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To: Clients and Friends
From: The Attorneys at Bove & Langa
Date: April 2009

THE BOVE & LANGA REPORT

FIRM UP-DATE

In addition to doing the legal work we love, we have been busy out in the community. Melissa will be presenting on "Powers of Appointment: Special Generation Skipping Transfer Tax Drafting and Exercise Issues" at the American Bar Association's Spring Symposia in Washington D.C. at the end of April. Recently, Alexander and Melissa presented their seminar "Asset Protection Planning: Domestic and International" at Massachusetts Continuing Legal Education (MCLE) and the Massachusetts Bar Association. Alexander went solo on the same topic in February before a packed house at the Boston Estate Planning Council. Bob will be presenting on "Avoiding Common Estate Planning Errors" for MCLE in May in Boston and Burlington. And, Kelly is winding up a successful year as one of the continuing education chairs for the Boston Bar Association.

NEW DEVELOPMENTS

Have We Ever Talked To You About The Probate System In Massachusetts? Well, Like The Weather In New England - It Will Soon Change: In our last report, we provided a comprehensive overview of fiduciaries, many of whom, such as executors, guardians, and conservators, are appointed by the Probate Court. Just when we thought we understood the probate system, it underwent a substantial overhaul with the recent enactment of the Massachusetts Uniform Probate Code ("MUPC"). In general, the MUPC is intended to significantly modernize, and in many cases simplify, the law and procedures relating to estates and guardianships. In this report, we highlight some changes for guardianships which become effective July 1, 2009. (In the future, we will highlight changes in estate administration that become effective July 1, 2011.)

One primary objective in overhauling the guardianship system was to recognize and be more protective of individual rights, and to limit court-imposed restrictions on those rights when faced with an individual's disability. The MUPC recognizes that terminology is important, so gone is the generic use of the term "ward", which is now limited to a disabled minor, while an adult is an "incapacitated person" or a "protected person".

Under the old system, typically an incapacitated person would lose all rights under a guardianship, such as the right to make decisions regarding health care, the right to vote, or the right to enter into a contract. A key change in the law encourages judges to create limited guardianships which focus on the specific limitations of the incapacitated person. This change is highlighted by the fact that a distinction will be made with respect to "the property" which will be overseen by a conservator, versus "the person" who will be overseen by a guardian. Although an incapacitated person may still end up subject to both a guardianship as well as a conservatorship, great effort will be made to allow the person to retain as much independence as feasible. And if a guardian is appointed to oversee the "person" of the incapacitated individual, the guardian must annually report to the court on the incapacitated person's condition and set out the future plans for the care of the person. In the past, reports to the court were limited to how the assets had been managed. Finally, how the new rules will apply to existing broad guardianships is being currently addressed by various committees - so stay tuned.

So You Think Your Ex-Spouse Won't Be The Beneficiary Of Your Pension Plan? Think Again: It is a commonly held belief that when a married couple enters into a settlement agreement, which is incorporated into their divorce decree, the terms of such agreement will control the disposition of all assets that are subject to the divorce decree. Surprise! In a recent United States Supreme Court case, an ex-wife (Liv) was awarded her former husband's (William) pension plan benefits even though William and Liv divorced and entered into a settlement agreement in which Liv waived all rights to William's pension. Why? The Court found that William's pension plan was subject to the "Employee Retirement Income Security Act of 1974" (ERISA), and that ERISA obligates retirement plan administrators to manage ERISA plans in accordance with the documents and instruments governing them – which does not include a state court divorce decree. So, even though the divorce decree seemed to divest Liv of her interest in William's pension plan, it did not because William had failed to execute a new plan beneficiary form implementing the divorce agreement. Upon William's death, the plan administrator relied on the unrevoked plan beneficiary designation and paid the benefit to Liv. The Court said the plan administrator acted properly and William's heirs were out of luck. Ouch! Even though this issue may not apply to you, it highlights the importance of making sure your retirement plan beneficiary designations are consistent with your wishes and are properly filed with your retirement plan administrator.

Are You Stressed Over Taxes Owed To The Commonwealth Of Massachusetts? Check your mail. In the effort to generate revenue, the Massachusetts Department of Revenue ("DOR") has recently announced two time-limited programs to settle past due taxes. One is a tax amnesty program for individuals which waives unpaid penalties for the failure to timely pay taxes or timely file a proper return, for tax periods ending on or before December 31, 2007, provided that all past due taxes for such periods and related interest are paid by April 30, 2009. This amnesty even applies to the unpaid penalties for taxpayers who currently are making payments to the DOR pursuant to a payment plan. In order to participate in this Amnesty Program, a taxpayer must receive a "Tax Amnesty Notice" from the DOR. The full text of the DOR Technical Information Release ("TIR"), TIR 09-3, can be viewed on the DOR website. If this applies to you, but you did not receive a notice, contact the DOR to see if you qualify.

