

Today

Defending a Last Will and Testament against Attack

There are some basic guidelines that will help preserve the wishes expressed in an individual's last will and testament. These guidelines are particularly important when a will contest is likely, such as when the testamentary plan is unequal or when a family member is disinherited.

Clear and concise drafting is a seemingly obvious point. However, mistakes such as misnumbered pages or alternative dispositions of a single asset are frighteningly common. Additionally, overly complex or ambiguous language should be avoided. If the will is not clear, a will contestant may see an opportunity to attack.

Careful Planning is Key

Careful planning is not complete without an evaluation of the individual's testamentary capacity. In New York, testamentary capacity requires that the individual know or understand (1) the nature and consequences of creating and signing a will; (2) the nature and extent of his or her property; and (3) the natural objects of his or her bounty. This is a much lower standard than that required for contractual documents. The individual's apparent capacity should be documented at each meeting and at the signing ceremony.

It is also extremely important to protect a

will from claims of undue influence or coercion. One step is to have the client independently contact the attorney and come to the office without other family members or intended beneficiaries. Another

recommendation is to prepare a letter discussing the individual's desires and what he or she wishes to accomplish in the will. For example, if one child is particularly aggressive, the

continued on page 3

We Welcome Sanders Litigation Associates, P.C.

Capell Barnett Matalon & Schoenfeld LLP is pleased to announce that effective January 1, 2016, the attorneys and support staff of Sanders Litigation Associates, P.C. will be joining our growing Real Estate, Commercial Litigation, Commercial and Residential Leasing, and Religious Corporations Law Practice, with Peter S. Sanders becoming a partner of the Firm. Peter brings with him his staff, including Adam Zabary, Esq., who will join our Firm as an associate.

All the Best

*Happy
Holidays from
all of us at
Capell Barnett
Matalon &
Schoenfeld LLP.
We wish you
all a Happy
and Healthy
New Year.*

Season's Greetings from Us to You



New York ice skaters enjoying the season in Central Park.

Achieving a Better Life Experience With the ABLE Act

The Achieving a Better Life Experience (ABLE) Act, which was signed into law on December 19, 2014, will allow individuals with disabilities to open "ABLE accounts" in their names. These accounts will provide an easy way for eligible disabled individuals to maintain excess funds under their direct control without jeopardizing eligibility for government support programs such as Medicaid and Supplemental Security Income (SSI). The ABLE Act creates a new section 529A of the Internal Revenue Code. Although these accounts are intended to be available in every state, each state will be required to individually approve the legislation. The New York State Senate and Assembly have already approved the legislation, and it is hoped that it will be signed into law by Governor Andrew Cuomo soon.

The legislation permits any individual who is entitled to SSI benefits, Social Security disability benefits or Social Security survivor benefits on the basis of a disability or blindness or who otherwise meets the criteria to be certified as disabled, to open an ABLE account, provided the disability occurred prior to age 26. Contributions to an ABLE account may be made by any person, including the disabled individual, family members or friends. It is important to note that an eligible beneficiary may only have one ABLE account.

Contributions Not Deductible

Contributions to an ABLE account are not deductible for federal income tax purposes. ABLE accounts may not receive contributions in any year in excess of the annual gift tax exemption amount (\$14,000 for 2015) and contributions are treated as a completed gift of a present interest for purposes of the annual per-donee gift tax exclusion. Earnings on the ABLE account



and distributions from the account for qualified disability expenses will not count as taxable income to either the contributor to the account or the disabled beneficiary.

For disabled beneficiaries receiving SSI, the first \$100,000 in an ABLE account will be disregarded and will not adversely affect eligibility. However, if the balance in the account exceeds \$100,000, the individual's SSI benefits will be suspended until such time as the individual's resources are reduced to less than \$100,000. A beneficiary's Medicaid benefits will not be adversely affected by an ABLE account, even if the balance in the account exceeds \$100,000.

