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*Protecting and Preserving
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California and Federal Tax Planning and Representation Newsletter

Bank and Trust Officer Held Liable for Estate Tax

The facts in *Hatleberg v. Norwest Bank Wisconsin*, 678 N.W.2d 302 (Wis. App. 2/24/2004) are as follows:

A trust officer contacted the bank's clients, representing that he and the bank has special expertise in estate planning. The trust officer recommended an irrevocable trust as part of a strategy to save estate taxes. He told the client that she could make annual exclusion gifts to the trust and the gifts, as well as any growth on the gifts, would be excluded from her estate.

The client contacted an attorney to draft the trust. The attorney was apparently inexperienced in drafting these types of trusts and failed to include *Crummey* withdrawal rights, which were needed to qualify the gifts to the trust as annual exclusion gifts. Upon reviewing the trust several years after the trust had been executed, the trust officer discovered this error and contacted the drafting attorney, but not the client. The trust officer provided the attorney with a sample of the language that needed to be included in the trust. The attorney, knowing that the trust was irrevocable and believing that the trust was fully funded (he did not know that continuing annual gifts were being made) thought there was nothing he could do to correct the error, so he did nothing to correct the error.

Despite his knowledge of the trust defect, the trust officer continued to encourage his client to make annual gifts to the trust for several years thereafter. The trust officer also assured the client and the executor under the client's will that making annual contributions to the trust remained a great estate planning strategy.

Upon learning of the defect in the trust document after the client's death, the attorney for the estate of the client (a different attorney than the one that drafted the trust) increased the value of the estate by \$440,000 (the amount of the irrevocable trust assets), which resulted in an additional estate tax liability of \$173,644 to the estate. The beneficiaries of the estate sued the drafting attorney, his law firm, the bank and the trust officer.

The attorney and his law firm settled. The bank and trust officer argued that advising the client about the need for the inclusion of *Crummey* withdrawal rights would have amounted to the unlicensed practice of law, and that they have no duty to review the trust documents or inform the client of the defect. The court held that the trust officer and the bank held themselves as having special expertise with regard to trusts. It held that the review of trust documents was incidental to its business of administering trusts and therefore not the unlicensed practice of law. The court further held that once the trust officer took it upon himself to review the trust document, he (and the bank) had a duty to the client to inform her of the defect – and to not encourage her to make further gifts or assure her that the trust would result in estate tax savings by doing so. Based on its holding, the court awarded damages of \$300,993, an amount equal to the estate tax on the trust assets that were included in the client’s estate – as well as the estate tax resulting from inclusion of the damage award in the client’s estate.

Financial planners, insurance agents and trust officers should heed the following lessons from *Hatleberg*:

1. Do not hold yourself out to have special knowledge or expertise in estate planning unless you are willing to be held to a higher standard of care.
2. When participating in the estate planning process for a client and a problem is discovered, that problem should be communicated promptly to the client as well as the other members of the estate planning team. When possible, corrective action should be taken.
3. Make sure all members of the estate planning team have full knowledge of the facts of the case.
4. When a problem is discovered, do not encourage the client to take further action that will only compound the problem or continue to assure the client that the estate plan remains viable.
5. Most importantly, it is incumbent upon financial professionals to associate with an estate planning attorney that is knowledgeable about the intricacies of income, gift and estate tax law and that has experience in planning, as well as implementing, various estate planning strategies.

Can We Be of Assistance to You?

Dennis M. Sandoval, A Professional Law Corporation, specializes in estate planning (including probate administration and trust / will contests), asset protection planning, elder law (including qualifying for Medi-Cal coverage, conservatorships, and creation of Special Needs Trusts for disabled beneficiaries) and tax controversy work (including federal and state tax audits, appeals and litigation). All of your referrals will be handled promptly and professionally.

Mr. Sandoval is available to speak to your group or organization. Call (951) 787-7711 to schedule him to speak on any topic relating to estate planning, elder law, asset protection or taxes.

Upcoming Seminars / Classes for Professionals

The Mechanics of Drafting First Party and Third Party Special Needs Trusts in California	6/18/2005	9 am - noon	UNEX 3 hrs. Attorney CLE
Basics of Conservatorships in California	5/26/2005	Noon - 1 pm	Kaiser Hospital Riverside, California
Maintaining and Maximizing Government Benefits for Special Needs Beneficiaries: The Basics of Administering a Special Needs Trust	6/18/2005	1 pm - 4 pm	UNEX 3 hrs. Attorney CLE
Retirement Plan Distribution Rules: A Magical Mystery Tour; Federal Estate Tax Repeal Update and recent Tax Developments	9/29 - 10/2/2005	TBD	National Academy of Elder Law Attorneys Sheraton New Orleans New Orleans
Topics to be Determined	10/6 - 10/10/2005	TBD	American Academy of Estate Planning Attorneys Catamaran Hotel San Diego