

TREASURY BACKS OFF PROPOSED DISCOUNTING REGULATIONS

In 2016, the Department of Treasury proposed new regulations for Section 2704 of the Internal Revenue Code. The proposed regulations would have significantly minimized or eliminated discounts for family limited partnerships and other entities. Earlier this year, President Trump had directed the Treasury Department to review the proposed regulations. In early October, the Treasury Department announced it would withdraw its proposed regulations limiting discounts.

Discounting is just one method some families use for transferring farm land and other assets to children. Rather than transferring farm land directly to children, a retiring farmer could place the land into a limited liability entity with restrictions regarding voting and transfers. This allows the retiring farmer to transfer an interest in the entity at a discount of as much as 50% to reflect the restrictions.

Although the proposed regulations will not be enacted, discounting is not always appropriate. Recently, the IRS was successful in attacking an aggressive death bed gift of a discounted family limited partnership in a recent tax case (*Estate of Powell*). In our view, this case shows that it is still important that discount gifting be done for a legitimate business purpose that is coordinated with the estate plan.

NEW LLC LAW EFFECTIVE FOR ALL EXISTING LIMITED LIABILITY COMPANIES ON JANUARY 1, 2018

In 2014, Minnesota adopted the Minnesota Revised Uniform Limited Liability Company Act (the “new LLC act”), which is set out in Chapter 322C of the Minnesota Statutes. Since August 1, 2015, new LLCs have been automatically covered by the new act. On January 1, 2018, all new and existing LLCs will be covered by the new act.

The new LLC act changes the way LLCs operate in a number of ways. Most significantly, the new LLC act shifts the default management structure of LLCs from a corporate-based model to a partnership-based model.

Under the old LLC act, set out in Chapter 322B of the Minnesota Statutes, members set out their relationship to each other and the company rules about meetings, records, and the like in a member control agreement and bylaws/operating agreement. The new LLC act eliminates the member control agreement and essentially combines them into the operating agreement. The operating agreement may also include buy-sell terms if the members do not have a stand-alone buy-sell agreement.

The mandatory adoption of the new LLC act for all LLCs on January 1, 2018 is an opportunity for business owners to review and update their LLC agreements to better reflect their actual governance practices.

Many existing LLCs may have adopted the corporate-based model under Chapter 322B, which would have dictated a board of governors, corporate officers, and annual meetings of the members. The

board of governors, who may or may not be members of the company, are often empowered to determine the compensation, distribution of profits, and tax matters of the business.

However, many business owners simply do not operate that way and only make updates to the LLC records when required for banking or litigation purposes. Under the new LLC statute, the default is that members themselves make decisions by a majority vote. Still, the new LLC act does include a provision that states that the terms of existing LLC documents will be honored in an attempt to maintain the status quo. This leaves some gaps for some companies that do not update their documents as some of the default rules change.

As Chapter 322B is phased out, planners, advisors, and the courts will be more familiar with the new LLC act, operating agreements making reference to 322B may be left in the lurch. Existing member control agreements that are not updated to be consistent with the new LLC act may be particularly difficult to interpret in the future if the repealed Chapter 322B does not remain publicly available, as has happened with old LLC laws in other states that moved to the new model. Overall, the mandatory adoption of the new LLC act for all LLCs on January 1, 2018 is an opportunity for business owners to review and update their LLC agreements to better reflect their actual governance practices.



Staff Corner: “Hi, this is Mary Lynn”

For over 40 years, the cheery voice of Mary Lynn Schiltz has greeted our clients in person and on the phone, helping with their legal questions and providing solutions, all while handling the “back office” functions of Ward & Oehler, Ltd. A native of Caledonia, Minnesota deep in Houston County (“Go Warriors!”), Mary Lynn arrived at the law firm in its early years as a newly minted legal secretary with training through the then Rochester VoTech legal secretary program. What skills! Steno pads! Master of the “mag card” and IBM Selectric typewriters! Early adopter of the Lanier standalone word processor! Remember Windows 95? She was there...and now? Office Manager for four attorneys and accompanying staff, primary bookkeeper in charge of office accounting and billing, real estate closer, and repository of vast institutional knowledge. Want to find a file? Ask Mary Lynn. Want to know the names of the children who survived Grandma thirty years ago? Ask Mary Lynn. Want to know when your appointment is scheduled and how to get to the office? Ask Mary Lynn.

Married to Dan Kotval of Rochester (a lookalike for Yankees manager Joe Girardi), Mary Lynn is an avid Minnesota Twins fan, complete with a Twins license plate bracket and Twins earrings. The past few summers, Mary Lynn has golfed the Rochester municipal courses, *recording over 50 rounds in 2017 alone!* Proud mother, devoted wife, compulsive housekeeper (with seven vacuums!), and eager traveler, Mary Lynn is a friend to many.