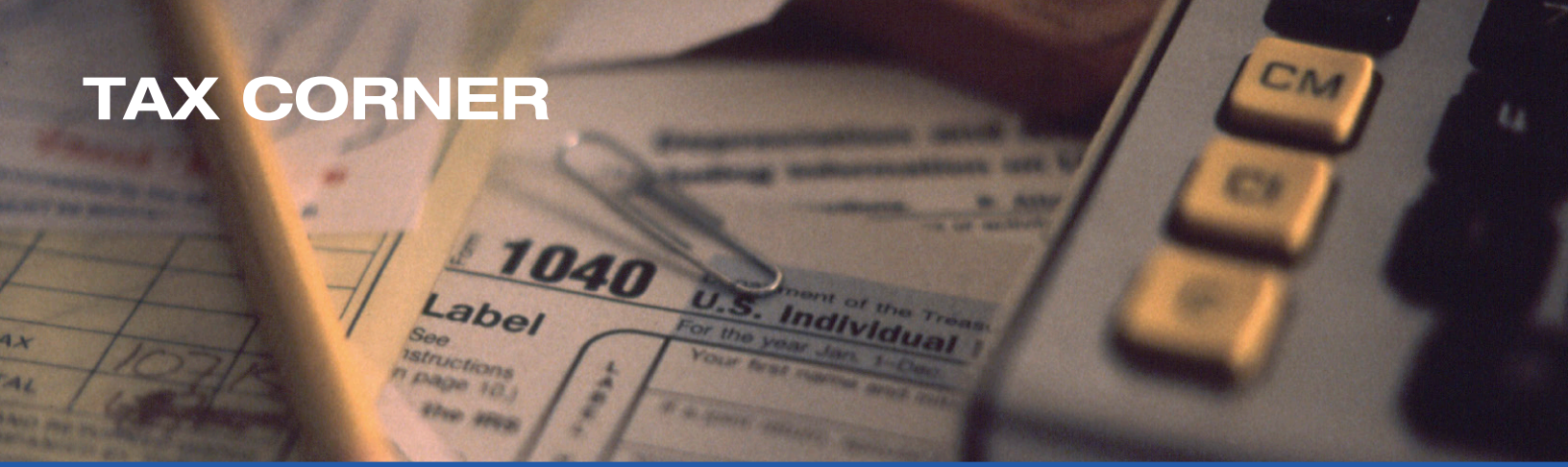
The eligible disabled individual, referred to in the legislation as the Designated Beneficiary, is permitted to use the ABLE account for "qualified disability expenses" related to his or her disability, including education, housing, transportation, employment training and personal support services, assistive technology, health care expenses, financial management and administrative services, expenses for oversight and monitoring, funeral and burial expenses and other approved expenses. However, there is a Medicaid payback provision that requires assets remaining in the ABLE account upon the death of the Designated Ben-

eficiary to be used to reimburse the state for payments made on behalf of the beneficiary.

Administrative Requirements Eased

In June 2015, the Internal Revenue Service issued proposed regulations detailing administrative requirements in connection with these accounts, including reporting contributions to and distributions from these accounts. However, after an outpouring of comments from the public stating that these reporting requirements would have been overly burdensome, the IRS eliminated them. This easing of account administrative requirements will hopefully encourage more states to approve the creation of these accounts.

Until now, disabled individuals could only have a very small amount of funds available under their direct control to use for their personal needs. Alternatives, such as special needs trusts, are often expensive to establish, require court approval and do not permit the disabled individual to be in direct control of the funds. An ABLE account will allow disabled individuals to be able to save for future expenses, enjoy tax-free growth similar to college 529 plans and be able to control their own finances.



The Empire Strikes Back

Congress recently expanded the applicability of the six-year statute of limitations and effectively overruled a holding by the Supreme Court. Generally, the IRS has three years to audit a taxpayer's return. The statute of limitations is increased to six years if a taxpayer omitted more than 25% of the taxpayer's gross income. However, the Supreme Court held that an overstatement of basis is not an omission of income, and thus, the six-year statute of limitations does not apply where the understatement of income is the result of an overstatement of basis. For example:

A taxpayer sells her house for \$500,000, and her actual basis is \$250,000. On her tax return, the taxpayer reports a basis of \$400,000 and a gain of \$100,000, as well as \$50,000 in wages.

Under the Supreme Court's holding, the IRS has only three years to audit the taxpayer's return. With the passage of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Congress overruled the Supreme Court by amending the statute to define an overstatement of basis as an omission from gross income. As a result, the six-year statute of limitations would now apply to the above taxpayer. This change applies to tax returns filed after July 31, 2015 and open tax returns.

FBARS Are Now Due April 15

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 changed the due date for filing certain tax returns, including FinCEN Form 114, better known as the FBAR. The FBAR is now due on April 15. A six-month extension is also available for late filings. FBARS are generally required for taxpayers who owned or had signature authority over foreign bank accounts with an aggregate value in excess of \$10,000 at any time during the calendar year.

The FBAR requirement also applies to securities, brokerage,

commodity futures, and options accounts, as well as insurance policies with a cash value, annuity policies with a cash value, and shares in a mutual fund or similar pooled fund. The maximum penalty for a willful FBAR violation is the greater of \$100,000 or 50% of the account balance. The penalty for non-willful FBAR violations is generally \$10,000 per year. The IRS has implemented amnesty programs for taxpayers who failed to comply with the FBAR requirement in the past. For more information about these programs, please contact our Tax Department.

