

The By-Pass Trust, Wisconsin Estate Tax, and Your Estate Plan

By: *David P. Weller*

During life and at death, every individual has the right to transfer property to individuals other than a spouse or charity in an amount equal to the applicable exclusion amount without payment of estate taxes. The property that can be transferred includes cash, stock, real estate, and life insurance to name a few. In 2004, the applicable exclusion amount is \$1,500,000. The gift tax applicable exclusion amount is \$1,000,000 thereby limiting the amount of taxable gifts that can be made during a person's lifetime to \$1,000,000 without gift tax liability.

The Economic Growth and Tax Relief Reconciliation Act of 2001 was touted as having eliminated the federal estate tax, which is commonly referred to as the "death tax." As you may know by now, the reports of the elimination of the "death tax" were greatly exaggerated as the 2001 Tax Act phased in an increase in the applicable exclusion amount from \$1,000,000 in 2002 to \$3,500,000 in 2009, with estate tax repeal scheduled for 2010. Then in 2011 the applicable exclusion amount returns to \$1,000,000.

A person can transfer an unlimited amount of assets to his or her spouse without payment of estate tax or gift tax, through what is

called the marital deduction. However, full utilization of the marital deduction by a married couple may result in federal estate tax, where federal estate tax could have been avoided. To illustrate this point, assume that a married couple has \$3,000,000 in assets and that each spouse owns \$1,500,000 of the assets. If the first spouse to die transfers all of his assets to his spouse, then there is no estate tax due from his estate and the surviving spouse will



have \$3,000,000 in assets from the combination of her and her husband's estate. On the death of the surviving spouse, she has \$3,000,000 in assets and an applicable exclusion amount of \$1,500,000 (assuming both spouses die in 2004 or 2005), leaving \$1,500,000 exposed to estate tax, resulting in federal estate tax due of approximately \$700,000. If instead the first spouse to die had fully utilized his applicable exclusion amount by transferring \$1,500,000 of his assets to someone other than his spouse (including certain trusts), the surviving spouse would have \$1,500,000 in assets on death and no federal estate tax would be due on either death.

A common method for utilizing the first spouse to die's applicable exclusion amount is to include a by-pass or credit shelter trust in a Will. The by-pass trust allows the first

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spouse to die to fully utilize his applicable exclusion amount by funding the trust with assets equal to his remaining applicable exclusion amount on death. The trust can distribute all income to the surviving spouse and allow for distributions from principal for health care, maintenance, education and support (known as the ascertainable standard). Access to trust principal beyond the ascertainable standard will cause the trust to be included in the surviving spouse's estate for federal estate tax purposes. The by-pass trust is a common planning technique for married couples with assets in excess of the applicable exclusion amount.

Prior to the 2001 Tax Act, Wisconsin calculated its estate tax based on federal estate tax law and used the same applicable

additional Wisconsin estate tax.

With the changes in the federal and state estate tax laws, many people are using a disclaimer funded by-pass trust which provides flexibility to deal with the changing estate tax laws. Under a disclaimer funded by-pass trust, the surviving spouse disclaims, or refuses to accept certain assets from the deceased spouse's estate. Any assets disclaimed are used to fund the by-pass trust. A disclaimer is subject to strict requirements and use of a disclaimer funded by-pass trust may not work for some people.

In this changing estate tax landscape, any estate plan that contains a by-pass trust should be reviewed in light of the new Wisconsin estate tax. Adding more uncertainty to the

