November 4, 2010

Volume 1, Issue 1

Linda Suzzanne Griffin, P.A.

Dear Friends of the Firm:

Take a look at my new website ……
www.lawyergriffin.com

This is my firm's annual memorandum updating your knowledge on various legal issues. I want to thank you for your referrals and continuing business.

This has been a busy year. I began my position as co-Chair of the Florida Bar Real Property Probate and Trust Law ("RPPTL") IRA, Insurance & Employee Benefits Committee. I continue to be Chair of the Ruth Eckerd Foundation Charitable Planned Giving Committee, a member of the Executive Council for the Florida Bar RPPTL Section, and a member of the Florida Bar Tax Certification Committee. I also continue to volunteer at the Clearwater Marine Aquarium, where filming for *Dolphin Tale* began this September.

As you know, I concentrate my practice in the areas of estate planning, wills, revocable and irrevocable trusts, estate tax planning, charitable trusts, probate, and trust administration. Even though I generally do not practice in other areas of law, such as probate and trust litigation, personal injury (slip and fall, nursing home negligence, wrongful death and medical

malpractice), corporations, family law, bankruptcy, elder law, collections, criminal law or real estate, PLEASE CONTACT ME IF YOU NEED A REFERRAL.

Good news! Jacqueline Fellows has joined the firm as an associate, and Christine, Heather, and Simi continue to serve our clients in their excellent manner. We also welcomed Nancy Lewis in the position of Client Relations Coordinator. Honeybear, my yellow lab, is still at the office (she will be 12 in January!) and she **loves** your visits. Come by and greet her and, of course, if you are allergic or just do not have preferences for dogs, she stays with Christine during your visit.

I hope you find this newsletter helpful. If you have any questions, then please contact Heather, Christine or Nancy for an appointment. Currently, I see clients on Monday, Tuesday and Thursday and Jacki sees clients Monday through Thursday. The office is open Monday through Thursday 8:30am to 5:00pm and is closed on Fridays. However, if, for any reason, you require a Friday, evening, or weekend appointment, then please let us know. For your convenience my firm accepts VISA and MasterCard. Please also take a look at my new website – www.lawyergriffin.com.

I hope you have a wonderful Holiday Season!

Sincerely,

Linda Suzzanne Griffin

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What Is Going On With The Estate Tax??!!

As you are probably aware, due to Congressional inaction, the estate tax and the generation-skipping tax were repealed for individuals dying during 2010 and for generation-skipping transfers made in 2010. Please note that the gift tax laws were not changed except as to certain specialized trusts. It is now November and Congress has *still* not acted. If Congress does not act, then the exemption amount will be only $1 million in 2011 (in 2009, the exemption amount was $3.5 million) and the estate tax will be assessed at 55%!

It is now appropriate to determine, if you have prepared estate planning documents, whether such documents should be amended. Wills or trusts which refer to the marital deduction, the applicable credit amount, the federal estate tax, the unified credit, the estate tax exclusion amount, and/or the generation-skipping transfer tax, should be reviewed promptly. In many cases, a simple amendment is all that will be necessary; however, in some cases, more significant revision may be appropriate.

As an example, for married clients, the estate planning documents may divide the estate of the first spouse to die into two broad portions – one portion is equal to the deceased spouse's unused estate tax exemption amount. The other portion is equal to what is called the "optimum" marital deduction. Typically, neither portion will be subject to estate tax when the first spouse dies even if there is an estate tax – the estate tax exemption portion (sometimes called the "credit shelter," "bypass" or "Family Trust" portion) escapes tax because it takes advantage of the estate exemption of the spouse dying first. The marital deduction portion is not subject to estate tax when the first of the married couple dies, but is subject to estate tax when the surviving spouse dies. If a spouse dies in 2010, the exemption amount is zero, and in 2011 the exemption amount is only $1 million.

Another complication is that, effective now and for the rest of 2010, assets passing to an estate or to trust beneficiaries will not have their income tax cost basis adjusted to date of death values. There is no planning which can avoid this result. It is imperative to note that if an individual died in 2010, a form may be due by April 15, 2011 (October 15, 2011 if an extension is granted) allocating basis (see the later discussion in this newsletter).

