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Law Notes
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TAX LAW CHANGES PROVIDE REASONS TO REEVALUATE EXISTING ESTATE PLANS

By **Patrice M. Ticknor and Harvey B. Wallace II**

Estate plans are generally revocable and may be changed as circumstances change prior to the testator's death. However, if the testator becomes incapacitated, plans generally become irrevocable and thus unchangeable. For that reason, a proper estate plan is designed to provide for unexpected contingencies such as an unexpected order of deaths, a change in the testator's fortunes, a family member's divorce or marriage, the death of an intended trustee or executor, or a change in the tax laws.

For the decade preceding the enactment of the American Taxpayer Relief Act of 2012 ("ATRA") on January 2, 2013, the unprecedented uncertainty regarding federal estate tax law was a substantial variable that dictated the structure of most estate plans. In particular, the continually shifting amount of the per person exemption from the estate tax and the generation-skipping transfer ("GST") tax made it impossible to predict the amount of those exemptions at the time of the testator's death.

In the case of a married couple, the estate tax exemption amount of the first spouse to die could not be pooled with the surviving spouse's exemption. Accordingly, in order to preserve the full amount of each spouse's exemption:

1. The ownership of the couple's assets was typically divided between the spouses so that, regardless of the order of death, each spouse would take advantage of as much of his or her exemption as possible,

2. Assets equal to the exemption amount of the first spouse to die were allocated to a separate trust, known as a "credit shelter", "nonmarital", or "residuary" trust – designed to benefit the surviving spouse while not being includable in his or her taxable estate, and

3. Any excess of the assets of the first spouse to die over the exemption amount was typically directed to a "marital trust" or paid outright to the surviving spouse.

ATRA made two significant changes to the estate and GST tax laws that, depending on a couple's circumstances and the extent of their assets, may make the credit shelter/marital trust structure unnecessary in whole or in part.

First, ATRA fixed the federal estate and GST tax per person exemption at $5 million (with a cost of living adjustment for 2014 that raised the exemption to $5.34 million per person). For the decade preceding ATRA, the prior law provided for an exemption level initially set at $1 million which increased in annual increments to $5 million in 2010. However, the prior law also provided that, at the end of 2010, the law would "sunset." In effect, the tax law would operate as if the prior law had never been enacted and the exemption amount would revert to $1 million. Legislation in 2010 delayed this "sunset" for two years and then in 2013 ATRA became law.

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As a result, while the exemption level substantially exceeded $1 million for most of the last decade, estate plans still needed to be prepared for a possible exemption of only $1 million. Any married couple with more than $1 million of assets were wise to adopt a credit shelter/marital trust estate plan structure to assure that the excess of their assets over $1 million would not be subject to the 35% (now 40%) estate or GST tax.

Second, for the decade preceding ATRA, if the first of a married couple to die did not have assets equal to the exemption amount, there was no way to preserve that spouse's unused excess exemption and it was lost. The concept of making a spouse's unused estate tax exemption amount "portable" was introduced in 2008 but was of little use because it applied for only 2012 and 2013 (and would apply only if both spouses died during that two year period). ATRA has now made the portability provisions permanent so that a couple may, in general, pool their per person estate tax exemptions regardless of which spouse owns what property and regardless of the order of their deaths.

However, for many couples, the credit shelter/marital trust estate plan remains the best choice. The creation of the two trusts on the first spouse's death continues to preserve the first spouse to die's exemption amount and also provides creditor protections, management advantages, and assurance that the agreed upon plan of disposition will be carried out. For other couples with combined assets below the $10.68 million pooled tax exemption level (or conservatively, below the combined $7 million level proposed by President Obama's budget), ATRA makes simpler alternatives to the credit shelter/marital trust structure viable.

For example, a couple with assets under $5 million might revoke or amend their existing two trust plans (alternatively, $3.5 million might be a safer "threshold" to take into account that the exemption might be reduced to $3.5 million). Each spouse's new plan would provide that his or her trust assets would go to the survivor's revocable trust instead of to two continuing trusts as under the previous plan. In that way, the first to die spouse's assets would be available to the surviving spouse as part of the surviving spouse's own trust. Then, on the survivor's death, both spouse's assets would be distributed under the provisions of the survivor's trust agreement – either outright to beneficiaries or in a continuing trust or trusts for the beneficiaries. This is much less complicated and less costly than dealing with three trusts under the previous plan – that is, the marital and residuary trusts created by the first to die spouse and the survivor's trust.

Obviously, this simplified plan would be appropriate only if both spouses agree on who the ultimate beneficiaries should be and on how they should be treated or if the spouses are willing to leave the identity of the ultimate beneficiaries up to the survivor who might make changes. For example, the surviving spouse of a long-married couple whose children all are the children of both spouses is not likely to later disinherit those children in favor of a new spouse or other beneficiary.