Time Period	Federal Applicable Exclusion Amount	Wisconsin Applicable Exclusion Amount
01/01/02 – 09/30/02	\$1,000,000	\$1,000,000
10/01/02 – 12/31/03	\$1,000,000	\$675,000
01/01/04 – 12/31/05	\$1,500,000	\$675,000
01/01/06 – 12/31/07	\$2,000,000	\$675,000
01/01/08 – 12/31/08	\$2,000,000	No tax
01/01/09 – 12/31/09	\$3,500,000	No tax
01/01/10 – 12/31/10	No tax	No tax
01/01/11 & thereafter	\$1,000,000	\$1,000,000

exclusion amount. Wisconsin has responded to the 2001 Tax Act with its own Wisconsin estate tax, which is based on an applicable exclusion amount of \$675,000. The Wisconsin estate tax will be eliminated beginning January 1, 2008, only to return when the federal estate tax returns on January 1, 2011, with an applicable exclusion amount of \$1,000,000. The changes in the federal and Wisconsin applicable exclusion amounts over time are listed on the chart above.

If the by-pass trust is funded between October 2002 and December 2007 at the federal applicable exclusion amount, there will be Wisconsin estate tax to pay. In 2004, funding the by-pass trust with the full federal applicable exclusion amount of \$1,500,000 will result in approximately \$68,000 in Wisconsin estate tax. If the surviving spouse is relatively young and inclined to reduce her estate through gifts, it may make sense to fund the by-pass trust with less than the full federal applicable exclusion amount. However, the federal estate tax rates are significantly higher than the Wisconsin estate tax rates and eliminating or reducing federal estate tax is sometimes worth paying

future of the estate tax, President Bush called on Congress in his recent State of the Union Address to permanently eliminate the federal estate tax.

Furthermore, we generally recommend that you review your estate planning documents when your family increases (through birth, adoption, marriage, etc.), decreases (through death or divorce), your assets significantly increase or decrease, or if there is a change in the law. The state and federal estate tax laws are complex and sometimes confusing and you may wish to consult with your attorney in devising an appropriate estate plan. ■



David P. Weller is an associate with Lathrop & Clark. His practice focuses on tax law, business planning and transactions, and estate planning and administration.

Collaborative Divorce

By: *Ann C. Krummel*

Four years ago, a group of Wisconsin lawyers dedicated themselves to offering a new way to resolve family law cases. They formed the “Collaborative Divorce Council of Wisconsin.” Once the difficult decision to divorce has been made, it is often the conflict caused by traditional litigation that scars lives and devastates children rather than the end of the marriage itself. Committed to changing the common understanding of divorce as “nasty” or “bitter,” the stated mission of the Collaborative Divorce Council is “Divorce with Dignity.”

It is true that the majority of family law cases are settled without courtroom litigation. Relatively few divorce judgments are the product of a judge’s decision handed down after a trial. But traditional divorce negotiations are founded on the adversarial process. Premised on opposition (“He/She only wants that because they know it will hurt me.”); speculation about the other party’s ability and willingness to “do battle” (“They’ll never prove that in court!”); and raw guesses of a given judge’s tolerance for mudslinging in the courtroom - these settlements are reached only when one or both parties are too exhausted, emotionally or financially, to continue the fight.

The Collaborative Divorce model abandons combat in favor of a problem-solving approach. In a collaborative process, mental health professionals and financial specialists team together with attorneys to find long term solutions that support the best interests of all family members, especially children. Never abandoning their skills and training in the law, attorneys commit themselves to serve as counselors and advisors rather than as gladiators.

The core of the collaborative commitment is a written agreement, signed by the parties and their lawyers, promising to resolve the case without going to court. Should either party threaten, or proceed with litigation, neither the attorneys nor any of the other professionals involved may continue in the case for trial. New experts, including substitute counsel, must be retained.

The collaborative process begins with open and complete exchange of all information, financial or otherwise. If appraisers or accountants are needed to determine values, or provide tax advice or investment strategies, agreements are reached as to how those services will be provided and the costs met. If disputes over parenting emerge such that children are at risk of being harmed by the conflict, therapists and child development experts will be identified and engaged.

Careful planning, including the use of written agendas, is used to bring the parties and counsel together in a four-way conference. Discussion and dialogue are supported in an environment of respect, rather than recrimination. Issues are identified and articulated, without allegation or accusation. The most important by-product of the collaborative process is that any chance of reconciliation in the marital relationship is preserved.

