

IN THIS ISSUE

Passing Your Business to the Next Generation

2



BOCA RATON / DESTIN / FT. LAUDERDALE / MIAMI / ORLANDO / TALLAHASSEE / TAMPA / WEST PALM BEACH

Domestic Asset Protection Trust

CARL S. ROSEN

In accordance with the law of most United States' jurisdictions, a person may not create a trust for his or her own benefit and, at the same time, protect the trust's assets from creditors. A person may, however, create an offshore trust for his or her own benefit and also protect the trust's assets from creditors. Although the establishment of an offshore trust (i.e., a trust created outside of the United States) can be a very useful asset protection device, these trusts have certain drawbacks. Significantly, the trustee of an offshore trust must be a bank or trust company located in the offshore jurisdiction where the trust is created and maintained. The bank or trust company may not have financial strength and security.

A growing number of states (including

DOMESTIC continued on page 3

Appellate Courts Reviewing Family Limited Partnerships

NATHAN TOWNSEND

For many years family limited partnerships have been a flexible and useful tool in estate planning. A recent United States Tax Court case may indicate a change in the Tax Court's views that could affect the future use and management of partnerships as part of your estate plan.

The Tax Court held in the Estate of *Strangi v. Commissioner* that a client who transferred 98 percent of his wealth to a partnership solely for estate planning purposes must include the value of the underlying assets in his estate for estate tax purposes. This is a very unfavorable result for the taxpayer. The taxpayer in this case has appealed the decision. The reasoning used by the Court, has many commentators worried if it is

subsequently affirmed, as this decision could eliminate the valuation adjustments for partnership units for federal estate tax purposes. Pending the outcome of the appeal, we must consider the potential long term consequences of this current holding on your estate plan.

According to the Tax Court's current holding in *Strangi*, in order to avoid the adverse outcome of this case, the proper creation and maintenance of new partnerships will be crucial. As for existing partnerships, it may require drastic measures. In either scenario, as we have previously advised, the separate entity nature of the partnership must always be respected. This can be accomplished

FAMILY continued on back

Passing Your Business to the Next Generation

MICHAEL A. DRIBIN

One of the most difficult issues which owners of closely held businesses face when they consider their estate planning needs is the disposition of their closely-held business. Often, the business has been built up over many years of hard work and effort. Sometimes there are obvious successors to run the business, such as one or more children who have been involved with the business, a key employee or others. Other times, no such person is on the horizon. Much litigation has arisen over these issues, usually due to inadequate planning.

Other issues arise concerning the disposition of the business to children. If one child has been involved in the operation of the business, and the others have not, logic would dictate that the business be left to the involved child for continuity purposes. The other children, however, need to be made whole with respect to the financial value. This raises other questions, such as what is the value of the business and what is an appropriate amount? What follows below is a listing of the certain key issues to be considered. It is not exhaustive and the issues are often psychological and very personal. We have found, however, that business owners, by virtue of the business they own, have among the greatest needs for estate planning and business succession issues:

OBJECTIVES OF BUSINESS SUCCESSION PLANNING

- Who will run the business?
- Who are the key players?
- How will control be transferred?
- How do you maintain family harmony and ensure that decisions will be unbiased and fair?

BUSINESS OR ORGANIZATIONAL CONSIDERATIONS

- Are your cash flow and capital needs covered?
- Are you comfortable with the management structure?
- Who retains ownership?
- Is your chosen successor available?

OWNER (FOUNDER) FINANCIAL, RETIREMENT, AND PSYCHOLOGICAL NEEDS

- What are your financial options?
- Are you ready to release control and find new challenges in life?

FAMILY CONSIDERATIONS

- Is your family active in the business?
- Do you need a buy-out agreement?

POST DEATH LIQUIDITY ISSUES

- How do you reduce the cost of estate administration?
- Should you have funded buy-sell agreements?
- How can you take advantage of estate tax deferrals?

ASSEMBLY OF THE PROFESSIONAL TEAM

- How do you choose someone to prepare the legal documents?
- Who will determine the value of your business?
- Are you carrying adequate insurance?
- Where does your banker fit into the picture?

RELEVANT INFORMATION

- What are your goals?



- Have you considered the goals of your family members?
- Who could operate the business in your absence?

SALE OR RETENTION OF BUSINESS

- Have you thought of selling to an outsider?
- Is a key employee interested in buying the business?
- What about a lifetime or testamentary gift?
- Is recapitalization the answer?

Broad and Cassel, through its trusts and estates, estate planning, corporate, tax and real estate practice areas, is equipped to advise you about your estate planning needs in general and, in particular, with respect to the disposition of a business.

Michael A. Dribin, Managing Partner in the Miami office of Broad and Cassel, is the Chairperson of the Firm's Estate Planning and Trusts Practice Group. He was admitted to The Florida and Illinois Bars in 1975. He can be reached by calling (305) 373-9400 or by email at mdribin@broadandcassel.com. BC

If you have any questions, contact any of the following attorneys or your attorney at Broad and Cassel:

BOCA RATON

Carl S. Rosen, P.A.

Corporate Center at Boca Raton
7777 Glades Road, Suite 300
Boca Raton, FL 33434
Phone: (561) 483-7000
Fax: (561) 483-7321

FT. LAUDERDALE

Douglas Kniskern

One Financial Plaza
Suite 2700
Ft. Lauderdale, FL 33394
Phone: (954) 764-7060
Fax: (954) 761-8135

MIAMI

Michael A. Dribin, P.A.

