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Hickert on Super Lawyers List



B. J. Hickert is the latest firm attorney selected for inclusion in *Missouri and Kansas Super Lawyers*. Only 5% of the lawyers in these states were selected. B. J. teaches estate and gift tax as an Adjunct Professor at Washburn Law School, and is a Fellow in the American Academy of Trust and Estate Counsel. Firm attorneys Dave Newbery and Jeff Ungerer were previously selected for inclusion.

The State of The Estate Tax

By Dave Newbery

On August 2, 2011, Congress passed the Budget Control Act of 2011 allowing the US government's debt ceiling to be increased, and forming a bipartisan joint committee to propose deficit reduction legislation prior to the end of 2011. While the future of the US estate and gift tax has been uncertain for some time, this new legislation and push for deficit reduction makes the future of the estate and gift tax law even more uncertain.

As a consequence, two things are clear: 1) traditional estate tax planning continues to be important for individuals and couples who have potential taxable estates in excess of \$1 million; and 2) estate planning strategies included in wills and trusts must be flexible to accommodate an ever changing tax environment. Note that a person's taxable estate includes not only savings, investments, and real estate, but also retirement plan benefits, IRA's and life insurance.

Recent history of the estate and gift tax law highlights the uncertainty and instability of the estate tax. In 2009, the estate tax exemption was \$3,500,000 with a tax rate of 55%. Throughout most of 2010, the estate tax was zero. As a result of the 2010 Tax Reform Act passed in December, 2010, the estate tax was retroactively enacted back to January 1, 2010 with a \$5 million exemption and a 35% tax rate (with an election to "opt out" of the estate tax for decedents dying in 2010). Under the 2010 Tax Reform Act, there is now a \$5 million per person estate and gift tax exemption and a 35% estate and gift tax rate, *but only through the end of 2012. Beginning January 1, 2013, the estate and gift tax exemption becomes \$1 million with*

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Pitsenberger's Article Published

Bill Pitsenberger's article entitled "What Health Care Reform Means to Your Clients (and You)," was selected for publication in the November/December 2010 issue of the Journal of the Kansas Bar Association. A complete copy of Bill's article can be found on our website: <http://www.nuhlaw.com/Publications/Articles.aspx>.

Bill has recently published three other articles on various health law subjects:

- "The Pool of Bethesda: Equity, Political Problems and Reinsurance Solutions in Mandated Individual Health Insurance," 11 Quinipiac Health Law Journal 145, 2008
- "Limited Provider Panels: Their Promise and Problems in an Individual Health Insurance Market," 1 Journal of Health and Life Sciences Law 67, 2008
- "Sez Who?: State Constitutional Concerns with External Review Laws and the Resulting Conundrum Posed by Rush Prudential HMO v. Moran," 15 Connecticut Insurance Law Journal 85, 2008-2009



Business Planning

By B.J. Hickert

Business Planning is on-going. Successful business owners continually reassess their plans, look for new opportunities, and assure that appropriate agreements are in place to protect existing assets, provide appropriate incentives for employees, and avoid land-mines that could derail the business. This article highlights a few sometimes overlooked business planning issues.

Employee Agreements: Every business should have an employee manual that states company policies, and employees should be required to read the manual and sign an acknowledgment that they have read and understand it. The manual should include employment terms that apply generally to all employees, including: 1) work rules and employee benefits; 2) provisions confirming employment is “at will” unless there is an employment agreement for a particular term signed by a designated company officer; 3) rules prohibiting

“Every business should have an employee manual”

sexual harassment and improper use of company equipment; and 4) rules regarding drug and alcohol use and testing. In addition, all key employees should have a written employment agreement with non-compete provisions, making it clear the employer owns the intellectual property, client lists, and client, supplier and employee relationships. Otherwise, upon the death or disability of the owner, the value of the business may evaporate.

Owner Agreements: One of the more frequently overlooked issues is transfer restrictions. Who can become an owner? If an owner/employee takes a job with a competitor, may he/she continue as an owner? What if a spouse becomes an owner in a divorce? Transfer restrictions may easily be included in organization documents for most every business, and most

every business would benefit from such restrictions. Also, an owner agreement can provide for the purchase of an owner’s interest upon death, disability or retirement, and specify a formula to value the interest at that time.

Employee Owners: Employees should be hired without any guarantee of ownership. This provides owners a period to evaluate: 1) whether the employee has knowledge, skills and temperament that enhance the ownership group; and 2) whether the employee shares the existing owners’ fundamental values and vision for the business. If not, or if it is not clear, the decision should be deferred. If an employee is ultimately offered an ownership interest, the employee should be required to sign an agreement to sell the interest back to the company when the employee’s employment terminates, to avoid diluting ownership with persons who are no longer active in the business (existing owners should not be required to sign such agreements, since the founding owners are entitled to be treated differently).

“Employees should be hired without any guarantee of ownership”

Customer Agreements: Business owners should also carefully consider whether their customer agreements are simple and coherent, but sufficient to protect their important interests. For example, are all risks appropriately allocated between the business and the customer? Should one party be required to insure certain risks? Should the parties release claims against each other? What if a tornado wipes out the business or the customer’s business?

Conclusion: Agreements are no substitute for a great business concept, but proper agreements are essential for the successful implementation of the concept and the preservation of existing business value.

Newbery Appointed to Kansas Bar Foundation Board

Dave Newbery was recently appointed to the Board of Trustees of the Kansas Bar Foundation. The Kansas Bar Foundation, founded in 1957, is a 501(c)(3) charitable organization supported primarily by voluntary contributions from lawyers.

The Kansas Bar Foundation supports programs providing access to the legal system for low-income Kansans, advocacy for children in need of care and victims of domestic violence, scholarships, educational materials and teacher training for public and private schools about the role of law and lawyers in society.



