INSIDE THE LAW

Fall 2018

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HIGHER ESTATE AND GIFT EXEMPTION CAN REDUCE ESTATE TAXES

By Dani R. Ruran, Esq.
508.459.8048 | druran@fletchertilton.com

The new Tax Cuts and Jobs Act (The Act) signed into law last December makes changes to the estate and gift tax exemptions that provide important opportunities to reduce estate taxes.

EXEMPTION DOUBLES FOR ESTATES AND GIFTS

The Act increases the federal combined gift and estate tax exemption, and the federal generation-skipping transfer GST tax exemption, from the 2017 limit of $5.49 million to approximately $11.2 million in 2018. For married couples, the new exemption increases from $10.98 million to approximately $22.4 million. These exemption amounts will be subject to annual inflation adjustments until 2025. At that time, the exemption is scheduled to revert to the 2017 levels—with an inflation adjustment. On amounts above the exemptions, the gift, estate, and GST tax rates will remain at 40%.

The gift tax "annual exclusion" is the amount a person may gift each year during his or her lifetime to any individual, or to a qualifying trust for the benefit of one or more individuals, without using up any of his or her combined federal gift and estate tax exemption. Under an inflation adjustment permitted by previous law, the federal gift tax annual exclusion amount increases from $14,000 in 2017 to $15,000 in 2018. This means, for example, a married couple may gift up to $30,000 each year to each child, or to a qualifying trust for each child, as annual exclusion gifts. Annual exclusion gifting helps reduce both federal and state estate taxes.

LIFETIME GIFTING CAN REDUCE ESTATE TAXES

The very large increases in the federal combined gift/estate exemption and the federal GST exemption present an important estate planning opportunity for individuals whose estates are likely to be above $11.2 million, or $22.4 million for married couples. For these individuals or couples, lifetime gifting to children and/or grandchildren even in excess of annual exclusion amounts will probably reduce federal estate taxes and possibly GST taxes. This is because appreciation in the gifted assets between the date of the gift and one's date of death is not included in the calculation of federal estate tax. There is no federal gift tax on gifted amounts as long as the aggregate amount of the gifts does not exceed the combined gift/estate tax exemption of $11.2 million, or $22.4 million for married couples.

Even individuals whose estates are under the new $11.2 million/$22.4 million exemptions but over $5.49 million—or $10.98 million for married couples—may wish to engage in lifetime gifting to reduce the federal estate tax, in case the exemption does revert to the 2017 level, as scheduled in 2025.

Massachusetts (MA) residents whose estates may exceed $1 million—or $2 million for married couples who have established "credit shelter trusts" as part of their estate plans—may be able to reduce or eliminate the MA estate tax by engaging in lifetime gifting. There is no MA gift tax, so any amounts may be gifted during one's lifetime without incurring an MA gift tax. At death, the MA estate tax is calculated based on the value of the "adjusted taxable estate," which does not include the amount of lifetime gifts. Estates are taxed in MA only if they exceed the $1 million "filing threshold." Lifetime gifts that exceed "annual exclusion" amounts (currently $15,000) are included in the calculation of this $1 million threshold. So if the sum of such lifetime gifts and the estate assets together exceeds $1 million, there will be estate tax. The estate tax will, however, be calculated on the value of the estate assets only.

Even if individuals or couples want to limit lifetime gifts to the annual exclusion amounts—up to $15,000 per year per donee, or up to $30,000 per year per donee for gifts made jointly by married couples—such gifts should be considered as a way of reducing both MA and federal estate taxes.

REVIEW WILL AND TRUST FUNDING FORMULAS

People should review their existing wills and trusts to determine whether any gifts to be made after death under those documents are still appropriate, given the increased federal estate tax exemption. This review should include formulas used to create one or more subtrusts. For example, a will or trust may provide for the creation of a trust after death for the benefit of the deceased's children. These trusts are often set up to be funded with the federal estate tax exemption in effect at the time of death, with the balance of the assets passing to the deceased's spouse, or to a trust for the spouse's benefit. Now that the federal estate tax exemption is so large, such a formula may result in nothing being left for the surviving spouse.

We suggest contacting a qualified trust and estate attorney to discuss the new combined federal gift and estate tax exemption, including the new GST exemption. Taxpayers may wish to explore whether it makes sense in their own situation to make lifetime gifts to children, grandchildren, and/or other beneficiaries—either directly or to a qualifying trust for their benefit. Given these changes to the tax law, it also makes sense to have an attorney review current will or trust documents to ascertain whether the existing gift or trust funding formula needs revision in light of the increased gift/estate and GST exemptions.