Further, Congress could amend the tax laws in 2010 by re-enacting them possibly retroactive to January 1, 2010. As a result of observing the Congress in December 2009, it is not possible to predict its conduct, especially as to taxes.

ADVICE: Review your documents and confirm that the amounts allocated to the Family Trust and Marital Trust are in accordance with your wishes. If not, then contact me to discuss further estate tax planning.

Are 'Inherited' IRAs Exempt From Garnishment?

In a recent case, *Robertson v. Deeb*, 2009 WL 2476529 (Fla. App. 2 Dist.), the court said No! Section 222.21(2)(a) of the Florida Statues provides "any money or other assets payable to an owner, a participant, or a BENEFICIARY" (emphasis added)…from a "fund or account is exempt from all claims of creditors of the owner, BENEFICIARY, or participant" (emphasis added). In *Robertson*, the IRA was operated properly so the only issue was whether the IRA that was inherited by the beneficiary was subject to the beneficiary's creditors. The Court stated that the protection did ***not*** apply to inherited IRAs because the "plain language" references the ***original*** "fund or account" and the tax consequences of inherited IRAs render them a completely separate "fund or account."

This author and the majority of members of the IRA committee of the Real Property Probate and Trust law Section of the Florida Bar strongly disagree with this holding. The intent of the statue, as discussed with the original drafters, is that the exemption inures to beneficiaries as evidenced by the plain meaning of Section 222.21(2)(1) of the Florida Statutes. Further, Section 222.21(c) of the Florida Statutes specifically provides that money that is exempt under (a) does not cease to qualify for exemption by reason of a rollover that is excluded from gross income under Section 402(c) of the Internal Revenue Code which refers to inherited retirement plans. Kristen Lynch and I co-authored an article published in the Florida Bar Journal, "The Robertson Case: A Beneficiary by Any Other Name is Still a Beneficiary," (April, 2010). You can access the article from my website, **www.lawyergriffin.com.**

The inherited IRA is subject to creditors' claims of beneficiary according to a recent Florida case.

ADVICE: If you are concerned about the protection of your IRA when distributed to your children in an "inherited IRA", then an alternative is making your IRA payable to a protected trust.

Gift Tax Exclusion Denied for Transfer of Limited Liability Company ("LLC") Interests

While planning for large estates, gifting is a major planning technique. In the case of LLCs and Family Limited Partnerships ("FLP") the strategy is to make gift of these interests at discounted values and take advantage of the $1 million gift tax exclusion and the annual exclusion. Unfortunately, it is not always easy. In *Fisher v. United States*, Docket #1:08-cv-0908-LJM-TAB, the U.S. District Court for the Southern District of Indiana held that gifts of LLC interests to the donors' children were future interests in property that did not qualify for the annual gift tax exclusion.

In reaching its decision, the court determined that provisions in the Operating Agreement placing exclusive discretion over distributions in the hands of the General Manager alone and placing restrictions on the transferability of the membership interests, including a right of first refusal by the LLC, prevented the children from having the right to a

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Carefully review your LLC and FLP Agreements to make sure gifts will qualify for the annual exclusion. Recent case law may require revisions.

Gift Tax Exclusion Denied for Transfer of Limited Liability Company ('LLC') Interests

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right of first refusal by the LLC, prevented the children from having the right to a "substantial present economic benefit" as required under *Hackl v. Commissioner*, 335 F.3d 664, 667 (7th Cir. 2003). Additionally, the court held that the children's right to use, possess, and enjoy the primary asset of the LLC, a parcel of beachfront property, was insufficient on its own to meet the *Hackl* requirement.

ADVICE: Carefully review your LLC and FLP agreements to determine whether gifts would qualify for the annual exclusion. Consider "put" rights and rights of first refusal or even a *Crummey*-like notice that the donee has the ability to sell to anyone within thirty days. Gift tax exclusions may be lost for transfers of LLC or partnership interests if distributions are subject to the exclusive control of one member's discretion and if significant restrictions are placed on their transferability.

