

**Special Interest  
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# ESTATE PLANNING

***Babirak, Albert, Vangellow & Carr, P.C.***

## Announcements

We will be changing our name. Effective December 31, 2002, we will be Babirak, Albert, Vangellow & Carr, P.C. David Shaheen will be leaving the firm and we wish him every success in his new endeavors. Neil Carr, as many of you know, is a securities lawyer who has been with the firm for many years.

Also, Babirak, Albert, Vangellow & Carr is pleased to announce that Donald W. Lewis has joined the firm as Of Counsel. Mr. Lewis received a Bachelor of Legal Letters degree from Brooklyn Law School and a Bachelor of Arts degree from Queens College. Mr. Lewis entered private practice in 1987 after his retirement from 30 years of service with the United

States Customs Service. Mr. Lewis is admitted to practice in the State of New York and the District of Columbia, the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, and the United States District Courts, Southern and Eastern Districts of New York. He is a member of the District of Columbia Bar Association.

## Favorable Shift in Attitude of Courts With Respect to Validity of Family Limited Partnerships for Federal Estate and Gift Tax Purposes

As a result of two decisions of the United States Tax Court, it appears that the Internal Revenue Service may begin to relax its position regarding the use of family limited partnerships as estate planning tools. In *Knight v. Commissioner*, Tax Ct. Rep. Dec. (RIA) ¶ 115.36 (2000), and *Estate of Strangi v. Commissioner*, Tax. Ct. Rep. (RIA) ¶ 115.35 (2000), the United States

Tax Court upheld the validity of two family limited partnerships for federal estate and gift tax purposes. The Court in both cases provided that if the creation of a family limited partnership satisfied applicable state law requirements for forming such entity, the courts and the IRS must recognize its validity for federal estate and gift tax purposes. The IRS's argument in both cases,

that the limited partnerships in question lacked "economic substance" was rejected. These two cases will likely make it more difficult for the IRS to challenge the validity of family limited partnerships in future estate and gift tax cases. The IRS, however, may change the focus of its challenges to the values set by taxpayers to their interests in these entities.

## Post-Mortem Reformation of Testamentary Instruments

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*“Federal Courts will not necessarily honor State Courts decisions for federal tax purposes.”*

Executors sometimes attempt post-mortem reformations of decedents' wills or trusts in order to minimize federal estate taxes. A 1998 decision by the United States Court of Appeals for the Ninth Circuit, however, illustrates that a favorable ruling by a local probate court on an executor's request to reform a decedent's testamentary instrument, does not necessarily guarantee that the federal court will honor this decision for federal estate

tax purposes. In *Estate of Rapp v. Commissioner*, 140 F.3d 1211 (9<sup>th</sup> Cir. 1998), the court held that a decision of a state probate court to approve an executor's request to modify the terms of a decedent's marital trust for the purpose of electing QTIP treatment on the estate tax return, was not binding on the United States Tax Court. The 9<sup>th</sup> Circuit cited as support for its ruling, the general rule established by the United States Supreme Court in

*Commissioner v. Bosch*, 387 U.S. 456 (1967), that when a federal court is applying a federal statute, the decision of a state trial court as to an underlying issue of state law should not be controlling. If the highest state court has not decided the issue, then the federal court must apply what they find to be the state law, giving regard to relevant rulings of lower state courts

## Recent Wills, Trusts & Estates Decisions

### Holographic Will: Signature Requirements

In *Kidd v. Gunter*, 263 Va. 442, 551 S.E.2d 646 (2001), the Virginia Supreme Court held that the trial court properly refused to probate as a holographic will, the contents of a handwritten journal, where the decedent's name appeared only on the inside front cover, on the grounds that it did not contain a signature which met the requirements of Virginia Code § 64.1-49.

### Prenuptial Agreement: Waiver of Statutory Claims

In *Pysell v Keck*, 263 Va. 457, 559 S.E.2d 677 (2002), a prenuptial agreement recited a married couple's intention to hold previously owned, as well as after-acquired property, separate. After the death of the husband, the wife asserted a claim for an elective share, family allowance and exempt property. The trial court granted

summary judgment in favor of the estate on the ground that the wife waived all claims to the husband's property via the prenuptial agreement. The Virginia Supreme Court reversed and remanded, holding that the prenuptial agreement did not contain an express waiver of the wife's right to assert her statutory rights against her husband's estate. The Court found that (continued on page 3).

## Recent Wills, Trust & Estates Decisions- continued

the agreement fixed the parties' rights only while the parties were living.

Suits for Aid & Discretion  
In *Caine v. Freier*, 264 Va. 251, 564 S.E.2d 122 (2002), the Virginia Supreme Court held that a

personal representative of an estate who seeks the aid and direction of the court in administering the estate is not "aggrieved" by the trial court's ruling and may not appeal it to the Virginia Supreme Court. The proper appellant is the

beneficiary of the estate who was aggrieved by the trial court's ruling.

## Estate Tax Changes for 2003- Still Waiting

As noted in previous newsletters, estate tax law changes were enacted in 2001 with the signing of the Economic Growth and Tax Relief Reconciliation Act. These changes gradually increase the amount a taxpayer can shield from estate taxes, while at the same time decreasing the maximum estate tax rate. In 2010, Federal

estate taxes are repealed, but may return in 2011 at the 2001 levels. Despite the hopes of many, no additional changes were enacted in 2002 to eliminate or make further reductions in the estate tax. No further changes are imminent for 2003. The estate tax law changes that became effective in 2001 will continue to apply. The

estate tax exemption amount in 2003 remains at \$1,000,000. The only change is that the maximum Federal estate tax for 2003 drops from 50% to 49%.

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