid to how a beneficiary (or trustee) can monetize the business interests if they choose not to be part of the family's enterprise.

CONCLUSION

Bottom line in this author's opinion is something very simple that families need to pay attention to: namely that "estate planning" has not one definition and is not necessarily succession planning as it relates to family enterprises or complex assets. An "estate plan" traditionally distributes assets after someone passes. In the context of family business planning more attention needs to be paid to the process of striving to help the family perpetuate their values and align the family around the purpose(s) of their wealth. Thus, succession planning (as this term has become known throughout the family business advisory industry) prepares a family (and its enterprises) to navigate the complex issues surrounding their shared wealth and the storms that inevitably engulf all families at one time or another.

View our newly released "What you need to know about Trusts and Estates" video series on our YouTube channel, which include such topics as:

- What is a Will Contest?
- Blended Family Estate Planning
- Planning for Foreign Persons Purchasing/Owning US Real Property
- What is Asset Protection Planning?
- Reasons To Avoid Probate
- Charitable Giving
- Probate and Administration
- Family Offices and Family Business

MOSES & SINGER LLP

Lawyers in Moses & Singer's **Private Client** practice groups are internationally recognized for their considerable skill and extensive experience in the fields of estate planning, wealth preservation, and family law. Our lawyers provide a full range of tax and estate planning services to corporate executives, entrepreneurs, family offices, and other high-net-worth individuals. In addition to experience in the traditional areas of will and trust drafting and estate administration, our attorneys excel in the latest techniques to effectively plan for business succession while minimizing taxes and preserving and protecting clients' wealth from potential creditor risks. The client's personal objectives and wealth preservation goals are integrated into the estate planning process. Our attorneys also counsel and represent banks and trust companies regarding fiduciary matters and trust and estate related litigations. Our family law attorneys counsel on prenuptial and postnuptial agreements and collaborative and contentious divorces.

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List of Private Client attorneys:

Gideon Rothschild
Co-Chair
212.554.7806
grothschild@mosessinger.com

Irving Sitnick
Co-Chair
212.554.7821
isitnick@mosessinger.com

Carole M. Bass
212.554.7877
cbass@mosessinger.com

Lori Anne Douglass
212.554.7803
ldouglass@mosessinger.com

Arlene G. Dubin
212.554.7651
adubin@mosessinger.com

Kerrie C. Horrocks
212.554.7827
khorrocks@mosessinger.com

Roy Kozupsky
212.554.7838
rkozupsky@mosessinger.com

Rebecca A. Provder
212.554.7628
rprovder@mosessinger.com

Daniel S. Rubin
212.554.7899
drubin@mosessinger.com

Alvin H. Schulman
212.554.7888
aschulman@mosessinger.com

Ira W. Zlotnick
212.554.7870
ira.zlotnick@mosessinger.com

Edward Becker
212.554.7819
ebecker@mosessinger.com

Alan H. Kupferberg
212.554.7805
akupferberg@mosessinger.com

Laura V. Levy
212.554.7848
llevy@mosessinger.com

Kara Rademacher
212.554.7849
krademacher@mosessinger.com

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In a world of giant, multi-office law businesses assembled by mergers, built on associate leverage and driven by billable hour quotas, the needs of clients can get lost. Moses & Singer offers a difference. That difference is the attention of leading practitioners-partners in the firm-with the experience and knowledge to provide our clients creative, cost effective, result-oriented representation. The direct involvement of our partners means aggressive, focused problem solving. The firm's attorneys concentrate their practices in the following areas:

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