And remember: it’s Mary Lynn, never just Mary.

Thanks for your many years of cheerful service, Mary Lynn!



Mary Lynn digging through some abstracts at our office in 1979.

Check out our next newsletter for more information about another member of our staff, Becky Henry, who recently joined our firm as a legal assistant!

The What, Who, Why, When, and How? of Easements

Many of us have heard of the term “easement”, and we may even have use of a neighboring property for one reason or another, but the concept of easements and how an easement is created can be confusing. Outlined below are the basics you should know.

What is an easement?

Real property law defines an easement as “the grant of a non-possessory property interest that entitles in its holder, called the ‘dominant estate’, to some form of use or enjoyment of another’s land, called the ‘servient estate’.” In simpler terms, an easement is a right of one party to cross or otherwise use another party’s land for some specified purpose, such as for railroads, utility lines, and gas pipelines. An easement can be perpetual or for a limited period of time.



Who are the Parties?

An easement requires at least two parties. The person who has the right to cross or use someone else’s land for some specified purpose, or the person who benefits from the easement, is called the “easement holder” or “dominant estate”. The person whose land the easement holder is crossing or using for a specified purpose is called the “servient landowner”. An easement can “run with the land” or be just to specific people.

Why are easements used?

Easements create an enforceable legal right to use the property owned by another person. An easement does not allow the easement holder to occupy the land or exclude others from using the land, other than may be granted with the easement or may be necessary to use the easement. The servient estate landowner may continue to use the land in any way he or she sees fit and may, subject to right of the easement holder to enforce the easement.

The most common form of an easement is called an “affirmative easement”, or the right to do something on another’s land. An affirmative easement could be anything from the right to swim in your neighbor’s pond, to the right to cross another’s land with your farm equipment or livestock, to the right to construct and maintain a driveway over a neighboring parcel in order to access your property.

An easement is either “appurtenant” or “in gross”. An easement appurtenant is one that benefits the easement holder and his or her land. An easement appurtenant generally runs with the land, which means that any subsequent owner of the property will also benefit from the easement. The right to cut across your neighbor’s field to access your property is considered an easement appurtenant. Conversely, an easement in gross is an easement that benefits an individual or legal entity without benefiting the easement holder’s land. Railway easements, utility easements, or an easement held by a company to place a billboard on your property are all examples of easements in gross.

When (and how) is an easement created?

An affirmative easement can be created in several different ways, but the most common – and recommended – way to create an affirmative easement is through an express grant, which requires a signed writing by the grantor of the easement. An express easement may be granted in a deed or other legal document that describes the real property over which the easement is granted and which typically contains the parameters of the specified use. The easement is then recorded with the appropriate county recorder’s office.

An affirmative easement generally passes to any subsequent owner of the property until such time as the easement is terminated. The language of the easement should state whether it is perpetual or temporary, and should also provide details as to how the easement can be terminated in the future. Many easement disputes can be avoided entirely or more easily resolved if the language of the easement is clear. For this reason, all easements should be drafted by a qualified real estate attorney.

In the Community

Our team has been busy in the community this past quarter! Here are some highlights:

- Mary Lynn Schiltz walked in the 2017 Walk to End Alzheimer's in Rochester.
- Alyssa Jerde was elected President of the Third District Bar Association for 2017-2018, which covers Olmsted, Wabasha, Winona, and Houston Counties.
- Jason Wagner walked in the Society of St. Vincent de Paul Friends of the Poor Walk in Rochester.
- Bill Oehler presented on charitable giving strategies through Elder Network's "Live for Today, Plan for Tomorrow" seminar series.
- Alyssa Jerde and Jason Wagner volunteered to provide free estate plans to low-income seniors through Legal Assistance of Olmsted County.
- Jason Wagner was elected President of the Elder Network Board of Directors for 2017-2018. Elder Network serves Olmsted, Wabasha, and Winona Counties.
- Alyssa Jerde and Jason Wagner taught a community education class on estate planning through Zumbrota-Mazeppa Public School.

Save the Date
February 7, 2018
7:00 – 8:30 p.m.

Estate Planning and Estate Tax Update

We will be holding an informational session at the Rochester Area Foundation in February to give an estate tax and estate planning update. While there are always new things to talk about with estate planning, we also have the potential of navigating repeal of the federal estate tax with the GOP proposed tax reform plan.

Please RSVP by calling the office.

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