On the face of it, the new higher exemptions are good news for people with sizable estates. But it is important to review existing documents to make sure the new laws do not create unintended consequences. **FT**

FLETCHER TILTON BUILDING BLOCKS

CONTRACTOR MUST BE *PERFECT* WHEN RECORDING MECHANIC'S LIEN

By Adam Chin Ponte, Esq.
617.336.2280 | aponte@fletchertilton.com

In our December 2016 article on Massachusetts mechanic's liens, we discussed the general requirements, process, and time constraints regarding the recording of mechanic's liens on private construction projects. Now, only weeks following a Massachusetts Superior Court decision that resulted in the discharge of a contractor's mechanic's lien on a residential project, the purpose of this article is to caution contractors, subcontractors, and vendors against recording liens haphazardly or, even worse, without advice of legal counsel. Indeed, contractors should assume that the lien must be *perfect* if they ever expect to recover unpaid monies pursuant to a recorded mechanic's lien.

In June 2018, a Superior Court judge ruled that a residential construction project owner was entitled to summary discharge of a contractor's mechanic's lien. Why? Because the contractor that recorded the notice of contract inserted the wrong amount for the contract value, and this seemingly minor defect was fatal in light of the defendants' denial that a signed contract ever existed. In *Atlas Contracting, Inc. v. Saleh et al.,* Middlesex Sup. Ct. (June 11, 2018), Judge Christopher K. Barry-Smith found that—because the plaintiff contractor's recorded lien documents asserted a contract value of $240,000, when the purportedly signed contract actually was for $227,000, and because the defendant homeowners denied having ever signed any contract—the mechanic's lien must be summarily discharged. This recent ruling from the bench serves to further the courts' interpretation and enforcement of the mechanic's lien statute, M.G.L. c. 254, §§ 1 et seq., requiring *absolute* strict compliance. *See Nat'l Lumber Co. v. United Cas. and Sur. Ins. Co., Inc.,* 440 Mass. 723, 726 (2004) ("A mechanic's lien is a statutory creation … and can be enforced **only** by strict compliance with the statute") (emphasis added); *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 644 (2002) (holding the mechanic's lien statute "is strictly construed **against the party claiming the lien**") (emphasis added).

When given the opportunity to grant leniency to contractors who perhaps recorded lien documents with seemingly trivial errors, Massachusetts courts have consistently been *unforgiving* and thus required a standard of near *perfection* relative to the contractors' recorded documents. In the above *Atlas Contracting* case, the contractor may have avoided summary discharge of its recorded notice of contract had it carefully considered the court's high standard held against plaintiffs seeking to enforce mechanic's liens. From an initial risk management perspective, perhaps the contractor could have better organized its documentation of the project, including secure storage of the signed contract. This could have prevented the slapdash preparation and recording of the notice of contract, which ultimately contained incorrect contract values with a net difference of approximately $13,000. This shortcoming, combined with the defendant homeowners' assertion that they never signed any contract, compelled the judge to discharge the lien, pursuant to the strict standards consistently announced by Massachusetts courts.

The above-cited cases, including the June 2018 *Atlas Contracting* case, should serve as an obvious reminder to contractors, subcontractors, and vendors that they must carefully maintain project files, require signed contracts before commencing work, and seek advice of legal counsel before recording lien documents against a property. By erring on the side of caution, and recognizing that the courts will require lien documents to be *perfect*, contractors can avoid the demoralizing blow that the plaintiff contractor was dealt in *Atlas Contracting*. A quick consultation with an attorney before preparing or recording lien documents might be the difference between getting paid and going broke. **FT**

Indeed, contractors should assume that the lien must be perfect if they ever expect to recover unpaid monies pursuant to a recorded mechanic's lien.

AN EMPLOYER'S PRIMER TO MITIGATING RISKS WHEN ENTERING INTO CONTRACTS

By Scott E. Regan, Esq.
508.459.8220 | sregan@fletchertilton.com

All employers will likely enter into at least one written contract with a third party, whether for services, equipment, and/or agreements with their own employees (e.g., confidentiality agreements, non-competition agreements, and/or non-solicitation agreements). Though verbal contracts are enforceable in many contexts, a written agreement allows the parties to create or expand their relationships, to detail the parties' obligations under the contract, and to reduce their agreement to an enforceable legal document.

Whether drafting their own agreements or analyzing agreements proffered by third parties, employers should carefully review every term of the agreement to ensure it sufficiently memorializes the parties' agreement and does not create any unnecessary risks. All too often, parties intending to execute a contract may have had a preexisting business relationship without issues or are otherwise optimistic that the relationship will continue without trouble. Based on a potentially incorrect sense of security, an employer may be inclined to "rubber stamp" an agreement without the requisite analysis and negotiation. Unfortunately, an employer that is later forced to enforce a breach of the agreement may realize that the agreement did not properly reflect the employer's understanding of the parties' relationship and, even worse, may contain terms that are blatantly unfavorable to the employer.

