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NEWS FLASH!!!

ASSET PROTECTION TRUSTS - STILL AN EFFECTIVE PLANNING TOOL: MASSACHUSETTS SJC OVERTURNS THE PFANNENSTIEHL CASE

Many of you have read the firm's [Spring 2016 Snippet](#) and the article entitled Pfannenstiehl v. Pfannenstiehl; well, we have an update!!!

First some background: To make a long story short, late in 2015 the Massachusetts Appeals Court issued a decision which threatened long-standing trust law favoring asset protection. The decision threw into doubt whether certain types of trusts would continue to provide the asset protection which had been intended. In this case, the Appeals Court Judge ruled that a trust created by a father for the benefit of his children and grandchildren was considered marital property and subject to division upon the divorce of his son. This was a shock. The trust contained spendthrift provisions and further made distributions subject to an ascertainable standard. In plain English...this trust should have provided asset protection for the beneficiaries and these provisions should have ensured that the property would not be included in the marital estate. This case made certain asset protection trusts susceptible to attack by both creditors and ex-spouses in a divorce proceeding.

Not surprisingly, the case was appealed to the Massachusetts Supreme Court. On August 4, 2016 the Supreme Court issued its ruling.

In its decision, the Court ruled that the trust property could not be assigned to the marital estate, stating that the trust interest was "so speculative as to constitute nothing more than an expectancy," and that it is "not assignable to the marital estate." Rather, it may only be used in considering the "opportunity of each spouse for future acquisition of capital assets and income."

This decision is great news for estate planning attorneys and their clients; confirming that the asset protection strategies, which they have been using for years, continue to be effective. That being said, to provide maximum creditor protection, it remains our opinion that a discretionary standard of distribution (as opposed to an ascertainable standard) will continue to be best practice.

WARNING: IRS CLOSING THE WINDOW ON COMMON GIFTING STRATEGIES ACT FAST!

Early this month the IRS issued a proposed regulation aiming to limit valuation discounts of closely held businesses and certain real estate holdings as they relate to interfamily transfers. This proposed regulation threatens the longstanding practice of discounting closely held businesses for estate and gift tax purposes

and will make it harder for business owners to transfer a closely held business with a minimal gift or estate tax. Generally, when transferring a family business, valuation discounts are applied on the transfer for lack of marketability, lack of control etc.; this is a common technique used by attorneys and accountants to reduce estate and gift tax liability and to pass a larger interest in a family business on to the next generation. This proposed regulation will likely make such business transfers considerably more costly.

Currently, the estate and gift tax exemption is \$5.45 million per individual, with a maximum tax rate of 40%. Meaning an individual can give away up to \$5.45 million without incurring a federal estate or gift tax (\$10.9 million for married couples). The Massachusetts estate tax exemption remains at \$1 million.

At this time, this is a “proposed regulation”, which means it must go through a 90 day waiting period for public comment and hearing, during which time the IRS will consider public comments before issuing the final regulation. After the initial 90 days, the IRS will likely issue the finalized regulation which has the ability to become effective as soon as 30 days thereafter. As the regulation has not yet been finalized, at this point it is unclear the exact impact it will have.

What does this mean for clients?: There is a small window of opportunity to make gifts of closely held business interests and certain real estate holdings, taking into account significant discounts. If you are thinking about transferring a closely held business contact the estate planning department at Schlossberg, LLC as soon as possible as the proposed regulation could take effect as soon as December 2, 2016 and its effect will likely be an increased estate tax rate for many clients.

For those of you interested in reading the full 50 page proposed regulation you can find it here: [IRS REG-163113-02](#).

For further information on the articles above, contact a member of the Estate Planning Team at [Schlossberg, LLC](#).

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