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Have You Thought About Your Estate Plan Lately?

By Michael Mattioni, Esquire & Thomas Whelihan



There is a natural reluctance to contemplate and plan for one's own disability or death. But the failure to develop and regularly update an estate plan subjects loved ones to unnecessary financial burdens and emotional disruptions. Most people believe that they are not wealthy enough to justify the time and expense of seeking the advice of an estate planner. Many mistakenly conclude that the law

automatically provides a fair and efficient plan for distribution of assets upon death. Others tend to think estate planning is only for the "older generation" or the wealthy. These notions reflect a misunderstanding of the range of issues addressed by estate planning. The primary goals of an estate plan are to arrange one's affairs and to distribute one's assets in a way that preserves their value with the least amount of expense, aggravation and stress.

A variety of legal documents are employed to accomplish these goals, but there are three instruments which should be a part of every basic estate plan.

A will, the fundamental function of which is to dispose of an individual's probate property at death, also enables the maker to

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Realty Transfer Tax Regulations Causing a Commotion

By Dawn M. Tancredi, Esquire

A year ago, in November, 2007, the Pennsylvania Department of Revenue promulgated regulations which change the nature of taxation on real estate transactions so that substantial transfer taxes are now due that were previously inconceivable in real estate transactions. In particular, the regulations include taxation on assignments of agreements of sale. The legitimacy of the regulations is expected to be challenged. This article explores only one of the many issues raised by the new regulations-the impact of the new regulations on assignments of agreement of sale.

It seemed to be settled by the Pennsylvania Supreme Court that payments for an assignment of the right to purchase real estate were not included in the purchase price and not taxable in a real estate transaction. *continued on page 3...*

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select individuals who will manage one's estate. These include: (1) the executor, who is responsible for gathering assets and paying all claims due to third parties; (2) the trustee, who serves to supervise assets which are held for others, such as minor children in trust; and, (3) the guardian, the individual responsible for raising minor children. Planning for minor children is the most important part of a parent's estate plan. Parents must consider who will be responsible for the personal care of their minor children until age 18 and who will have the job of managing the minor's property. Pennsylvania law permits a parent to appoint a guardian and a trustee in her will to care for minor children and to manage property passing to them. The selection of a guardian can be difficult and emotionally charged, but this should not cause parents to postpone finalizing their wills. In the absence of a will, state law governs the outcome of many issues. Pennsylvania intestacy law will make inheritance decisions which may be contrary to one's own preferences. Failure of a parent to nominate a guardian and a trustee will result in a judge, who does not know the children or families involved, deciding who should care for the children and manage their property. For these reasons a will is a very important planning tool regardless of a person's age or assets.

Estate planning includes planning for problems which can arise while the individual is still alive. Incapacity or a diminished ability to function is something that can occur at any age. Therefore, a general durable power of attorney is also an essential component of any estate plan. As its name implies, this document gives a broad range of powers permitting someone to handle an individual's affairs when the individual becomes incapacitated. The maker of a durable power of attorney (the principal) appoints a person to act as an agent (or "attorney in fact") for and on behalf of the principal. The purpose of the power of attorney is to assure third parties that the named attorney in fact is authorized to act on behalf of the principal.

Pennsylvania law allows a competent individual over the age of 18 to execute what is commonly known as a "living will", wherein she may state her specific directions for the provision or cessation of certain forms of "life-sustaining [medical] treatment" should decisions concerning such forms of treatment be needed when she is no longer physically or mentally able to competently and responsibly make them for herself. 20 Pa.C.S.A. §5404. Discussing these issues and planning for them in advance reduces much of the anxiety associated with these types of decisions.



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In *Allebach v. Comm.*, 546 Pa. 46 (1996), the Allebachs entered into an agreement to sell an undeveloped tract of land for \$610,000. The agreement was assigned a couple times and the final buyer paid \$3,200,000 though the Allebachs only received the original purchase price of \$610,000.

The Supreme Court found that the realty transfer tax should be based on the value of the deed which was presented to the recorder's office. The Court referred to the realty transfer tax statute which defines a taxable "document" as "any deed, instrument or writing that conveys, transfers, demises, vests, confirms or evidences any transfer or demise of title to real estate." The definition of "document" specifically excludes land contracts. Since the statute was clear that an agreement of sale cannot be taxed under the law, the assignment of rights in an agreement cannot be taxed. In addition, the Court directed the Department of Revenue to take up the issue of changing laws with the Pennsylvania legislature. The transfer tax was based upon the consideration received by the Allebachs as set forth in the deed as this was the actual amount they received for the transfer of the property. The intervening assignment and consideration paid was not a transfer of real property subject to transfer tax.

The Department of Revenue relies on the 30-year old case of *Baehr Bros. v. Commonwealth*, 487 Pa. 233, 409 A.2d 326 (1979) to support its argument that it may tax assignments of agreements of sale. In *Baehr*, the shareholders of a liquidated corporation could have received the real estate of the company by a deed, and then deeded the real estate into a trust that benefitted them. The Court found that substance over form was important when it ruled in favor of the taxpayers and recognized that if the transfer were done in two steps, both transactions would be exempt-- it allowed the transfer in one step without taxation. The Department of Revenue claims that if it can characterize a single transaction as if several transactions had occurred, it may impose transfer taxes on all of the parts of the transaction.