Under Massachusetts law, except in the case of certain wrongful acts that are beyond the scope of this article, a party that executes a written contract is presumed to know the contents of the agreement and to have agreed to be bound by the same. This is especially true concerning a contract between sophisticated businesses. Thus, employers should analyze the proposed contract to identify any potential issues and attempt to resolve such issues before signing an agreement.

Though employers should consider consulting with an experienced attorney for advice about a specific contract or business relationship, the following are some contractual clauses that should be carefully evaluated if they are spotted in a contract:

1. Indemnification Clauses: Generally, such clauses require a party to release another party from liability and/or to reimburse another party if it is held liable for breaching the contract. Indemnification clauses may result in an unwanted allocation of risk and significant expense. Accordingly, parties may want to consider limiting (e.g., by agreeing to hold another party harmless only for certain actions) and/or eliminating such provisions.
2. Statute of Limitations Reduction Clause: A statute of limitations refers to the time frame in which a lawsuit/administrative action can be filed concerning breach of contract and/or other claims. In Massachusetts, an aggrieved party generally has six years to bring an action to enforce a breach of contract. Under certain circumstances, however, parties can reduce such limitations periods by way of contract. Consequently, employers should make sure that they are comfortable with any clause purporting to reduce any statute of limitations period.
3. Arbitration Clause: An arbitration clause is a dispute-resolution clause that generally requires any legal disputes arising out of and/or relating to the contract to be resolved by binding arbitration rather than litigation. Parties often believe that arbitration is a faster, cheaper way to solve contract-related disputes, and courts routinely uphold arbitration clauses. As there are potential benefits and pitfalls to both arbitration and litigation, parties should carefully examine such clauses.
4. Notice and Cure Period: These clauses often allow the alleged breaching party to cure a purported violation before the non-breaching party proceeds to arbitration and/or litigation. Such clauses can be an effective method to identify and resolve disputes before initiating costly enforcement actions.
5. Attorneys' Fees Clause: Generally, absent an agreement or statutory authority, parties are responsible for paying for their own attorneys' fees. These provisions, however, often allow the non-breaching party to recover its reasonable attorneys' fees and costs from the breaching party. Given the considerable expense often associated with litigation, these clauses should be carefully negotiated.

Though verbal contracts are enforceable in many contexts, a written agreement allows the parties to create or expand their relationships ...

Cont'd from pg. 6 - Mitigating Risks When Entering Into a Contract

6. Liquidated Damages Clause: Generally, liquidated damages set forth a predetermined amount that will be owed if a party fails to perform under the contract. These damages should be carefully examined, as they are often subject to judicial scrutiny.

Provided that a contract does not violate any applicable laws, and includes the minimum terms necessary to render it enforceable, parties generally have wide latitude to draft contracts as they see fit. Though there is likely no way for employers to eliminate every risk when entering into a contract, all employers benefit from understanding that they will likely be held to the agreements they execute and should thus carefully review any agreement before signing. **FT**

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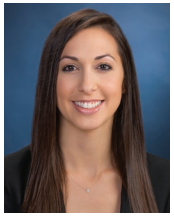
THE IMPORTANCE OF BENEFICIARY DESIGNATIONS

By Lauren E. Miller, Esq.

508.459.8044 | lmiller@fletchertilton.com



Beneficiary designations are a crucial—and often overlooked—part of estate planning. A beneficiary designation is a way for you to designate how an asset will be distributed upon your death. Two common types of assets that allow you to designate beneficiaries are life insurance and retirement accounts, such as an IRA or a 401(k).

You may have completed a beneficiary designation form at the time you purchased a life insurance policy or opened a retirement account. But as time passes and circumstances change, failure to update your beneficiary designations to reflect these life changes can have unintended consequences. To ensure that your assets are distributed pursuant to your current wishes, you should review your beneficiary designations every three to five years, or when you experience any major life event, such as marriage, divorce, birth, or death.

If you never named a beneficiary—or if the company lost track of your beneficiary designation form (which, unfortunately, can happen)—that asset will likely pass to your estate upon your death. At that point, the only way for the beneficiary to access that asset is through the cumbersome probate process. Particularly in the case of retirement funds, this could result in negative tax consequences that otherwise could have been avoided. For this reason, you should keep copies of your current beneficiary designations with your other important documents. Whether you have a robust estate plan or no estate plan, reviewing your beneficiary designations regularly will ensure that your assets are distributed to your intended recipients upon your death. **FT**

FirmNews

JOIN US IN CONGRATULATING OUR NEW OFFICERS

In recognition of their accomplishments, expertise, commitment, and community involvement, Fletcher Tilton is proud to announce that the following attorneys have been elected as officers of the firm.