Last Will and Testament

Continued from page 1

client can prepare a letter stating that it is her desire to benefit each of her children equally and that if a conflicting will appears, it should be presumed to be the product of undue influence unless prepared by her usual attorney and accompanied by a clear statement indicating otherwise.

A No-Contest Clause

If a will contest seems likely, the individual may consider including an in terrorem clause. An in terrorem clause, also known as a "no-contest" clause, generally provides that a bequest will fail if the beneficiary initiates or participates in a will contest.

Finally, at the will signing ceremony, it is crucial to comply with statutory requirements. New York law requires that the client sign his or her will in the presence of at least two witnesses. Witnesses should be individuals who will remember the ceremony and be able to testify. Although only two witnesses are required under New York law, it is advisable to have three witnesses as a precautionary measure. Having an experienced attorney serve as a witness is also strongly advised.

Following the simple, yet fundamental guidelines outlined above will help to minimize the likelihood of a successful will contest.

Circular 230 disclosure.

Pursuant to regulations of the U.S. Department of Treasury, it is required that we advise you that anything in this newsletter is not intended to be used and cannot be used as tax advice.

Structuring Reverse 1031 Like-Kind Exchanges

An IRC Section 1031 exchange is a mechanism used by property owners selling income producing real property ("relinquished property") to defer tax on the gain of the sale by purchasing another income producing property ("replacement property") within 180 days. In addition to purchasing the replacement property within 180 days, the taxpayer must identify the replacement property within 45 days of the sale. As long as the purchase price of the replacement property is equal to or greater than the sales price of the relinquished property, there will be no taxable gain on the sale of the relinquished property. If the sale price of the relinquished property is greater than the purchase price of the replacement property, the taxpayer will only be taxed on the difference between the two prices, not on the full gain on the sale of the relinquished property. In a 1031 exchange, the property owner sells the relinquished property prior to purchasing the replacement property. However, there are situations where a property owner desires the tax benefits of a 1031 exchange but needs, or wants, to purchase the replacement property first. In such circumstances, a reverse 1031 exchange is needed.

There are numerous reasons for engaging in a reverse 1031 exchange, such as the taxpayer finding the replacement property and closing on it before they have a buyer for the relinquished property, the elimination of the

45-day calendar identification period required by Section 1031, the ability of the taxpayer to obtain a favorable financing rate, and having more time to make improvements to the replacement property.

As in a forward 1031 exchange, a Qualified Intermediary ("QI") facilitates the transfer of the replacement property to the property owner and transfer of the relinquished property to the purchaser. In a reverse 1031 exchange, the QI creates a limited liability company (called an Exchange Accommodation Titleholder, or "EAT") that temporarily takes title to the replacement property.

There are two different ways to structure a reverse 1031 exchange: the "Exchange First" and the "Exchange Last" procedures. In the Exchange First procedure, the taxpayer transfers title to the relinquished property to the EAT. This transfer of title must take place before the closing on the replacement property.

The Exchange First Procedure

The Exchange First procedure is lender friendly because the EAT does not have to sign loan documents if the taxpayer secures the replacement property by a loan. This may make it easier for a taxpayer to obtain funding on the purchase. However, taxpayers must determine whether they need a lender's consent to transfer the existing loan to an EAT.

The downside of an Exchange First procedure is that the taxpayer must be able to invest enough equity into the replacement property as of the initial closing of that property to at least equal the equity that the taxpayer will receive from the sale of the relinquished property; the taxpayer must know which property he will dispose

The Exchange Last Procedure

In the Exchange Last procedure, the EAT takes title to the replacement property, ensuring the entire transaction is tax deferred. It also gives the taxpayer access to funds before the relinquished property closes, allowing the taxpayer to pay down the loan on the relinquished property so that all of the exchange funds can be invested into the replacement property and complete a tax deferred exchange. Additionally, the taxpayer has 45 days to decide which property to dispose of in the exchange. Exchange Last procedures are not lender friendly because the EAT secures the loan on the replacement property but has no personal liability.

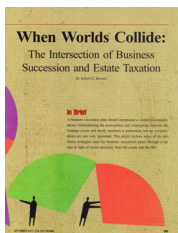
Overall, 1031 exchanges allow taxpayers who own income producing real property to defer tax on the sale of their relinquished property when they purchase another income producing property. The reverse 1031 exchange provides further flexibility, allowing taxpayers to acquire the replacement property prior to selling the relinquished property.

