Barrett, Easterday, Cunningham & Eselgroth LLP

Summer Edition 2011

Tax Changes Impact Estate Planning Alternatives

There have been a number of significant tax changes that affect estate planning alternatives on both federal and state levels. The change that will impact the most people is the repeal of the Ohio estate tax effective January 1, 2013. Until the repeal effective date, Ohio continues to grant a $338,334 exemption, which is the lowest exemption in the nation of the approximately eighteen states that still have an independent estate tax. The state with the next lowest exemption has an exemption that is double the Ohio exemption. Of those states, fifteen have exemptions ranging from $1,000,000 to $5,000,000.

While the merits of the repeal can be debated, the repeal actually puts Ohio more in line with the vast majority of the country. It is expected that less people will change their state of residency for the purpose of avoiding the Ohio estate tax. As the laws stand today, this results in tax savings only to people with estates between $338,334 to a little over 3,000,000. People who die in 2013 with larger estates will still be paying the same amount of net tax unless Congress makes changes to the federal laws. The federal 2010 tax act for enacted a number of significant changes for federal estate and gift tax purposes; however, these rules are effective only for 2011 and 2012. The estate tax exemption amount was increased to $5,000,000. Therefore, a husband and wife could transfer $10,000,000 free of federal estate tax. Historically, most couples prepared trusts to make use of these exemptions.

The new act added the concept of portability, which means to the extent the deceased spouse did not use that spouse's exemption, the unused exemption carries over to the surviving spouse. As the law stands currently, both spouses need to die within the next two years to take advantage of this law change. There are numerous illustrations that show the historical trust plan still outperforming use of the portability feature. Estate planning commenta-

(Continued on page 3)

Inside this issue:

Zoning Dispute Over Agricultural Use Leaves Township Officials Wining (as in wine) About Result

Ohio statutory law limits the authority of township and county officials to regulate the use of land for agricultural purposes. However, the law often doesn't stop government officials from attempting to do so. A recent appellate court case demonstrates that the term "agriculture" involves more than growing corn or milking cows.

This recent case involved the owners of a 64-acre parcel of land located in Auburn Township, Geauga County, Ohio. The land was located in a residential zoning district. The landowners first built a barn, a pavilion and residence on their property. Next, they decided to produce grapes and make and sell wine on their property. This is known as viticulture. The landowners built a "crush pad" to the rear of the barn-winery so they could crush and press grapes.

In any event, the local township zoning inspector decided that the pavilion and "crush pad" were not part of the winery, were not exempt and violated the township's setback regulations. A zoning appeal and court rulings followed.

The appellate court pointed out that Ohio's statutory law expressly includes viticulture as an agricultural use and that structures used for viticulture are exempt from township zoning power "if they are: (1) primarily used for vinting and selling wine and are (2) located on land any part of which is used for viticulture."

The pavilion on the property was used for storage of grapes, wine tasting and wine sales. Thus, the appellate court upheld the trial court's finding that the pavilion's primary use was "for wine making and selling" and therefore exempt from the township's zoning authority.

While the landowners had used the pavilion for other uses prior to starting their viticulture operation, the appellate court also found that the new use was exempt from the township's zoning power because the new use was an exempt agricultural use.

The landowners had built a covered walkway between their residence and the winery/crush pad. The township argued that the crush pad and a covered walkway on the property converted the agricultural use into a residential use subject to township zoning. The appellate court also rejected this argument and found that the agricultural use exemption is based upon the use of a structure and not on whether the structure is detached or connected with another structure.

It is important to note that the limitations on the authority of townships and counties to regulate agricultural uses do not apply to land located within Ohio municipalities. Additionally, the rules are more complicated when a parcel of land not greater than 5 acres is located in a platted subdivision. Please feel free to contact us if you have any questions.

Kristi Kress Wilhelmy Joins BECE

It is with much pleasure that we welcome Attorney Kristi Kress Wilhelmy to our firm. Kristi comes to us from the law firm of Vorys, Sater, Seymour and Pease, where she worked for three years. Prior to that, she was employed as an attorney at Bryan Cave in Kansas City, Missouri. She has experience litigating a variety of matters including contract and general business disputes, employment matters, eminent domain/real estate appropriation actions, coal, oil, and gas litigation, and consumer protection matters.