There is a problem with the idea that an assignment of an agreement of sale is in "substance" like a deed. The law does not treat agreements of sale the same as deeds. A deed is recorded in an established system whereby interested parties (including the Department of Revenue) may find information about a property in one place. A deed actually transfers title to real estate, while an assignment is a transfer of the right to purchase real estate that may not result in the actual transfer of real estate.

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Assignments of agreements of sale are not recorded; therefore, the collection of transfer taxes on the assignment of a right to purchase a property is extremely difficult since they are not easily trackable.

The regulations appear to contravene the *Allebach* decision, so the regulations are likely to be challenged. However, until there is a successful challenge, anyone thinking of using an assignment with respect to the purchase of real estate should be aware of the possibility that the Department of Revenue will believe that the entry into the assignment will be subject to transfer tax.

Lease Restrictions and Sub-Lessees

By Lauren M. Reap, Esquire

In these troubled economic times, merchants are doing whatever they can to stay afloat. Diversification is a particularly attractive way to gain customers and increase the purchases made by current customers. Stores like Target and Wal-mart now offer an extensive selection of grocery items in addition to their standard items which range from garden/patio furniture, pet supplies, stationary, to sporting goods and clothing, etc.

Before you rush into opening a mega-store, however, you should carefully review the leases and restrictions governing that space, because despite outward appearances, a restriction might be lurking which crushes your plans. In Giant Food Stores v. THF Silver Springs Shopping Center (“THF”) 959 A.2d 438 (Pa.Super.2008), Giant and THF’s predecessor (“Landlord”) entered into a lease of space in the Silver Spring Shopping Center (“Shopping Center”) for 20 years. The Lease contained a “Supermarket Restriction,” agreed for the term of the lease that:

[N]o store(s) and/or buildings, or any part of the same, now or hereafter acquired and/or constructed by landlord within the Shopping Center or upon any property within a three (3) mile distance therefrom in which the Landlord has an ownership interest shall be used for the sale (at retail or wholesale), for off-premises consumption of groceries, . . . if at any time during the term hereof the Demised premises is

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Lease Restrictions and Sub-Lessees

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not being used as a supermarket for the sale of food for a consecutive period in excess of six (6) months . . . the restrictions contained herein shall be null and void.

Around September of 2001, Giant decided to relocate their business in a shopping plaza owned by another entity. Giant and its Landlord entered into a letter agreement which stated: Giant would fund certain improvements to be completed by Marshalls; the Supermarket Restriction would not be nullified despite Giant's vacating the premises and subleasing to Marshalls (Marmaxx Operating Corp); the Supermarket Restriction would not apply to Wal-mart Stores, Inc. its successors or assigns; and that Giant would thereafter acknowledge in writing that Wal-mart could expand its presence in the Shopping Center to devote some of its sale space to selling groceries. The parties then entered into a subsequent letter Agreement wherein Landlord consented to Giant's sublease, and Giant consented to Wal-mart's expansion in the Shopping Center.

In July of 2003, Giant and Landlord executed a written Amendment to the original Lease. The Amendment provided that the Supermarket Restriction shall remain in full force throughout the term of the Lease, and the Supermarket Restriction shall not apply to Wal-mart, its successors or assigns.

In 2005, THF Silver Spring Development ("THF") purchased the Shopping Center. In 2006, THF filed for a permit to construct a Sam's Club at the Shopping Center. Sam's Club is a subsidiary of Wal-Mart, and a seller of groceries. In June of 2006, Giant filed an action to permanently enjoin THF from leasing retail space to Sam's Club or any other store to selling groceries. The Trial Court granted Giant's Motion for Summary Judgment and enjoined THF from taking action that would violate the Supermarket Restriction.

The Pennsylvania Superior Court affirmed the trial court's decision. The Superior Court held that the trial court properly considered the original lease, first and second letter agreements, and the Lease Amendment when ruling in favor of Giant. THF made two arguments: 1) that the Agreements only restricted the land actually occupied by Wal-Mart; and 2) that "Wal-Mart, its successors and assigns" included subsidiaries of Wal-Mart for purposes of the exception to the

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Supermarket Restriction. The Superior Court held, that the lease was clear that no grocery-selling stores could be opened anywhere in the Shopping Center. The Court also held that the parties intended “successors and assigns” to include only subsequent owners and lessors of the parcel leased by Wal-Mart, not its subsidiaries. Otherwise, the intent of the exception would be destroyed because the space could be leased to any grocery-seller who used Wal-Mart as a straw party. Ultimately, the Court prohibited THF from leasing any retail space in the Shopping Center to Sam’s Club or any other grocery-selling store.

This decision highlights the importance of reviewing every clause in a lease before executing a lease. This article provides general information regarding leases and is not intended to address any particular lease or situation involving a lease. Anyone considering entering into a lease is encouraged to have the lease reviewed by an attorney or other real estate professional to insure that their expectations are met by the lease.



Firm News and Updates

Regina Parker and Patricia O'Neill have been elected to the board of Women's International Trade Association and will serve as members in the organization's Membership and Rules and Regulations Committees.

Dawn M. Tancredi was a panel member at the St. Joseph's University Pre-Law Symposium. She addressed a group of students interested in attending law school and answered questions about her career as an attorney.

Lauren M. Reap participated in a presentation given by the Delaware Valley Environmental American Inn of Court on Marcellus Shale. Marcellus Shale contains natural gas that is trapped within gaps found throughout the shale.

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