If the divorce process continues, the “work” is shared. Each party may leave a four-way conference with a list of tasks to be completed before the next meeting. These tasks may include finding legal descriptions for real estate, obtaining bank records, or arranging appraisals. As a result, legal fees are substantially reduced. Assets that might otherwise be sold to pay litigation costs are preserved. Friends and family members are less likely to be asked for financial assistance to help pay attorney fees. Where incomes are already stretched to meet consumer debt, savings through the use of collaborative divorce may be the best way to avoid bankruptcy.

Please do not become a victim of the easy belief that divorce, even on a collaborative approach, is a simple solution to the hard problems of marriage in modern times. But the divorce process itself need not add devastation to the decision to depart. Legal counsel should be able to model patience, good listening, and objective analytical skills both for the client and the other party. The Wisconsin Family Code defines grounds for divorce as “irretrievable breakdown” of the marriage. With a willingness to choose peaceful resolution, parents and children are much more likely to emerge from the divorce process with hearts and minds intact. ■



Ann C. Krummel brings 10 years experience as a Family Court Commissioner to her practice with Lathrop & Clark. She is a member of the Collaborative Family Law Council of Wisconsin and a trained collaborative practitioner.

Notes From The Chair

By: *John C. Frank, Partnership Chair*

A couple of months ago, at a dinner celebration in Milwaukee, Donald L. Heaney was awarded the Charles L. Goldberg Distinguished Service Award by the Wisconsin Law Foundation. The Wisconsin Law Foundation is a non-profit corporation organized separately from the State Bar for the purpose of developing charitable and educational programs to promote public understanding of the law. The Goldberg Award is given in recognition of lifetime achievement in the legal profession for attorneys with a record of service to the profession and to the public.

I have known Don Heaney as a practicing attorney and as my reliable partner for about 25 years. It is easy to take him for granted. Sometimes it takes an event outside of your everyday relationship to renew your appreciation for someone close.

Don Heaney has over 45 years of experience practicing law, with a particular focus on business litigation. During a substantial portion of his legal career, he also has served as counsel for the Diocese of Madison and Bayview Foundation, Inc., a nonprofit provider of low and middle-income housing.

While I have known Don Heaney as a law partner, his achievements go beyond the practice of law. He served as President of the State Bar in 1985-86 and President of the Dane County Bar in 1982-83. He has been twice knighted by Pope John Paul II as an Equestrian Knight of the Holy Sepulchre and as a member of the Order of St. Gregory the Great. Although I have difficulty with the image, Don has told me a number of times that his status as a knight allows him to ride his horse into the cathedral.

Don also is a founder, officer and director of the Wisconsin Lawyers' Mutual Insurance Company. This company was organized at a time when legal malpractice insurance was becoming difficult to impossible to obtain. Don traveled throughout the state convincing lawyers that they must solve the malpractice crisis by organizing and funding their own mutual

insurance company. You need not be a lawyer to recognize the difficulty of this task. It takes a special individual to get a group of lawyers to agree about anything, particularly something that costs them money and affects their practice.

On behalf of the Firm, congratulations to Don on receiving the award and thank you for teaching us the practice of law as a profession, rather than just a job. ■



John C. Frank has been with Lathrop & Clark for over thirty years. His practice areas currently include estate planning and administration, real estate and tax law.

New Partner

Lathrop & Clark is pleased to announce that **Lydie Arthos Hudson** has become a partner in the firm. Lydie is a member of the firm's Patent, Copyright and Trademark Practice Group.