Personal Notes

At Capell Barnett Matalon & Schoenfeld LLP we support public charities through donations of our time, energy and resources.

Howard Capell continues his worldwide travels. Upon the completion of his trip down the west coast of Africa in 2015, Howard will have visited 103 countries. This past year, Howard was appointed to the board of the Long Island Council of Churches, for whom he continues to volunteer his legal services to member congregations and clergy. In 2016 Howard will celebrate the graduation of his oldest grandson, Ian, from high school. Ian will be off to college next fall.

Robert Barnett successfully completed his term as President of the New York State Society of CPA's Nassau Chapter and continues to serve on its Board of Directors. Robert works very closely with Sidney Kess, CPA, J.D., LL.M., a nationally acclaimed educator, and has participated in the highly regarded UJA-Federation of New York's 45th Annual New York Estate, Tax, & Financial Planning Conference as well as the 2015 Zicklin Tax Series at Baruch College. Robert was a featured speaker at the prestigious AICPA 2015 conference "Sophisticated Tax Planning for Your Wealthy Clients," in Boston, Massachusetts, and at the Annual Estate and Financial Planning Conference of the New York State Society of Certified Public Accountants. Robert continues his many featured presentations at the acclaimed Long Island Tax Symposium and serves as Co-Chair of the NYSSCPA Nassau Chapter's Federal Tax Committee and as a member of the Nassau Academy of Law. Robert authored several tax articles this year that were published in *The CPA Journal*, *the Journal of Accountancy*, and other publications.



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Gregory Matalon created and moderated several lectures for various groups of certified public accountants and attorneys, including a lecture for the National Business Institute titled "Estate Planning Update." Gregory was invited to lecture at the Long Island Tax Professional Symposium on gift and income tax issues, titled "709, Line by Line" and "IRA Traps and Benefits," for the American Bar Association's 2015 Lavender Law Conference on the topic of "Creating Your Own Law Firm," and at the Interchurch Center on charitable giving for religious organizations. Gregory was quoted in a press conference from the office of Congressman Steve Israel regarding the introduction of a bill that would ban credit discrimination against LGBT individuals. Gregory continues to serve as Vice Chair of The Kew Forest School Board of Trustees. He enjoyed spending Thanksgiving in London, England, and attending his 20-year college reunion at Skidmore College.

Stuart H. Schoenfeld continues to speak in front of community and professional organizations about estate planning, planning for families with children with developmental disabilities, and eldercare. He most recently lectured at the Long Island Tax Professional Symposium about "Elder Care Advocacy and the Medicaid Application Process" and "Funding the Cost of Long Term Care." Stuart recently returned from a trip with his family to Vancouver and Alaska. His children continue to make him proud of their accomplishments. Risa is building her career as an architect, while Carly attends the day habilitation program at Family Enterprises and Essential Enterprises (FREE). Benjy is a sophomore at SUNY New Paltz. Stuart

serves as a member of the Board of Directors of the Merrick Jewish Centre.

Joseph Milano continues to work on behalf of the Metropolitan New York Synod of the Evangelical Lutheran Church in America and the Atlantic District of the Lutheran Church Missouri Synod. In three separate proceedings, Joseph relied on the *cy pres* doctrine to obtain almost \$3 million in distributions to the Synod and a church of the Atlantic District, where the beneficiaries were religious organizations no longer in existence. In October, Joseph appeared on a panel with the Chief and Deputy Chief of the New York State Attorney General's Charities Bureau to discuss the role of the Attorney General in regulating religious organizations. Joseph's wife, Karen, is Vice President of Physician Services at The Brooklyn Hospital Center.

Renato Matos worked closely with the Interchurch Center to develop and host the first annual conference entitled "Important Updates to the Laws that Affect Religious Organizations," which was well-attended and well-received. He also lectured at the Long Island Tax Professionals Symposium, which he has done for numerous years. He enjoyed a wonderful summer travelling to Paris and the Amalfi Coast, and is looking forward to enjoying his country home in Columbia County.

Albert Dumauval is an associate in the Firm's Tax and Estate Planning Departments. Albert received an LL.M. in Taxation from the NYU School of Law. Albert's practice includes tax and estate planning with international tax issues. In 2015, Albert lectured on a wide range of tax topics, including the IRS offshore voluntary disclosure

programs, charitable deductions, innocent spouse relief, and passive activity losses. Albert is licensed to practice law in New York and New Jersey.