The second program is a voluntary compliance program for employers that either have failed to file Massachusetts withholding or wage and information returns, or have misclassified workers that should have been classified as employees on such returns for past taxable periods. In general, when an employer fails to file a required tax return, the DOR may make an assessment of tax at any time and is not limited to the number of past due tax returns that may be assessed. If an employer voluntarily complies with the requirements of TIR 09-2, which can also be viewed on the DOR website, in most cases the DOR will apply a limited look-back period to tax periods beginning on or after January 1, 2008. Although this program has the potential to be a great deal for employers who have not complied with the applicable DOR requirements, it is important to note that participation in this DOR voluntary disclosure program has no effect on penalties that may be imposed by other agencies, such as the Division of Unemployment Assistance.

Congress Leads Off With Help For Retirement Savings. You've watched your retirement account dwindle through no fault of your own, and are loath to reduce the account further by taking the "minimum required distribution" ("MRD") this year, compulsory due to your age (you are over 70 ½), but not necessary to meet your living expenses. Fortunately, Congress has stepped up to the plate with the Worker, Retiree, and Employer Recovery Act, which, in effect, eliminates the need for a 2009 MRD for most players. You can take it if you want it, but there will be no 50% penalty if you decide against a distribution. But wait … there's more. The law is really an "Old Timer's Game" and not for rookies. If 2008 was the year you turned 70 ½ and you didn't take your first mandatory MRD during that year, you should have taken the "2008 MRD" by April 1, 2009 – the new law did not give you a reprieve. Similarly, if you are turning 70 ½ in 2009 you must take your first MRD on or before April 1, 2010. Is it better to take the MRD or leave it in? You guess is as good as ours: it depends on whether the market shows us some cheese, or races towards the Mendoza Line.

That's Not Missile Command, It's My Astronomy Homework …. A common way to save for a child's college and post-graduate education expenses is to open a tax-favored "529 Plan". Most of you know that a 529 Plan is funded with cash using the older family member's "annual gift tax exclusion" to avoid a taxable gift, with the cash then invested in mutual funds which grow (hopefully grow!) income tax free, ultimately to be used by the child for qualified higher education expenses ("QHEEs"). Traditionally QHEEs were defined as tuition, fees, books, supplies, and equipment but did not include the cost of a computer unless school policy required the student to have one. This outdated notion has been jettisoned temporarily by the American Recovery and Reinvestment Act of 2009. (You thought this law was the "Jobs Bill" when it really is the "Steve Jobs – and Bill Gates – Bill".) Expenses paid or incurred now and next year for the purchase of any computer equipment, software, or technology (including internet access and related services) are considered a QHEE, whether used by the student or by the student's family while the child is enrolled at an eligible educational institution. Does this expanded definition include a Blackberry, iTouch, iPhone, or similar handheld device? It should, as long as education, and not amusement or entertainment, is the primary reason for the purchase. iKnow! What a deal!

The Secret Is Out! It's hard to imagine that anyone missed the hoopla surrounding the recent UBS secret Swiss bank account scandal. Estimates of the number of Americans and U.S. residents who may be targeted by the IRS for tax evasion ranges from 5,000 to over 50,000, the larger number evidenced by a U.S. government lawsuit against UBS asking the court to order a disclosure of the names of those depositors. Because of the strict Swiss bank secrecy rules, both UBS and the Swiss government are struggling to reach some resolution with the US government. Since tax evasion is such a serious charge, some U.S. depositors have been advised by their attorneys to voluntarily come forward and report the accounts (and the interest income) before their names are revealed, on the belief that the IRS will then go much "easier" on them (less jail time??).

It appears that everyone seems to know about secret Swiss accounts, but certainly not everybody has one. In fact, the question is, why would anybody want one? Perhaps people like Saddam Hussein, Ferdinand Marcos, or Jean-Claude ("Baby Doc") Duvalier had their own good reasons to have such accounts, but for "law abiding" citizens, the stakes are very different. Such accounts have certainly not helped the thousands of UBS customers who may have thought they were avoiding U.S. taxes but instead are facing charges of tax evasion. And as tax attorneys are heard to say: the difference between tax <u>avoidance</u> and tax <u>evasion</u> is twenty years.