For couples whose combined assets are greater than the $5 million per person exemption but are less than the combined $10 million exemption, simplification must take into account the couple's long term dispositive plan for descendants. This is because the GST tax exemption is not portable even though it is equal to the estate tax exemption. If continuing trusts are established for a couple's children at the time the surviving spouse dies, those assets may be subject, in part, to a 40% GST tax upon a child's future death unless the first to die spouse's GST exemption is preserved by a credit shelter trust.

Even if the credit shelter/marital trust estate plan structure remains best, portability may allow simplification. Portability allows certain assets that would have had to be paid to the credit shelter trust in order to preserve the first to die spouse's estate tax exemption to be instead paid outright to the surviving spouse or to pass by joint tenancy to the surviving spouse (or to the surviving spouse's revocable trust) without loss of the exemption. For example, payment of IRA and 401(k) plan benefits to a trust (rather than the surviving spouse) often accelerates the rate at which required distributions must be made and increases the income tax on those distributions. In addition, if held by a credit shelter trust, the family home will lose its eligibility for the homestead exemption, increasing property taxes.

Aside from minimizing complexity or avoiding or reducing taxes, there are many other good reasons to reevaluate an estate plan. Changes in personal, family, and business circumstances may be even more important considerations calling for adjustments to an existing estate plan. Birth, death, illness, disability, marriage, or divorce in the family should trigger a reevaluation of whether an existing estate plan will accomplish an individual's current personal and family goals. A business acquisition, business sale, sale of substantial stock holdings, or a planned gift to charity may also call for estate planning changes.

USE OF CRIMINAL BACKGROUND CHECKS

THE EEOC'S "GUIDANCE" AND ATTEMPTS TO REGULATE RESULT IN A COURT'S DECISION THAT THE EEOC STATISTICS ARE "SCIENTIFIC DISHONESTY"

By **Sheryl A. Laughren**

A federal judge cast doubt on government efforts to restrict employers' use of criminal background checks when it dismissed a lawsuit by the Equal Employment Opportunity Commission ("EEOC") against a Dallas event-marketing company. The case, *EEOC v. Freeman*, 961 F Supp 2d 783 (D MD, 2013) was filed in 2009 and was one of the earlier salvos by the EEOC in its attempts to regulate employers' use of criminal background checks.

The Court found that the data relied upon by the EEOC was riddled with "errors and analytical fallacies" that made the EEOC's conclusion that criminal background checks resulted in discriminatory exclusion of African-Americans and Hispanics from jobs "completely unreliable." The Court found that the statistician used by the EEOC "cherry-picked" data and that the EEOC's litigation was "a theory in search of facts to support it."

Employers should continue to tread carefully in this arena, however, because the *Freeman* decision was issued by the United States District Court in Maryland, and it is not controlling as to any other pending action.

Since 2009, but more emphatically since 2012, the EEOC has been taking a hardline in enforcing its position (and its 2012 "Guidance") on use of criminal background screening processes and policies. Whether the decision in *Freeman* will cause the EEOC to curb its assault on policies of this nature is, at best, an unknown, and other cases in which the EEOC is challenging background check policies and practices remain pending before other courts.

In June 2013, the EEOC brought actions against BMW and Dollar General, a clear message to all employers that it is very serious about its guidelines and intends to enforce them.

The actions against BMW and Dollar General were the first major background-checking cases brought by the EEOC since it issued a revised Guidance on the subject in April of 2012. The thrust of the Guidance is that employers cannot fire employees or deny hire to applicants because of criminal arrests or convictions on an across the board basis (that is, to all applicants and/or classifications). Instead, employers must limit use of background checks to jobs where the candidate's criminal or financial history is clearly relevant to the job. Employers must also take into account the nature and seriousness of the offense and the time elapsed since it occurred.

Under the Guidance, the legality of the employer's "criminal conduct exclusion" is judged on the basis of whether it is job related and consistent with business necessity. This is a difficult level of proof, and the burden is on the employer to establish both factors.

Like the action against *Freeman*, the actions against BMW and Dollar General were brought under Title VII of the Civil Rights Act of 1964 and allege the policies have a "disparate impact" (disproportionately screened-out) African-Americans from jobs. In the complaints, the EEOC alleges that the employers used criminal background checks across the board, and that the background checks were not job related and consistent with business necessity. Additionally, the EEOC complained that the policies did not provide for individual assessment for those applicants who were excluded to determine if the reason for the disqualification was job-related and consistent with business necessity.