Transfer to a Family Limited Partnership ("FLP") for Consideration Avoids Inclusion in Estate

As discussed, gifting of FLP interests are a common strategy to reduce the size of the estate. Unfortunately, if the transferor holds too many "strings" then, despite the gift, the FLP interest will be includable in the estate of the transferor. Section 2036 of the Code provides if there are strings, then inclusion will occur *unless* the transfer was a bona fide sale for full and adequate consideration.

In a recent case, the Tax Court held that stock transferred to an FLP was a bona fide sale for full and adequate consideration and did not have to be included in the transferor's gross estate under Section 2036 of the Code. *Estate of Samuel P. Black, Jr.*, (2009) 133 TC No. 15.

The court found that the transfer to the FLP was a bona fide sale because it was done for the legitimate non-tax purpose of keeping the stock in the family. Additionally, the court found that full and adequate consideration was given for the stock because the FLP partners received partnership interests proportionate to the value of the stock transferred. Once the court determined that there was full and adequate consideration, the court did not have to go to the second prong of retained interest analysis.

ADVICE: To avoid inclusion in their taxable estates, clients transferring assets to an FLP should make sure a legitimate non-tax purpose can be identified and that full consideration, such as a proportionate interest in the FLP, is given in exchange.

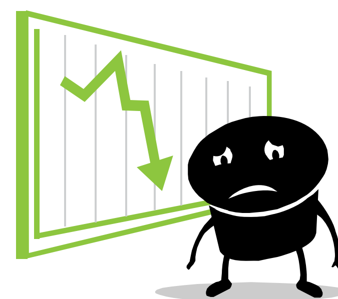
No Economic Hardship Exception for Distributions from Individual Retirement Accounts ('IRA')

Recently, the Tax Court held that early distributions from an IRA are subject to a 10% early distribution penalty and ordinary income tax despite the taxpayer's financial hardship. *James T. Colegrove, et. Ux. V. Commissioner*, U.S. Tax Court Summary Opinion 2010-44 (April 13, 2010).

Mr. Colegrove, a real estate broker and under the age of 59 ½, withdrew over $50,000 from his IRA in 2006 after the Florida real estate recession left him unable to meet his business and family expenses. The Internal Revenue Service ("IRS") argued that the withdrawals were early distributions subject to the 10% penalty. Mr. Colegrove, representing himself, argued that the distributions were loans from his IRA.

Fortunately for Mr. Colegrove, both the IRS and the Tax Court characterized the withdrawals as early distributions, rather than loans. Tax-free loans from an IRA are prohibited transactions that result in the loss of the IRA's tax exempt status and cause all assets of the IRA to be deemed as distributed on the first day of the year the loan is made and, thus, would have made the distributions all subject to income tax. Though sympathetic to Mr. Colegrove's situation, the Tax Court held that the 10% penalty applied and that there is no "economic hardship" exception to the early distribution penalty.

Had Mr. Colegrove consulted a tax attorney, he could have saved both time and money. The law is clear in this area, and his case was a losing one from the beginning.



ADVICE: Clients should consult with their advisors before removing funds from retirement vehicles. Also clients should be wary of representing themselves in tax matters and should, at a minimum, consult an attorney regarding the merits of their cases before proceeding.

Changing Your Address with the IRS

It is important to inform the IRS if your address changes. Taxpayers are held to have knowledge of all correspondence sent to their "last known address" on record with the IRS. However, a taxpayer is not held responsible for correspondence sent to an old address if the taxpayer has properly informed the IRS of a change in address. In *Estate of Paul Rule et al. v. Comm'r*, T.C. memo 2005-309, the IRS was unable to collect over $500,000 in deficiencies and penalties against an estate because the IRS sent correspondence to an old address even though the estate's administrator had notified the IRS of its new address.

Rev. Proc. 2010-16, effective June 1, 2010, explains how taxpayers must inform the IRS of a change of address and supersedes earlier procedures. The IRS uses the address listed on the most recently filed and processed return as the address of record. The address of record is automatically updated when taxpayers update their addresses with the postal service. Additionally, taxpayers can change their address of record by sending the IRS clear and concise notification of the change. Such notification can be written, oral, or electronic. Oral notification must be made in person or on the telephone to an IRS employee with access to the Service Master File. Electronic notification must be submitted through an application on the IRS's website; email is not sufficient.