Asset Titling and Beneficiary Designations Matter

By Dave Newbery & B.J. Hickert

Estate planning is not just about Wills and Trusts – equally important are the manner in which assets are titled and beneficiary designations are completed. Here is a simple real-life example.

Harvey executes a Last Will and Testament directing 100% of his assets be distributed to Brunhilda, his wife of 25 years, but if she has predeceased, then equally to their two adult children. Harvey's primary asset is his IRA which was established 30 years ago when he was single. Harvey dies and his widow, Brunhilda, discovers that Harvey's mother, Dorothy, is the designated beneficiary of Bill's IRA. Brunhilda has never liked Dorothy and has always enjoyed being rude to her. Does Bill's Last Will and Testament override and negate his IRA beneficiary designation? – **NO it does not.**

"Estate Planning involves at least two distinct components: appropriate documents (Wills, Trusts, Durable Powers of Attorney etc.) and specific asset titling and beneficiary designations which should be consistent and coordinated with the documents."

A decedent's Will is only effective as to the decedent's solely owned property not subject to any beneficiary designations. Consequently, disposition of the following assets will typically not be governed by a person's Last Will and Testament:

- Employer qualified retirement plans
- Individual Retirement Accounts
- Nonqualified tax-deferred annuities
- Life Insurance
- POD ("pay on death") bank and brokerage accounts
- TOD ("transfer on death") real estate and securities
- Property titled in a trust
- Jointly owned property (as Joint Tenants with Right of Survivorship)

A lawyer can help avoid other common mistakes such as:

Failure to Plan for Final Expenses: Suppose Mary, a single individual, attempts to avoid probate by titling all her assets as joint tenants with her children or by naming her children as designated beneficiaries. There are two problems with this: 1) if a child predeceases, then that child's children (Mary's grandchildren) may be inadvertently disinherited; and 2) there will be no funds (or responsible person) to pay Mary's debts, final expenses, funeral costs, file her final income tax return, etc. Maybe all the children will kick in their share; maybe they won't.

Imprecise description of beneficiaries: For example, if a couple and two single people are named beneficiaries, did the

decedent intend the couple share a one-third interest or is each beneficiary to receive a one-fourth interest? If one of the designated beneficiaries is not living, does his or her share go to his or her children or to the other designated beneficiaries?

Failing to Keep Copies: You should keep copies of all documents of title (i.e. deeds and title certificates) and beneficiary designations, and show these documents to your attorney during your periodic estate planning reviews. If you do not have a copy, get a copy. This will not only help avoid the situation described at the outset of this article, but it will also provide added assurance that the financial institution will find the most recent beneficiary designation after your death. After all, financial institutions are sold, merge and have computer problems, just like any other business.

Failing to Update Beneficiary Designations: Please note that a Kansas statute invalidates will provisions in favor of an ex-spouse, but there is no similar law invalidating beneficiary designations in favor of an ex-spouse (and the Kansas legislature again this year declined to adopt such a law). Consequently, beneficiary designations in favor of an ex-spouse are generally enforceable, absent a specific agreement to the contrary.

Unwise Use of Joint Ownership: Sometimes, persons add others as joint owners of an account or other asset because they want the other person to receive the asset after their death. Unfortunately, adding an additional owner subjects the asset to the claims of the added owner's creditors and spouse in a divorce proceeding. A far better option is to name the person as a beneficiary to receive the asset only at the time of death. (i.e., by will, trust or beneficiary designation).

Unwise Use of Beneficiary Designation: Often, a beneficiary designation is also not appropriate. For example, if you want to leave assets for a minor beneficiary, do not name a parent as the designated beneficiary in hopes that the parent will use the funds for the minor. The parent may have creditor problems and lose the assets, or the parent may become incapacitated. A better option is to name the parent as a custodian under the Kansas Uniform Transfers to Minors Act or as a trustee of a trust for the benefit of minor beneficiaries.

Simply stated, Estate Planning involves at least two distinct components: appropriate documents (Wills, Trusts, Durable Powers of Attorney etc.) and specific asset titling and beneficiary designations which should be consistent and coordinated with the documents. All should be discussed with your estate planning attorney.

We can assist in protecting/enhancing your assets.
More importantly, we can help assure they're used for
your priorities.

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Our attorneys have outstanding business, financial and tax experience. Areas of practice include:

- Tax Planning and Litigation
- Estate Planning
- Probate and Trust Administration
- Business Law
- Commercial Real Estate Law
- Mediation - Trusts, Estates, & Complex Valuation Matters
- Health Law
- Administrative Law

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a 55% maximum tax rate unless Congress takes action prior to that time.

The current state of deficit reduction concern in Washington, as well as the bipartisan bickering creates a high probability that one of two things will occur prior to January 1, 2013:

1. Congress will not agree on what to do with the estate and gift tax and allow the current law to operate (thereby resulting in a \$1 million exemption and a 55% maximum tax rate); or
2. Congress will reduce the exemption and increase the tax rate from the current \$5 million exemption and 35% tax rate as a part of the deficit reduction measures.

Some people may believe that traditional estate planning is no longer needed because of the so-called "portability" provision under which a surviving spouse "inherits" the unused portion of a deceased spouse's unused estate tax exemption. However, under current law, this portability provision only applies if both spouses pass away during 2011 and 2012. In addition, the new portability provisions apply only with regard to the most recently deceased spouse.

There are other circumstances where portability, even if permanent, will not effectively replace traditional tax planning strategies. In short, recent legislation has not altered the benefits of traditional estate, gift and GST tax planning for individuals and couples with more than one million dollars of assets.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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