There is no doubt of the EEOC's commitment to making an example of employers who it decides have, even innocently, violated the law. And, while anti-discrimination advocates are applauding EEOC activism, for those managing their organizations' hiring policies and attempting to protect their consumers, clients, suppliers, and employees, the proper role of background checks can be rife with confusion and potential litigation.

As stated by the Court in *Freeman* "any rational employer in the United States should pause to consider the implications of actions [against use of criminal background checks] … the EEOC has placed many employers in the 'Hobson's choice' of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers."

In light of the lingering specter of EEOC attack, the following steps should be taken by employers to minimize their exposure to claims of discrimination arising out of criminal background checks:

1. Examine your current policies on the background screening of employees and applicants for hire or promotion. Revise the policy, if necessary, to comply with the EEOC's guidelines.

2. Do not stop doing background checks. Avoid negligent hiring by screening potential new hires and current employees who are in positions that require them.

3. Scrutinize the job descriptions and legal mandates (i.e. licensing requirements, etc.) for each position.

4. For each job for which you will perform criminal background checks, assure that you can clearly enunciate job-relatedness for the criminal conduct exclusion.

5. Do not use a "blanket" criminal conduct exclusion unless you fall under strict licensing guidelines.

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HARP 2.0 MORTGAGE REFINANCE LOAN PROGRAM: MORE BORROWERS QUALIFY FOR REFINANCING

By **Patrice M. Ticknor**

The Home Affordable Refinancing Program ("HARP"), is a federal government program intended to help underwater, or near underwater, homeowners refinance their loans at a lower monthly payment. Originally announced in March 2009, the initial version of HARP had requirements that made many homeowners ineligible for the program. For example, only those homeowners with a loan-to-value ("LTV") ratio of 80% to 105% could qualify for refinancing.

Under the revamped HARP program (known as "HARP 2.0"), borrowers may now be able to refinance no matter how much their home has fallen in value. In many cases, the appraisal and underwriting process have been eliminated and certain fees have been modified or canceled. In addition, borrowers will not be required to provide extensive income documentation. Many borrowers with second mortgages will more easily be approved because the largest lenders have agreed to automatically re-subordinate their second mortgages to the new refinanced mortgage. These modifications make the refinancing process less complicated and less expensive.

Under HARP 2.0, borrowers must meet the following requirements:

1. The mortgage must be owned or guaranteed by Fannie Mae or Freddie Mac,

2. The mortgage must have been sold to Fannie Mae or Freddie Mac on or before May 31, 2009,

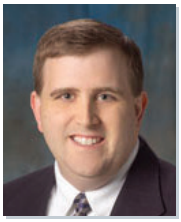
3. The mortgage cannot have been previously refinanced under HARP – unless it was a Fannie Mae loan from March through May 2009,

4. The current LTV ratio must be greater than 80% – that is, the borrower's equity in the home can be no more than 20%, and

5. The borrower must be current on the mortgage at the time of the HARP refinance with no late payment in the previous 6 months and no more than one late payment in the previous 12 months.

While there is no longer a maximum LTV for a fixed rate mortgage, if the new loan is an adjustable rate mortgage, the LTV cannot exceed 105%. The expiration date for HARP 2.0 is December 31, 2015.

To determine whether your mortgage is owned or guaranteed by Fannie Mae or Freddie Mac, and if so, the date it was acquired, visit their websites at www.knowyouroptions.com/loanlookup for Fannie Mae and www.freddiemac.com for Freddie Mac. If you believe you meet all the HARP 2.0 requirements, contact your existing lender or any other mortgage lender offering HARP refinancing. The program is set to expire on December 31, 2015.



NEW LAW EXEMPTS CERTAIN PROPERTY TRANSFERS BETWEEN PARENTS AND CHILDREN FROM TAXABLE VALUE UNCAPPING

By **Randolph T. Barker**

When residential real property in Michigan is transferred to a new owner (including transfers to family members), the local assessor generally "uncaps" taxable value to reflect the market value (or true cash value) of the property at the time of the transfer. This often results in an increase in taxable value and property taxes beginning in the year following the transfer.

A recent amendment to the General Property Tax Act created a new exemption from taxable value uncapping for certain transfers between parents and their children. Beginning December 31, 2013, under new MCL 211.27a(7)(s), transfers of "residential real property" to a person who is related to the transferor by blood or affinity in the first degree will not be "transfers of ownership" and will not "uncap" the taxable value of the property. Aside from the relationship requirement, the new law also requires that the use of the property does not change following the transfer. In the case of a parent who owns a cottage and wants to transfer it to his or her children, for example, satisfying the requirements of the new law would allow the transfer to occur without an increase in the taxable value of the property and a corresponding increase in property taxes.

Although the new exemption provides a useful estate planning tool based upon individual circumstances, it notably fails to include typical transfers to a child from a parent's revocable trust or from a decedent's estate. In other words, since neither a trust nor an estate could be related to the child "by blood or affinity," new subsection (7)(s) would not apply.