Be sure to always keep the IRS notified of your current address.

ADVICE: Always keep the IRS informed of your current mailing address to avoid missing communications, which could lead to penalties. When dealing with estates and trusts, always send the Form 56 – Notice Concerning Fiduciary Relationship.

2010 Basis Step-Up Allocation

As previously mentioned, the basis in the estate assets of decedents dying in 2010 is not automatically "stepped up" to the date of death fair market value. However, in 2010, the law allows up to $1.3 million to be allocated among a decedent's property to step up the property's basis. An additional $3 million can be allocated to step-up the basis of property passing to a surviving spouse either outright or in a QTIP marital trust.

The decedent's personal representative must file a return with the IRS allocating the $1.3 million in order to take advantage of the step-up in basis. The return is due on April 15, 2011 (October 15, 2011 if an extension is filed) and must be submitted with the decedent's final tax return. While the IRS is still in the process of creating a form, the information required is outlined in Section 6018(c) of the Internal Revenue Code. The IRS will post the form on its website once it is completed.

ADVICE: If you are the personal representative, trustee, or beneficiary of a decedent's estate or trust, contact your CPA and attorney to be sure that such a return is properly filed, if necessary. The basis amounts will be necessary to determine the taxable gain when an asset is sold.

Homestead Law Changes

Florida's Homestead Laws have been clarified and amended.

New Florida legislation has been passed regarding homestead. The first major change involves the lifetime transfer of homestead. Section 732.4017 of the Florida Statutes ("F.S.") provides that a lifetime transfer of homestead is not considered a devise and, thus, will not be subject to the constitutional restrictions on devise provided: (1) the owner validly conveys his interest in the homestead during his lifetime to someone other than himself (i.e., a trustee of a trust); and (2) the owner does not retain any power to revoke the transfer or revest the transferred interest in himself. The conveyance can be either outright or in trust, and the owner may retain a beneficial interest in the homestead, such as the right to live in the property during his lifetime. Also, if the homestead is conveyed in trust, then the owner can retain the power to alter the rights of the trust beneficiaries during his lifetime (not by will) as long as the power cannot be exercised to benefit the owner. Note, however, such power can only be used to alter rights of beneficiaries included in the original trust agreement; new beneficiaries cannot be added.

The second major change involves situations where the owner improperly devises or fails to devise his homestead. Formerly, F.S. § 732.401 provided that the homestead descends in the same manner as intestate property if there was no surviving spouse, and, if there was a surviving spouse, the spouse received a life estate and the owner's descendants received a vested remainder, per stirpes.

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Homestead Law Changes

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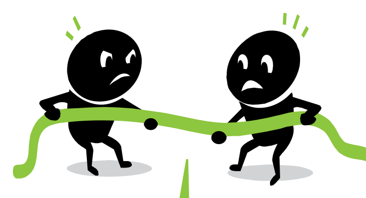
The revised version of F.S. § 732.401 adds a section that gives the surviving spouse the option to elect an undivided one-half interest as a tenant in common, with the remaining undivided one-half interest going to the owner's descendants, per stirpes. Such election must be made within six months of the owner's death and during the surviving spouse's lifetime. Once made, the election is irrevocable.

Revised F.S. § 732.401 also clarifies the effect of a disclaimer by the surviving spouse. Under subsection (3), if the homestead was validly devised to the surviving spouse, then the surviving spouse's subsequent disclaimer is effective, and the homestead will pass according to the owner's will or trust. Subsection (4) clarifies that if the surviving spouse receives a life estate under the statute after an invalid devise of the homestead, the interests of the owner's descendants in the homestead will not be divested by the surviving spouse's subsequent disclaimer.

ADVICE: If you have issues with a former spouse being the guardian of your homestead at your death (because the homestead must go to the minor child) or if you have a minor child and an adult child who must receive a share of the homestead and the adult child has a drug or alcohol problem, or if you have a disabled child who cannot handle a distribution of the homestead, then this statute may help.