Lydie focuses on the acquisition of intellectual property rights and the strategic development of these rights through licensing, distribution and technology transfer. She advises both established corporations and start-up businesses. Having previously worked as corporate counsel for Nicolet Instrument Corporation, she offers her perspective as in-house counsel on a variety of legal issues. Lydie currently serves on the board of University of Wisconsin Children's Hospital and has served on the board of the University of Wisconsin Medical Foundation. Lydie graduated from the University of Michigan with a degree in classics and received her law degree from the University of Michigan in 1986. ■



Ventures

Lathrop & Clark was a sponsor and exhibitor at the 2004 Business Women's Expo held on February 10, 2004, at the Sheraton Madison Hotel. ■ **The 3rd Annual School Law Seminar** "A Review of Current Legal Issues Affecting Wisconsin Schools" took place on November 13, 2003, at the Crowne Plaza Hotel in Madison. More than sixty representatives of the firm's school district clients attended the all day seminar. ■ **Mike Julka, David Rohrer, Joanne Harmon Curry, Shana Lewis, David Weller and Rick Verstegen** spoke at the Lorman "Employment Law from A to Z in Wisconsin" one-day seminar on April 1, 2004, at the Radisson Inn in Madison. This was a detailed seminar covering The Fair Labor Standards Act, Employee Leaves of Absence, Employee Benefits and Tax Law, Legal Aspects of Technology in the Workplace, Retaliation Claims, and Employee Handbooks. ■ **Jeff Clark** presented the inaugural two-part series entitled "Legal and Financial Planning" at St. Mary's Hospital for over 35 participants in October and November, 2003. The seminar was sponsored by the South Central Wisconsin Chapter of the Alzheimer's Association. Jeff was also elected President of the Poynette Optimist Club. ■ **Joanne Harmon Curry** participated in the "Multicultural Student Services Home School Conference" held at UW-Stout on January 28, 2004, where she presented "Compulsory School Attendance and the Truancy Law." Joanne authored "Bullies in the Schoolyard" for Vol. VII, Ed. 2, Winter 2003 NAPSA Notes, which is the publication for the National Association of Pupil Services Administrators and also presented "Is There a Bully in Your School?" at the Wisconsin Council of Administrators of Special Services Winter Conference on February 20, 2004. ■ **Bill Fahey** presented at the Wisconsin Association of School Business Officials "Accounting Seminar" on March 18, 2004. ■ On February 18, 2004, **Chris Jenny** taught the "Legal Issues for Small Businesses" class at the Wisconsin Women's Business Initiative Corporation's Start Smart Class. ■ **Paul Johnson** taught the Estate Planning and Probate section of the UW Law School's Lawyering Skills program the week of February 23-26, 2004. Each section of the course is taught by four attorneys and is designed to give 3rd year law students a working knowledge of the actual practice of law as it pertains to everyday situations attorneys deal with. Paul also was an Attorney Coach for the Lodi High School mock trial team which just concluded its first season

of competition. The two teams from Lodi finished third and sixth out of 18 schools at the regional competition in Madison which was held on February 7, 2004. ■ **Mike Julka** will be presenting at the Wisconsin Association of School District Administrators "Small Schools Conference" on March 18 and at their "Annual Convention" on May 6, 2004. He will also be a guest lecturer at the University of Wisconsin Law School on April 20, 2004. ■ **Shana Lewis** is teaching an Employment Law course at Madison Area Technical College. Shana also presented at the 5th Annual Middle Level Leadership Conference "Center of Education for the Young Adolescent (CEYA)" in January and spoke to the Public Sector Labor Relations Law class at the University of Wisconsin Law School on March 2, 2004. ■ **Shelley Safer** authored the trademark law chapter for the 2004 Wisconsin Attorney's Desk Reference, a publication of the State Bar of Wisconsin. ■ **Frank Sutherland** recently accepted the position of president of the non-profit organization, Giving B.A.C.K., Inc. Among other charitable activities, Giving B.A.C.K., Inc. distributes backpacks filled with personal care items to homeless people. In February, Frank also served as a panel member for the discussion of legal issues affecting small businesses at a class offered to entrepreneurs by the Community Action Coalition. ■ **Rick Verstegen and Joanne Harmon Curry** authored a chapter in the 2004 Annual Survey Update for the State Bar of Wisconsin. ■ **David Weller** recently received a BV rating by Martindale-Hubbell. ■