The fact is there are no U.S. tax benefits to offshore accounts, per se, even though some have been led to believe there are, because offshore banks do not produce 1099s, reporting the interest earned on the account to the U.S. government. Our tax laws require U.S. persons to report their worldwide income from all sources. In addition to reporting their income, any U.S. person who has one or more foreign "financial accounts" that had a combined value of $10,000 or more at any time during a calendar year must report the existence of such accounts each year to the US treasury on Form TDF 90-22.1 (known

as the Foreign Bank Account Report – "FBAR"). Failure to file the FBAR when required is subject to penalties ranging from $10,000 to $100,000 or more, and even imprisonment where criminal intent is present. And note that a "financial account" is not limited to bank accounts. Also included are foreign brokerage accounts, mutual funds, insurance policies, and annuities. So, while all such accounts may be kept secret from just about everyone, there is one relative who must be kept fully informed – Uncle Sam.

SPECIAL! HOT OFF THE PRESS: In a late announcement, the IRS says if a taxpayer voluntarily discloses the foreign account before September 22, 2009, it will forego criminal prosecution for failure to file the FBAR and pay the tax. But it will still add interest and certain penalties, plus a special penalty of 20% of the highest value of the foreign account. Beats waterboarding!

Prepare Yourselves Ye Tax Return Preparers! A natural outgrowth of a trust & estates law practice is assisting clients in the filing of gift tax returns and estate tax returns. Recently, Congress and the Internal Revenue Service have turned up the heat on tax return preparers by extending preparer penalties previously limited to tax professionals who prepare income tax returns to those who prepare gift and estate tax returns. As a result, some law firms have stopped preparing gift and estate tax returns, and are even loath to give advice as to those returns, since the new penalties apply to a "non-signing tax return preparer" as well as the professional who signs the return. Rest assured that we at Bove & Langa will stand by the planning techniques we recommend and then implement on your behalf, and we will continue to prepare and file gift and estate tax returns which disclose and explain those techniques to the taxing authorities.

PLANNING OPPORTUNITIES

Giving Can Be Fun! At least that's what they say. We suppose there can be considerable reward to the giver; such as the feeling that we have helped someone in some way, and in fact, our tax laws themselves encourage giving. As you may know, although we have a gift tax in the U.S., it only applies where the gift (to an individual as opposed to a qualified charity) exceeds certain restrictions. Under present law, a person can give up to $13,000 annually to any number of individuals, and unlimited amounts for tuition and medical care. (The individual donees do not have to be related to the donor.) On top of that, a person can give up to $1 million during lifetime without incurring an out-of-pocket gift tax. In addition, there are some important tax savings techniques that benefit tremendously from the present low interest rates. For instance, one technique enables a person, say, a parent, to place income-producing property into a trust, keep the income for a period of years, then have the property (which, perhaps, has even appreciated) pass to the children with very little (or no) gift tax exposure.

Similar or even greater tax benefits can be realized through a self-cancelling note ("SCIN"), a technique we have used for years. A SCIN allows a sale of assets, typically between family members,

for a promissory note, which automatically cancels at the seller's death, avoiding estate taxes on these assets.

Why may all this be important now? Because a new tax regime is rumored to be on the horizon, for the better or the worse, probably for the worse. Think about giving while it can still be fun.

You Run The Business Together: But Do You Both Get Credit For Doing So? You have heard us speak exhaustively about the virtues of operating your business in a protective form, such as a corporation or limited liability company. But sometimes a wife and husband who run a business together "don't want to fix what's not broken", and all our discussions and concerns about asset protection fall on deaf ears. Does this sound like you? If so, here is an idea you might consider and it doesn't really change how you do business. Instead of one spouse showing all the business income and deductions on Schedule C as a sole proprietorship (which is often what happens), a wife and husband can make a "qualified joint venture" election pursuant to Internal Revenue Code §761(f) and treat the joint venture, in effect, as one-half operated and earned by the wife, and one-half operated and earned by the husband. Yes, it does require the filing of two Schedule Cs with your income tax return, but it avoids the necessity of a partnership return (and all the complicated accounting that requires), while permitting each spouse to receive credit for social security and Medicare coverage purposes. No creditor protection perhaps, but economic protection is achieved nonetheless.

QUICK TIP

Limited partnerships, corporations, and limited liability companies are creatures of statutory law. To create any one of these entities the owners must file the appropriate formation documents with the Commonwealth. Strangely, for many years only corporations and LLCs were required to renew their status annually, with limited partnerships enjoying a free ride. No more. Effective July 1, 2008 every limited partnership must file an annual report with the Secretary of the Commonwealth's Corporation Division. The annual filing date is tied to the anniversary date of the original organizational filing, and whether the first filing was due in 2008 or is due in 2009 is tied to the month of the original filing. The fee for filing an annual report is four hundred fifty dollars ($450) if filed electronically, five hundred dollars ($500) if filed by paper or facsimile.

SUMMARY

Buy low, sell high.