Irrevocable Life Insurance Trust ('ILIT') Administration Changes

F.S. §736.0902 of the Florida Statues was added to the Florida Trust Code effective July 1, 2010. The new statute makes the prudent investor rule (F.S. §518.11) and the duty to administer a trust as a prudent person (F.S. §736.0804) inapplicable to certain trusts holding life insurance contracts (commonly called an 'ILIT') on a "qualified person", which is either: (1) the insured, if the insured gives the trustee the money to pay the premiums on a policy on his life and/or his spouse's life; or (2) the spouse of a person described in (1), held in trust.

The major duties the statute eliminates are the duties to: (1) verify the policy meets the insurable interest requirements; (2) determine whether the policy is a good investment; (3) make sure the life insurance company is financially sound; (4) diversify the trust's investments; (5) decide whether to exercise various policy options; and (6) be knowledgeable about the insured's physical and financial health. While the elimination of duty (1) above applies to all trusts unless the trust instrument specifically requires the trustee to verify an insurable interest or the trustee has knowledge that the policy was acquired without an insurable interest, the elimination of duties (2) through (6) above only occurs if the trust instrument expressly states that F.S. §736.0902 of the Florida Statutes applies or if the trustee sends notice of his intent to have the statute apply to all qualified beneficiaries and no qualified beneficiary objects within 30 days of receipt of such notice.

A new statute relieves certain trustees of duties of administering a life insurance policy held in a trust.

ADVICE: If you are a donor or a trustee of an ILIT, then contact me to review that ILIT to see if notices should be sent to relieve the trustee's duties.

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MISSION STATEMENT

To honor God by being of maximum service to our fellow man by providing legal services with wisdom, integrity, professionalism and excellence.

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Items to Consider Prior to 2010 Year End

Gift tax rates are now 35% and are scheduled to increase to 55% in 2011. Consider making taxable gifts prior to year end.

In 2010 there is no generation skipping transfer tax. Make outright gifts to grandchildren prior to year end. Consider making taxable terminations and taxable distributions prior to year end.

Real estate values are low. Consider combining taxable gifts with a transfer to a GRAT or QPRT.

Consider revising estate planning documents as the estate tax *exemption* is being reduced from $3.5 million in 2009 to no estate tax in 2010 to only $1 million in 2011. Thus, what was once nontaxable may become taxable.

Prior to funding irrevocable life insurance trusts, be sure you have no generation skipping transfer tax issues. It may be better to loan the money.

Capital gains tax rate will rise to 20% in 2011. Consider selling in 2010 to take advantage of the 15% rate.

Consider Roth conversion. Income tax rates will probably never be lower.

Consider charitable gifts to offset income after making a Roth conversion.

In light of a recent adverse Florida case, consider converting the LLC you own to a Florida limited liability limited partnership for asset preservation.

Make annual gifts ($13,000) prior to year end.

ADVICE: Promptly contact me should you have any questions regarding these items.

Florida's Estate Tax Patch

Two new statutes, effective retroactively to January 1, 2010, give courts the authority to construe wills (Section §733.1051 of the Florida Statutes) and trusts (Section §736.04114 of the Florida Statues) that do not provide for the 2010 repeal of the federal estate tax for decedents dying in 2010. The statutes remain in effect until December 31, 2010 unless Congress acts before then to repeal the estate tax repeal.

Before the passage of these statutes, there was no guarantee that a personal representative or trustee would be able to have a court construe a will or trust whose dispositive scheme was based on federal estate tax considerations, such as exemption amounts or funding formulas. While the remedial legislation will help give effect to the decedent's wishes, there is some concern over whether the IRS will honor the Florida court's settlement for federal tax purposes. For example, it is possible the IRS could ignore the court's property interest characterizations and treat the judicial construction as a gift by a spouse or children, depending on the circumstances.

ADVICE: In interpreting the language of documents of those individuals who die in 2010, these statutes will provide the planner/litigator the authority to ask the court to confirm the decedent's probable intent. Thus, if you are the personal representative or trustee and there is any ambiguity about the drafting of the document, then these statutes should help.