Brian J. Coughlin | Immigration | bcoughlin@fletchertilton.com
Brian Coughlin focuses his practice on U.S. immigration and global workforce mobility. He counsels established and emerging corporate clients on immigration issues related to employment authorization, company policy drafting, employee training, and general enforcement and regulatory compliance issues. He also advises on immigration due diligence and risk management in connection with corporate mergers, acquisitions, restructuring, and startups. Brian works from the firm's Framingham office.

Adam C. Ponte | Litigation | aponte@fletchertilton.com
Adam Chin Ponte manages our new Boston office, and devotes his practice to complex civil and commercial litigation. He represents businesses and individuals in various matters including business litigation, construction disputes and risk management, real estate disputes, and employment litigation. Adam also has significant experience in handling trust and estate litigation, where he has represented trustees and beneficiaries before various probate and family courts.

BOARD APPOINTMENTS: ATTORNEY PETER R. BARBIERI

Attorney Peter R. Barbieri has been reappointed to the Holliston Economic Development Committee for a three-year term, and to the Board of Directors for the MetroWest YMCA.

Peter is a commercial real estate attorney serving the MetroWest, and works from the firm's Framingham office. You can reach Peter at pbarbieri@fletchertilton.com.

FLETCHER TILTON OPENS BOSTON OFFICE

Fletcher Tilton is pleased to announce the opening of its first Boston office at 12 Post Office Square. The firm has been operating in Worcester, Massachusetts since 1822, adding a Framingham office in 2002, a Cape Cod office in 2013, a Providence office in 2017, and now one in Boston. "You could say that growth agrees with us," says firm president Mark Donahue.

The office will be headed up by returning litigation attorney Adam C. Ponte. Mr. Ponte left the firm briefly last year to work in Boston and discovered that the many family-owned and closely held corporations in Boston require sophisticated representation, but object to the high hourly rates typically charged by Boston law firms. By establishing a Boston office but continuing to handle accounting, IT and other support operations from its lower-overhead Worcester main office, Fletcher Tilton can offer Boston clients the sophisticated legal services they deserve, but at more competitive rates.

Adding to the core Corporate and Litigation practices, attorneys from the firm's Estate Planning, Real Estate, Immigration, Commercial Lending, and Labor & Employment practices will also bring their expertise to the Boston office. "This is an important strategic move for our firm as we look to the future," says Donahue. "Boston is a great city, getting better every year. But it's expensive here. Our new Boston office gives us a real opportunity for growth while helping clients to lower their costs of doing business."

FREDERICK MISILO ELECTED CHAIRMAN OF THE BOARD FOR FALLON HEALTH

We are pleased to announce that Fletcher Tilton attorney Frederick M. Misilo, Jr., has been elected as Chairman of the Board for Fallon Health, the nationally recognized, non-profit health care services organization. In a press release issued by Fallon Health, Fallon's President and CEO Richard Burke said, "Fred's commitment to improving the lives of those who live and work in the community strongly aligns with the mission of Fallon Health. In addition to providing business acumen, Fred will be a passionate and tireless advocate for all those we serve."

ALEX M. RODOLAKIS NAMED TO PRO BONO HONOR ROLL FOR 2018

Attorney Alex M. Rodolakis has been recognized by the United States Bankruptcy Court for the District of Massachusetts for providing "legal assistance, without compensation, to those who face substantial economic hardship so that they are able to navigate through the bankruptcy process."

Attorney Rodolakis volunteered his time as a lecturer in the M. Ellen Carpenter Financial Literacy Program for high school students and provided pro bono bankruptcy services to individuals as part of South Coastal Counties Legal Services, Inc. Read more at FletcherTilton.com/firm-news.

UPCOMING SEMINARS

ESTATE PLANNING SEMINARS - *Speaker:* Michael Lahti, Esq.

Tues., Nov. 13: 10 a.m. & 1 p.m.
Location: Crowne Plaza, Warwick, RI

Tues., Jan. 22: 10 a.m. & 1 p.m.
Location: Kirkbrae Country Club, Lincoln, RI

Tues., Feb. 12: 10 a.m. & 1 p.m.
Location: Blackinton Inn, Attleboro, MA

Wed., March 6: 10 a.m. & 1 p.m.
Location: The Lobster Pot, Bristol, RI

For details and to register for these seminars and others, visit our website, FletcherTilton.com/seminars-events.

Fletcher Tilton PC
Attorneys at law

The Guaranty Building
370 Main Street, 12th Floor
Worcester, MA 01608-1779

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