Rose Parish-Ramon

Miami Center
201 South Biscayne Blvd.,
Suite 3000
Miami, FL 33131
Phone: (305) 373-9400
Fax: (305) 373-9443

WEST PALM BEACH

Patricia Lebow, P.A.

One North Clematis, Suite 500
West Palm Beach, FL 33401
Phone: (561) 832-3300
Fax: (561) 655-1109

ORLANDO

Anthony W. Palma, P.A.

Scott G. Miller, P.A.

Stacey Prince

Nathan Townsend

Bank of America Center
390 North Orange Ave., Suite
1100
Orlando, FL 32801
Phone: (407) 839-4200
Fax: (407) 425-8377



www.broadandcassel.com

Dribin becomes Managing Partner in Miami

Michael A. Dribin, Chairman of the Firm's Estate Planning and Trusts practice group, has accepted the position of Managing Partner of the Miami office and now sits on the Firm's Executive Committee. He is responsible for a growing full-service office with nearly 20 attorneys supported by 30 paralegals and staff. Located in the heart of Miami, one of the world's leading centers for international trade and finance, the office is ideally situated to meet the wide range of personal and business needs of its diverse clientele. To learn more, visit us at www.broadandcassel.com.

DOMESTIC *continued from page 1*

Alaska, Delaware and Nevada) have recently passed legislation allowing a person to create a United States trust for his or her own benefit and which is also protected from creditors (i.e., a "Domestic Asset Protection Trust" or "DAPT). This special type of trust must contain the following general criteria: (1) the trustee of the trust must be a resident or trust company in a state which authorizes Domestic Asset Protection Trusts, (2) the trustee must have custody of the trust assets, (3) the trust must be governed by the laws of a state which authorizes Domestic Asset Protection Trusts, (4) the trust must contain a clause which prohibits the beneficiary from transferring his or her interest in the trust, (5) the trust must be irrevocable, and (6) the trust must prohibit the beneficiary from controlling the trust assets. Accordingly, U.S. citizens no longer have to transfer assets offshore in order to protect assets from creditors. DAPTs also have estate planning benefits. For example, a DAPT can be structured in such a manner that assets transferred to the trust will be excluded from the transferor's gross estate for federal estate tax purposes.

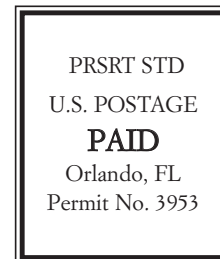
While DAPTs combine the advantages of both asset protection and estate tax minimization, some uncertainty exists because no Court presently has ruled on a case regarding a DAPT. The Internal Revenue Service, however, has audited several estates in which the decedent created a DAPT. In such audits, the Internal Revenue Service resolved all tax issues relating to the DAPT in favor of the taxpayer, thus providing some optimism regarding the DAPT's validity for estate tax purposes.

*A member of the Firm's Estate Planning and Trusts Practice Group, Carl S. Rosen is a Partner in the Boca Raton office of Broad and Cassel. He was admitted to The Florida Bar in 1995. He can be reached by calling (561) 483-7000 or by email at crozen@broadandcassel.com. **BC***



ESTABLISHED IN 1946

**Estate Planning and
Trusts Department**
Bank of America Center
390 North Orange Avenue
Suite 1100
Orlando, FL 32801



Broad and Cassel attorneys have been practicing in the area of Estate Planning and Trusts for more than 30 years.

ADVERTISEMENT

The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

FAMILY *continued from page 1*

by not using the partnership as your personal bank. Therefore, not all assets should be placed into the partnership. Because the Tax Court ruled that Mr. Strangi's partnership was treated as his personal account, the partnership agreement should not require distributions to the partners and any distributions that are permitted by the agreement should not occur frequently, if at all.

The Tax Court's opinion has also led to concerns that a taxpayer's ability to exercise; alone or with another, control over the beneficial enjoyment of assets in a partnership may cause inclusion at death. The ability to make decisions on distributions from or liquidations of the partnership may be sufficient elements of control to cause inclusion. Gifting all interests in the partnership prior to death would accomplish this goal. But, be wary, if the IRS prevails upon Strangi in appeal the Internal Revenue Code provides for a

three-year look back period for such transfers. Several commentators believe that transferring all partnership to one's spouse or through the sale of all partnership units to a grantor trust may allow owners to dispose of such interests prior to death without inclusion in the Estate. This requirement, imposed by the current Strangi decision, that taxpayers must divorce themselves of control of the partnership prior to death, in order to insure the favorable estate tax valuation adjustments, has been the most significant change in the Tax Court's approach to family limited partnerships.

Immediately prior to the release of this newsletter, the case of *Kimbell v. United States* was decided and provided taxpayers with a favorable decision in this area of partnerships. In fact, it has been rumored that the Tax Court in the Strangi appeal has been awaiting the outcome of the Kimbell case before making its final ruling. The Kimbell court found that the creation of the family limited partnership

was a bona fide transfer of assets to the partnership in return for full and adequate consideration represented by the pro-rata interests in the partnership entity. In addition, the court found that family members should not be subjected to additional scrutiny by the IRS in the determination of whether the transfer meets the full and adequate consideration requirement test.

Currently, these court opinions must be considered by our clients who have or are considering partnerships in order to obtain estate tax valuation adjustments. Please note, these decisions do not affect the usefulness of the partnership for asset protection planning.

*If you would like more information about this matter, contact Nathan L. Townsend, an Associate and member of the Firm's Estate Planning and Trusts Practice Group in Orlando. He was admitted to The Florida Bar in 1996. He can be reached by calling (407) 839-4200 or by email at ntownsend@broadandcassel.com. **BC***