Absent a change in the law, property held in a revocable trust would require two deeds (one from a trust to the parent and then a second from the parent to the child) to take advantage of the exemption. Given the rationale behind the exemption, proposed amendments to include transfers from revocable trusts and decedent's estates have a reasonable chance of passing the legislature.

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6. Consider each background check "hit" you get for its relevance to the job. For each individual who is initially disqualified due to the criminal conduct exclusion, perform an individual assessment to determine if the reason for the disqualification is job-related and consistent with business necessity. Consider each applicant's history with assessment of:

a. The facts or circumstances surrounding the offense or conduct,

b. The number of offenses for which the individual was convicted,

c. The applicant's current level of maturity vs. likely level of maturity at the time of the crime,

d. Post-conviction job-performance with/without incidents of criminal conduct,

e. Rehabilitation, education, and training since conviction,

f. Employment or character references and any other information regarding fitness for the particular position, and

g. Whether the individual is bonded under a federal, state, or local bonding program.

Taking preventative measures helps to protect employers from the expense and distraction of employment litigation. Feel free to contact Sheryl Laughren, or any other member of Berry Moorman's Labor & Employment Law Group, with questions or for assistance in review of your policies.

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FIRM NEWS

Harvey B. Wallace II was selected for inclusion in the 2014 edition of The Best Lawyers in America in the practice areas of Trusts and Estates and Non-Profit/Charities Law. Harvey has been selected for inclusion for over 20 years.

Three Berry Moorman attorneys were recognized in Michigan Super Lawyers 2013 as outstanding attorneys in their practice areas. **Donald F. Carney, Jr.** was selected for his proficiency in estate & trust litigation. **Sheryl A. Laughren** was listed for her expertise in employment & labor law. **Thomas M. Sullivan** was listed for his experience in business/corporate law. **Randolph T. Barker** was recognized as a "Rising Star" for proficiency in employment litigation defense.

Two Berry Moorman attorneys were named as Top Lawyers 2013 by *dbusiness* magazine. **Harvey B. Wallace II** for Trusts and Estates and **John J. Schrot, Jr.** for Family Law. **Randolph M. Wright** was also named a Top Lawyer in Metro Detroit for 2014 by *dbusiness* for International Trade Law.

John J. Schrot, Jr. received the Shamrock Bar Association's Distinguished Lawyer Award for 2013. The Shamrock Bar Association consists of lawyers and judges affiliated with Detroit Catholic Central High School.

John also received this year's prestigious Top 10 Attorney Award from the National Academy of Family Law Attorneys ("NAFLA"), recognizing him as one of the top 10 family law attorneys in Michigan. NAFLA was established with the primary goal of discovering the top 10 family law attorneys in each state and recognizing them for their hard work, knowledge, skill, experience, expertise, and success in their practice of family law. After the initial nominations, fifty of the nominees are chosen by the Selection Committee to advance to the final selection stage. The Board of Governors then selects the final 10 recipients.

John's legal career has predominantly focused on family law, business law, and other complex civil litigation matters. He also has extensive experience in contract negotiations, commercial transactions, employment law, arbitration, and other intricate personal and contractual relationships. John has consistently achieved an "AV Preeminent" rating, the highest peer rating by Martindale Hubbell, a nationally recognized directory of attorneys, for his legal ability and ethical standards.

On March 24, 2014 **David Foy** made a presentation titled "Anatomy of an Employment Contract" to Detroit area ophthalmology residents from the Beaumont Health System, the Henry Ford Health System, and the Kresge Eye Institute.

On April 19, 2013, Dave and his wife, Mary, along with Tim and Ann Kay, hosted a fourth tailgate fundraiser in Grosse Pointe for the University of Michigan C.S. Mott Children's Hospital. The event raised over $40,000.00 to help advance the efforts of Mott including support of its world-class Pediatric Congenital Heart Center, with specific emphasis on cardiac research and pediatric heart transplants.

On September 12, 2013, the firm's labor and employment group participated in the American Society of Employers' annual Employment Law Workshop at Schoolcraft College. **Randolph T. Barker** led one of the break-out sessions, providing valuable information on factors used by the government in determining whether a worker is an employee or independent contractor and why correct classification is particularly important due to the impending implementation of the Affordable Care Act. Randy also participated in the" Ask the Panel" luncheon session that was sponsored by Berry Moorman and moderated by **David Foy**.

Randolph M. Wright was elected to the Board of Directors of Vietnam Veterans of America Detroit Chapter # 9 on January 25, 2014. Randy is a former President of the Chapter and a national board member of the Vietnam Veterans of America, Washington, DC.

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