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BROOKS & BROOKS, LLP

Estate Planning with Certainty

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Executors and Trustees Must Exercise Caution

A recent federal case out of the Western District of Pennsylvania, United States vs. David Stiles, et al., No. 2:13-cv-00138 should remind us that executors and trustees have a duty to pay not only the decedent's debts and administration expenses, but also taxes. In this case, estate taxes. In short, the two individuals in charge of an estate were liable for estate taxes due because they depleted the estate before paying the estate's tax liability. Fiduciaries (executors and/or trustees) have a statutory duty to pay taxes, whether estate (death) taxes and income taxes. Further, executors have the duty to file a final income tax return for a decedent and to pay any income taxes on that return due from estate assets.

These tax obligations are not anything a probate court will notify the executor about. The probate court is only concerned about probate issues, not tax issues. However, if one becomes an executor, one has to be aware, or be advised by competent legal counsel, of the tax obligation beyond the probate world.

We at Brooks & Brooks have always advised our fiduciary clients of their responsibility for filing tax returns, estate and income, and assist them in that process. Additionally, we advise our fiduciary clients on income tax planning to structure the administration of an estate or trust such that taxable income and deductible expenses are received and paid within the estate or trust entity's income tax year, to reduce or eliminate income taxes altogether. If a particular estate is also subject to estate tax then further considerations are made to determine if the estate administration expenses would give a bigger benefit by deducting them on the estate tax return or on the income tax return of the entity. Tax management, and now income tax management, is becoming more and more important as the estate tax exemptions keep increasing.

Things that make us smile -

An elderly gentleman had serious hearing problems for a number of years. He went to the audiologist who was able to fit him with a set of hearing aids that allowed the gentleman to hear 100%. The elderly gentleman visited the audiologist a month later and was told 'Your hearing is perfect. Your family must be really pleased that you can hear again.' The gentleman replied, 'Oh, I haven't told my family yet. I just sit around and listen to the conversations.....I've changed my Will three times!'

Free Workshops

November 10, 2015

Olean Bartlett Country Club
6:30 to 8:30 p.m.

December 1, 2015

Fredonia White Inn
6:30 to 8:30 p.m.

Decedent's Estate *When is a gift not a gift?* Part 2

In our January-February 2015 newsletter, we presented an article detailing when a gift was actually a gift and when it was not. That was essentially Part 1 of the issue. What follows is Part 2.

SUMMARY OF PRIOR ARTICLE

Referring back to our prior newsletter, we understand that the burden of proof concerning a gift is on the donee to establish by clear and convincing evidence that three things have happened: 1) the donor had donative intent at the time the gift was made; 2) the delivery of the gift to the donee was completed; and 3) the donee accepted the gift.

Let's take it up a notch - what if the donee stood in a confidential and/or fiduciary relationship with the donor? What if the donee is someone who assists the donor with his or her daily living needs, finances, health care, etc. or is the Power of Attorney agent for the donor? Now the donee must go beyond the relatively simply three-element test and also show that the gift was free of fraud and/or undue influence.

In these circumstances, there is a presumption of impropriety in the transaction. Especially in the case of a Power of Attorney agent, the presumption increases the donee's burden so that he or she must also prove that any transfers between the donor and the donee were not only free from fraud and/or undue influence, but also that the transfer was in the best interest of the donor! When called upon, a Court will closely scrutinize these transactions and especially where the gifts are of money withdrawn from the donor's accounts and actually made by the donee under a Power of Attorney, as is stated in *In re Roth 283 A.D. 2d 504, 2001.* And, a donee with a fiduciary relationship cannot avoid the scrutiny even if the donor writes the check to the donee so it is not made under the authority of a Power of Attorney. It is the relationship between the two parties that creates the scrutiny, not necessarily which one actually signs the check, Bill of Sale, title to the car, etc.

Beware of Service Companies for Transfers of Directly Registered Stock

We at Brooks & Brooks have seen an increase of private companies representing themselves as "retained" by a stock company to assist in stock transfers for direct registration shares, most usually in the context of a deceased shareholder.

We have been involved in several cases where after a death of a shareholder, someone in the family receives an official looking packet of information from a company, which states that it has been "retained" by the stock company to locate and help transfer the shares to the rightful owner. Two companies we have seen such packets from are Keane Financial, LLC and LPPR, LLC.

Because these companies state very early on in the material that they have been "retained" by the stock company in question, one would have the impression that their services are paid for by the company itself on behalf of the shareholder. Nothing is further from the truth. A detailed reading of all the material will uncover a statement (obviously not on the first page) that says the service company will be paid 3% of the value of the stock for its services. In one of our cases, the service company's fees would have amounted to over $1,300. We were handling the small estate administration for the client beneficiary and were able to access the transfer forms directly at the stock company's website and complete them for our client for less than one-half of what the service company would have charged.

Whether these service companies are truly "retained" by the stock companies or not, we do not know. Rather than being "retained" in the classic meaning of the word, these companies may indeed be authorized by the stock company to effect the transfers. Whether "retained" or "authorized", the bottom line is the same: There is a fee to be paid to these companies… and it is not a flat fee. The more value involved, the higher the fee.

Caution - read the fine print!