Kristi graduated summa cum laude from both The Ohio State University, where she received her B.S. in agricultural education, and the University of Toledo College of Law, where she received her Juris Doctor degree. She clerked for Judge Mary Beck Briscoe (U.S. Court of Appeals for the 10th Circuit in Lawrence, Kansas) and Judge James G. Carr (U.S. District Court - Northern District of Ohio). Kristi's primary area of practice here will be litigation. She grew up on her family's farm in Brown County, Ohio where she was involved in raising beef cattle, sheep, corn, soybeans, wheat, and tobacco. She was active in both 4-H and FFA, including serving as the 1997-98 State FFA Reporter and as a member of the 1998 Ohio State Junior Fair Board.

Kristi is a member of the American and Ohio State Bar Associations, and is admitted to practice in the states of Kansas (inactive), Missouri (inactive), and Ohio, and in various federal courts.

When she is not practicing law, Kristi enjoys spending time with her husband, Brad, and two children, Sadie and Aiden.

(Continued from page 1)

tors are suggesting that portability is useful primarily as a post death planning opportunity for people who did not have appropriate estate plans prepared during their lifetime. This is particularly true for people with large estate or with children with large estates. The portability provision does not apply to the generation-skipping transfer tax exemption. Therefore, in order to fully use the generation skipping transfer tax exemption, a trust plan needs to be put in place before the first spouse dies. The trust plan also protects the appreciation on the trust assets during the lifetime of the surviving spouse from estate tax. Further, many national commentators do not believe the portability feature will survive do to its complexity.

Probably the biggest change was that the gift tax exemption increased from $1,000,000 to $5,000,000 for 2011 and 2012. This opens the door for transferring much more wealth more rapidly than before without incurring any gift tax. If it appears that the exemption will drop back to $1,000,000 in 2013 per existing law, many people will be taking advantage of this large exemption in late 2012. It also opens the door to more people who want to gift away all of their assets in order to qualify for Medicaid benefits.

The repeal of the Ohio estate tax and the upward trend in the federal exemption may allow people the opportunity to plan what they want to do with their estate and accomplish personal objectives without having to mold their plan as much around the tax ramifications.

Cell Tower Investors Seeking Easements

Some landowners who already lease property to cell tower companies are being contacted by investor groups that hope to negotiate perpetual easements and then make money by leasing the space on the towers to communications companies. Since these easements run with the land and likely have no termination date, care should be taken not to bind future owners to provisions that could lead to hardships or unanticipated uses (think railroad rights-of-way used for other purposes).

These deals may be structured in a variety of ways, such as a grant of easement with an easement purchase agreement, an agreement combined with the easement grant, or a letter of agreement with an easement grant. Typically, the purchase or letter agreement is private and the easement grant is recordable. The easement grants are typically for two easements, an exclusive easement for the area where the tower and related facilities are located and a non-exclusive access/utility easement from the road to the tower area.

Among the provisions to consider and negotiate if you are approached with such an offer are these:

- If the land is subject to a current lease, what happens if the current tenant removes its cell tower or leaves it behind?
- Who pays the real estate taxes?
- Will the easement grantee pay for the easement property and facilities and improvements on the easement?
- What happens if the easement is no longer used for cell tower transmission purposes?
- Can the easement owner expand the access/utility easement without consent and without additional consideration?
- Is the consideration a one-time lump sum, an annual payment for a term of years, or a sharing of net rental income?
- If profit-sharing, may the landowner obtain an accounting or conduct an audit?
- Is a signing bonus offered?
- Who pays for maintaining the access easement?
- Are there reasonable limits on use of the access easement?
- Who pays for repairing and restoring property surrounding the easement that may be damaged by maintenance or construction crews?
- May the landlord ever terminate the easement for defaults by the easement grantee?
- Will the easement automatically revert to the landowner if abandoned?
- What if the easement is abandoned and the tower and facilities are not removed**?**
- Will the easements be recorded by the grantee?

Firm News...Russell Cunningham will speak at **Ohio State Retiree's Association's "Coping with Change Conference"** on September 22nd in the Fawcett Center, OSU Campus, at 1 p.m.. His topic will be "*Trusts: Answers to some of your questions."* Russell Cunningham is an OSBA Certified Specialist in Estate Planning, Trust and Probate Law….**Carolyn Eselgroth** attended an Oil and Gas Law Symposium in June. Topics included dealing with dormant minerals and old leases, mandatory pooling and the oil and gas boom in Ohio.