New Faces



Lathrop & Clark is pleased to announce that **Stephen J. Roe** has become an associate in the firm. Steve focuses on patent law and software copyright law and, for the past 13 years, has advised clients on patent procurement and enforcement in electrical, software, materials, business methods, and other high-tech areas. Steve represents established technology companies in expanding their patent portfolios, as well as start-ups in securing their intellectual property. Steve was a partner at the Alexandria, Virginia, patent law boutique of Oliff & Berridge and offers his practical knowledge of patent preparation and prosecution to his clients. Steve received his J.D. from Boston University and his B.S. in Mechanical Engineering from the Massachusetts Institute of Technology. Steve is admitted to practice in Virginia, and is a registered Patent Attorney before the U.S. Patent and Trademark Office. He is also a member of the U.S. Court of Appeals for the Federal Circuit, the U.S. District Court for the Eastern District of Virginia, and the American Intellectual Property Law Association. ■

Client Profile: Madison Area Rehabilitation Centers, Inc.

By: *Shana R. Lewis*

Madison Area Rehabilitation Centers, Inc. (MARC) is a vibrant human service agency founded in 1952 by parents of young children with developmental disabilities. Some clients have been served by MARC for forty years, and some parents have volunteered for decades. Approximately, one hundred employees help MARC serve nearly three hundred adults with developmental disabilities.

The purpose of MARC is to enhance the quality of life for adults with severe developmental disabilities. MARC makes every effort to help adults identify and achieve their personal goals and dreams. Good choices lead toward paid work, social activities, independence, new friends, and a sense of accomplishment. Choices define the program and services at MARC. MARC adapts to changing needs as adults age or change their interests and choices.

Richard Berling serves as MARC's Executive Director. He has worked with people with developmental disabilities for almost a quarter of a century. Mr. Berling and the MARC Board, which is comprised of fifteen volunteer family members and professionals who serve their community without compensation, work tirelessly on behalf of MARC and its consumers.

All MARC services are based upon an Individual Support Plan (ISP). The ISP is subject to periodic review. It contains all the goals, objectives, and dreams a client wants to achieve. Individual planning can be very creative and MARC encourages adults to keep their goals high in order to achieve a lot. Work is a primary goal for many adults as it provides not only a wage, but also a sense of belonging

and an opportunity to socialize and gain self-esteem.

All MARC locations offer paid, sheltered and supported employment, vocational evaluation, job training, personal care, individual support, behavioral support, field trips, social opportunities, leisure, art and music appreciation, and community integration. Supported Employment means working at a community-based job. It is a flexible service with continuing opportunities to improve job duties, schedules, and benefits.

MARC center-based services include paid work, art and music appreciation, social activities, communication, choice making, and personal care. Bench assembly work secured from area businesses is paid on a piece rate basis. This allows earnings to be commensurate with productivity. Hence, adults can work at their own pace.

Most MARC clients receive public funding. Individual funding levels determine the amount of staff time, the critical element in services for adults with developmental disabilities, available for each adult. There are many ways to support MARC, including donations, volunteering, or attending a fund raising event, such as the MARC Mt. Horeb Spring Auction on Saturday April 24, 2004; MARC East Spring Casino Night on Saturday May 15, 2004; and MARC Golf Classic at the Meadows on Tuesday June 22, 2004. MARC is a 501(c)(3) organization; therefore donations to MARC are tax-deductible. MARC uses the donations it receives to purchase specific equipment, and to hold special events and activities that all the adults it serves can enjoy.

MARC is a true asset to the adults it serves, as well as to our community, and Lathrop & Clark LLP is proud to provide legal services to MARC. ■



Shana R. Lewis' practice focuses on general school law and labor and employment law, including employment discrimination, family and medical leave, and collective bargaining. She represents both individuals and employers in public and private sector employment law.

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