

ALERTS

Wealth Transfer Newsletter October 2011

CURRENT DEVELOPMENTS, PLANNING OPPORTUNITIES & UPDATES

Wealth Transfer Team

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GREETINGS

It is the beginning of the fourth quarter of 2011 and many of us are still sorting through the enormous changes that resulted from the passage of the Tax Relief Act of 2010 ("TRA 2010") last December. This has been a year of activity for a number of our clients, many who had been sitting on the fence for years because they had already used all of their then available \$1 million lifetime gifting exemption.

A number of clients have decided to take advantage of the increased lifetime gifting exemption of \$5 million per taxpayer that will be in effect until December 31, 2012 to transfer assets to children and grandchildren, often using sophisticated techniques to leverage their exemption amounts. New techniques, such as the beneficiary defective inheritor's trust ("BDIT"), have been utilized and an article outlining the specifics of the exciting options afforded under a BDIT is included in this newsletter. A number of clients have also taken advantage of the record low interest rates to refinance outstanding promissory notes and to make transfers to grantor retained annuity trusts. A brief article exploring some of the planning opportunities afforded by these record low rates is also included in this newsletter. We have highlighted an emerging trend in our practice relating to fiduciary litigation matters and introduce some of our litigators. The ability to "re-Roth" an IRA that has diminished in value has a limited window and is discussed herein. Finally, we have been asked by a number of clients whether or not elaborate estate planning is even needed based upon the new concept of portability that was included under TRA 2010. Our response is a wholehearted yes, as discussed in the included article.

In summary, we view October as a month of opportunity. As always, we at Moore & Van Allen are available to assist you and provide the best guidance based upon the latest developments.

Neill McBryde

RE-ROTH YOUR IRA

As you may have seen in recent client alerts, if you converted your traditional IRA to a Roth IRA in 2010 in hopes of minimizing taxes, but the account has since declined significantly in value, you may want to consider reversing and then re-executing the Roth IRA conversion. While a “re-Roth” of your retirement account under these circumstances will not allow you to recoup any of these losses, it could reduce your income tax liability. The conversion to a Roth IRA creates a tax liability, which is calculated based on the account’s value on the conversion date and is unaffected by subsequent market fluctuations. Therefore, if your retirement account currently has a lower value than it had on the 2010 conversion date, you could be required to pay taxes on money that is no longer in the account if you do not reconvert.

FIDUCIARY LITIGATION IS EMERGING TREND

An emerging trend in the trusts and estates arena is fiduciary litigation. A number of our clients, both corporate and individual, have had the misfortune of being involved in situations where a fiduciary has been accused of breaching his or her duties or where questions arose under an estate or trust administration. These matters often involve balancing the challenging dynamics of dysfunctional families and their counsel.

PLANNING OPPORTUNITIES IN A FAVORABLE INTEREST RATE ENVIRONMENT

As discussed in prior newsletters, a lower interest rate environment presents unique and unprecedented planning opportunities to maximize wealth transfer to children and younger generations. These opportunities are due in large part to several important factors (e.g., depressed asset values and a potentially limited timeframe to continue receiving higher valuation discounts), but perhaps most importantly are due to a favorable interest rate environment. The Section 7520 rates and the applicable federal rates recently announced for October 2011, as discussed below, are the lowest rates ever recorded and should give many taxpayers food for thought.

BENEFICIARY DEFECTIVE INHERITOR'S TRUST - AN INTERESTING NEW ESTATE PLANNING STRATEGY

The Beneficiary Defective Inheritor's Trust ("BDIT") undoubtedly has become one of the most powerful estate, tax and asset protection strategies available for planning professionals to recommend to their clients. Essentially, a BDIT is a third-party settled trust (i.e., the trust is established by someone other than the client such as a parent). It is designed: (1) to give the client control (as Investment Trustee) and beneficial enjoyment (as primary beneficiary) of trust property such that the client can use and manage the trust assets without compromising the trust's ability to avoid transfer taxes at the client's death, and (2) to protect the trust assets from the client's creditors. After the death of the client (the primary beneficiary), control of the trust passes to client's descendants, subject to the client's ability to change the disposition of the trust assets through the exercise of a special power of appointment. In addition to receiving control of the trust, the subsequent primary beneficiaries also may receive the benefits of trust owned property such as: (1) transfer tax avoidance, and (2) creditor protection, including protection from a divorcing or separated spouse.

"PORTABILITY" AVAILABLE BUT NOT ALWAYS ADVISABLE

Portability is a new planning opportunity made available by the Taxpayer Relief Act of 2010 ("TRA 2010") that allows the executor of a decedent to transfer the unused estate tax exemption of a decedent to his or her surviving spouse.

While the rules for portability are complex, in essence portability allows a spouse to transfer his or her unused applicable exemption amount to his or her surviving spouse at death. The following example illustrates generally how portability works. Husband dies in 2011 with an estate of \$4,000,000 and having made \$1,000,000 of taxable gifts prior to death. Pursuant to Husband's Will, the \$4,000,000 of assets are left outright to his surviving Wife. Wife has a personal estate of \$5,000,000 and has made no taxable gifts in prior years. The executor of Husband's estate elects to transfer Husband's remaining unused exemption to Wife on a timely filed estate tax return [i.e., \$5,000,000 (Husband's exclusion amount) - {\$0 (Husband's taxable estate (i.e., because assets passing outright to Wife qualify for the marital deduction)) + \$1,000,000 (Husband's adjusted taxable gifts)} = \$4,000,000]. Wife does not remarry and dies in 2012 having a taxable estate of \$9,000,000 (i.e., \$5,000,000 of personal assets plus the \$4,000,000 of assets inherited from Husband). Wife's \$9,000,000 taxable estate is fully sheltered from estate tax by \$9,000,000 of applicable exclusion amount [i.e., \$5,000,000 (Wife's exclusion amount) + \$4,000,000 (deceased Husband's unused exclusion amount)].

TEAM ACCOMPLISHMENTS AND ACCOLADES

Ken Coe was included in Business North Carolina's 2011 Legal Elite.

Chris Jones recently spoke on "The Appraisal Process and Ten Valuation Opportunities Beyond the Traditional FLP Approach," at the Southern Federal Tax Institute and spoke on the "Eye of the Storm? A Review of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010," at a webinar for the North Carolina Bar Association.

Mark Horn was recently elected to the Board of the Charlotte Estate Planning Council. Mark was also recognized with the Five Star Award for Best in Client Satisfaction Wealth Manager (SM) by Charlotte Magazine.

Neill McBryde spoke at the Estate Planners Day at Queens University in May and at the annual meeting of the Estate Planning and Fiduciary Law Section of the North Carolina Bar with **Brad Van Hoy** in July. Brad Van Hoy also spoke at the 2011 Annual Review for the North Carolina Bar Association.

Matt Kain and **Wilson Loftis** authored Current Developments for the Will and The Way, the official publication of the Estate Planning and Fiduciary Law Section of the North Carolina Bar in April and May of 2011

Paul Lynch was included in Best Lawyers in America for Trusts and Estates for 2012.

Neill McBryde was included in Business North Carolina's 2011 Legal Elite and was recognized as a national leader in the Chambers USA Guide: America's Leading Business Lawyers 2011.

The Wealth Transfer Team welcomes back **Doug Benson** as Counsel in the Charlotte office.

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Trudy H. Robertson, Moore & Van Allen PLLC, 40 Calhoun Street, Suite 300, Charleston, SC 29401, is the lawyer in South Carolina responsible for any advertising content in this communication.

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