David Barrett spoke about managing counterparty risk in a volatile market at the National Grain and Feed Association's *Trading, Trade Rules and Dispute Resolution* Seminar in St. Louis, Missouri... Congratulations to **Amanda Stacy** who graduated from Ohio Northern University Claude W. Petit College of Law in May. Amanda worked here as an intern last summer and is planning to join our firm after she takes the bar examination later this summer.

Attention Charities and Donors: Check the IRS Auto-Revocation List

Donors will no longer be able to make tax-deductible contributions to charitable organizations that find their tax exemptions automatically revoked. For many groups, revocation day was on May 15, 2011.

The automatic revocations are mandated by the Pension Protection Act's requirement that charities file returns with the IRS. Failure to file for three successive years resulted in automatic revocation of tax exemption for approximately 275,000 organizations across the country. Churches and certain church-related organizations are exempt from this filing requirement.

The "Automatic Revocation of Exemption List" was posted on June 8 on the IRS website: irs.gov/autorevocationlist. IRS will be posting monthly updates to this list, which divides organizations by the states in which they are located. Donors can still deduct contributions made prior to the date of revocation.

Unfortunately, the Pension Protection Act does not give IRS authority to undo the automatic revocations. Nor does the law provide for an appeals process. If an organization wishes to be reinstated as tax-exempt, it must File Form 1023 (for Section 501(c)(3) organizations) or Form 1024 (for other tax-exempt organizations, including 501(c)(5) agricultural organizations and 501(c)(6) business leagues).

Organizations with gross receipts of more than $50,000 in the most recent taxable year are to write "Automatically Revoked" at the top of the application for tax exemption to ensure it is reviewed by the proper division in the exempt organization section of IRS. A user fee of $850 must be included with the application for organizations whose gross receipts exceed $10,000 annually over a 4-year period. The application for reinstatement must be filed within 15 months after the publication of an IRS revocation letter or the date its name is posted on the IRS Auto-Revocation List on the website.

The reasoning is that smaller organizations are more likely to be run by volunteers who "may face unique challenges in meeting federal tax obligations..."

Reinstatement for larger organizations is effective as of the date of the application. IRS will consider reinstatement retroactive to the revocation date, if the organization requests retroactive reinstatement in a letter and can show reasonable cause for its failure to file. Requests for retroactive reinstatement must include, among other requirements, a detailed description of all the facts and circumstances that led to each failure to file and to the continuous failure to file over three years, the discovery of the failures and the steps taken to mitigate the failures and avoid them in the future, evi

dence to support these statements, and properly completed and executed information returns for the three years.

Smaller organizations (gross receipts of not more than $50,000 in the most recently completed taxable year) also must submit Form 1023 or Form 1024. However, the user fee is a significantly lower $100, and the organization is to write "Notice 2011-43" at the top of the application for exemption and on the envelope. IRS will treat small organizations as having met the "reasonable cause" requirement for not filing the prior three years if: (i) the organization was not required to file annual information returns prior to 2007; (ii) the organization was eligible to file a Form 990-N (the e-postcard) for 2007, 2008 and 2009; and (iii) the organization submits a properly completed and executed application for reinstatement of tax-exempt status on or before December 31, 2012. The reasoning is that smaller organizations are more likely to be run by volunteers who "may face unique challenges in meeting federal tax obligations," according to IRS Notice 2011-43.

Organizations seeking reinstatement should read Notices 2011-43 and 2011-44, as both contain specific requirements for these filings in addition to those indicated in this story. These are published on the irs.gov website.

Barrett, Easterday,
Cunningham & Eselgroth LLP

7269 Sawmill Road
Suite 100
Dublin, OH 43016

Tel: 614-210-1840

www.ohiocounsel.com

Our law firm provides a wide range of individual and business-related legal services including a special emphasis on serving the needs of agricultural producers and agri business clients. Areas of emphasis include agricultural legal issues, business and estate planning, agricultural finance, commodities law, commercial transactions, environmental law, estate/probate administration, federal farm program issues, government regulation, land use planning and valuation, real estate, like-kind exchanges, income and estate tax law, litigation and dispute resolution.

We are located in Dublin, Ohio, a northwest suburb of Columbus.