Joshua Weiss is an associate in the firm's Corporate and Commercial Transactions, Religious Organizations, and Real Estate Departments. Joshua is licensed to practice law in New York and New Jersey.

Erik Olson is an associate in the Firm's Estate Planning and Estate Administration Departments. Erik joined the Firm in October 2014 after interning with the Firm in the summer of 2013. Erik is licensed to practice law in New York and California.

Dolly Hoffman joined the Firm's Litigation Department in 2015. Dolly received her Juris Doctor from St. John's University School of Law and a Medal for Excellence in Bankruptcy Law from the American Bankruptcy Institute. Dolly was an editor-in-chief of the *American Bankruptcy Institute Law Review*, the journal responsible for editing and publishing a book on Single Asset Real Estate Transactions. Prior to joining the firm, she worked for several prominent firms in Manhattan where she worked on matters involving municipal bonds, bankruptcy, and a wide variety of commercial matters. Dolly is licensed to practice law in New York and Connecticut.

Eric Kobet is an associate in the Firm's Tax Department. Eric joined the Firm in September 2015. Eric received a Juris Doctor and an LL.M. in Taxation from the NYU School of Law. During law school, Eric served as a legal extern with the Joint Committee on Taxation and as a legal intern with the New York State Office of the Attorney General. Eric is licensed

IRA Reminder

Taxpayers born before July 1, 1945, generally must receive payments from their IRAs and workplace retirement plans by December 31.

NOTE: FA special rule allows first-year recipients of RMD payments, those who reached age 70½ during 2015, to wait until as late as April 1, 2016, to receive their first RMDs. This means that those born after June 30, 1944, and before July 1, 1945, are eligible for this special rule. Though payments made to these taxpayers in early 2016 can be counted toward their 2015 RMD, they are still taxable in 2016. However, the second RMD payment must also be made in 2016.

SOURCE: IR News Release, IR-2015-122, Oct. 29, 2015.

Capell Barnett Matalon & Schoenfeld LLP

Creative Attorneys | Effective Solutions

Long Island Office:

100 Jericho Quadrangle, Suite 233
Jericho, NY 11753

TEL: 516-931-8100 | FAX: 516-931-8101

info@cbmslaw.com | www.cbmslaw.com

New York City Office:

225 W. 35th Street, 16th Floor
New York, NY 10001

TEL: 212-661-1144

FAX: 212-643-1130



News & Notes

Expansion of New York City Office

Capell Barnett Matalon & Schoenfeld LLP is pleased to announce that we have expanded our offices and presence in New York City. Renato Matos and Joseph Milano are the resident partners.

Capell Barnett Matalon & Schoenfeld LLP
225 West 35th Street, 16th Floor
New York, New York 10001
Tel: 212-661-1144 | Fax: 212-643-1130

Conference Co-Host

In October, the Firm co-hosted a conference with The Interchurch Center titled "Important Updates on the Laws that Affect Religious Organizations." Renato Matos moderated the conference and Gregory L. Matalon, Joseph Milano and Robert Barnett all participated as speakers. In addition, there were speakers from the Charities Bureau of the New York State Attorney General's office and the New York City Department of Finance. This conference was well attended by religious organizations of all denominations throughout the tri-state area. The Firm looks forward to co-hosting another conference for religious organizations in 2016.

CBMS Mets fans were thrilled to see their team go to the World Series.



Howard Capell
hjc126@aol.com

Robert Barnett
rbarnett@cbmslaw.com

Gregory Matalon
gmatalon@cbmslaw.com

Stuart Schoenfeld
schoenfeld@cbmslaw.com

Joseph Milano
jmilano@cbmslaw.com

Renato Matos
rmatos@cbmslaw.com

Peter Sanders
psanders@cbmslaw.com

Albert Dumauval
adumauval@cbmslaw.com

Joshua Weiss
jweiss@cbmslaw.com

Erik Olson
eolson@cbmslaw.com

Dolly Hoffman
dhoffman@cbmslaw.com

Eric Kobet
ekobet@cbmslaw.com

Adam Zabary
azabary@cbmslaw.com

Darasena Figueroa
dfigueroa@cbmslaw.com

Karen Jakubowski
kjakubowski@cbmslaw.com

Ahmed Ali-El
aali-el@cbmslaw.com

Lany Burnett
lburnett@cbmslaw.com

Hinda Wolfenson
hwolfenson@cbmslaw.com

Henna Rizvi
hrizvi@cbmslaw.com

Louis Bengivenni
lbengivenni@cbmslaw.com

Arman Omrani
aomrani@cbmslaw.com

Melonie S. Miller
mmiller@cbmslaw.com

CBMS Emails