Fletcher Tilton PC
Attorneys at law

VOLUME 20 | ISSUE 3

LEGACY

Looking Forward. Thinking Ahead.

A NEWSLETTER FROM THE TRUST & ESTATE DEPARTMENT OF FLETCHER TILTON

IN THIS ISSUE

Fletcher Tilton PC
Attorneys at law

Worcester | Framingham | Boston | Cape Cod
Medfield | Hudson | New Bedford | Providence

Find us on Facebook Connect with us on LinkedIn

MESSAGE FROM FRED MISILO
CHAIR, TRUST & ESTATE DEPARTMENT

The work of trust and estate lawyers by necessity involves guiding individuals and families on highly personal and important matters. This work requires a breadth of knowledge, experience and expertise in the law. It also requires empathy in helping clients apply legal complexities to their unique set of circumstances. Estate and trust lawyers also recognize that the planning process, when done correctly, requires regular review and revision to stay current with recent legal developments and life events such as divorce, disability, marriage of children, retirement, the birth of grandchildren, and other key changes. Done correctly, your estate plan should be consistent with your life's circumstances, integrated with your current financial assets, and up-to-date with the law.

This edition of LEGACY highlights the broad expertise of attorneys within the Trust and Estate Department of Fletcher Tilton. Attorney Richard Barry's article highlights the implications of gifting assets in the context of estate and capital gain taxes. His insightful approach to the complexities in this area of estate planning demonstrates that what may at first appear to be an advantageous strategy may turn out to be illusory when additional strategies aren't considered. Attorney Barry emphasizes that gifting assets requires thoughtful, deliberative, well-informed decision-making. Attorney Marisa Higgins explores the impact a divorce has on an estate plan and cautions against a complacent attitude toward estate planning following a divorce. For parents and families who have a family member with an intellectual or developmental disability, an imperative element of their estate plan is to integrate important government benefits into their future planning for their family member with a disability. Attorney Patrick Tinsley, who has assisted many families in securing eligibility for essential government benefits, provides an overview on how to handle your family member's application for these benefits in the most effective way possible. Housing is a vital consideration in an estate plan which is concerned about the future for a family member with a disability. Attorney Theresa Varnet's article provides guidance on how to manage an ABLE Account and the Supplemental Security Income rule on in-kind support and maintenance in housing situations.

I hope you find this edition of LEGACY interesting and useful. Please contact me or any of the authors with questions or requests for more information. I can be reached at fmisilo@fletchertilton.com or 508-459-8059.

Stay safe!

Fred Misilo, Chair
Fletcher Tilton Trust and Estate Department
(508) 459-8059

Massachusetts Estate Tax Versus the Capital Gains Tax (To Gift or Not To Gift)

by Richard C. Barry, Esq. | 508-459-8008 | rbarry@fletchertilton.com
Vice-Chair of the Trust and Estate Department

Both the federal and Massachusetts estate taxes are based on the value of a person's assets on his or her date of death. Both taxes provide an unlimited marital deduction, which means that all assets passing to a surviving spouse are not subject to the estate tax. Under the federal estate tax, each person also has an exemption which is presently $11,580,000. A person's estate would have to exceed $11,580,000 before it would become subject to the federal estate tax. Consequently, the federal estate tax has become irrelevant for most people.

In contrast, the Massachusetts estate tax is still applicable to many estates. The threshold for an estate to be subject to the Massachusetts estate tax is $1,000,000, and if an estate exceeds $1,000,000, the tax is calculated on the entire estate, not just the amount which exceeds $1,000,000. The tax does not have a flat rate, but imposes graduated rates which increase as the size of the estate increases. There are 20 brackets, with the highest tax bracket of 16% for the portion of an estate which exceeds $10,040,000.

In addition to the federal estate tax, there is also a federal gift tax. However, the federal exemption of $11,580,000 is also available to be applied to lifetime gifts, which means that a person could make gifts which total $11,580,000 and still not pay any federal gift tax. There is no Massachusetts gift tax.

The combination of a high federal gift and estate tax exemption and no Massachusetts gift tax means that a person could make gifts prior to his or her death to avoid or reduce the impact of the Massachusetts estate tax. To illustrate, Father has an estate which has a total value of $2,000,000. Included in the $2,000,000 is Father's home, which has a value of $500,000. The Massachusetts estate tax on an estate of $2,000,000 is $99,600. Father wishes to reduce the Massachusetts estate tax and determines that he could give his house to Son, who will allow him to continue to live there. Father's taxable estate would then be $1,500,000, and the Massachusetts estate tax would be $64,400, resulting in a tax savings of $35,200.

When a person (donor) makes a gift of property to a donee, the donor's cost basis in the property is also transferred to the donee.

At first glance, this strategy seems to make a lot of sense. However, the above analysis has ignored the capital gains tax. Father bought the home four decades ago for $50,000, which is his cost basis for determining any potential capital gain. When a person (donor) makes a gift of property to a donee, the donor's cost basis in the property is also transferred to the donee. Thus, Son's cost basis in the house will also be $50,000. Son has his own home, and after Father dies he intends to sell the house that belonged to Father. If he sells it for $500,000, he will have a gain of $450,000. The federal capital gains tax (20%) on $450,000 will be $90,000, and the Massachusetts capital gains tax (5%) will be $22,500, for a total of $112,500.

By gifting the property, the opportunity to step up the cost basis of the property was lost. The tax law provides that when property is inherited and included in the decedent's taxable estate, its cost basis gets stepped up to its fair market value on the decedent's date of death. Returning to our example, if Father retained ownership of the house until he died, Son's cost basis would be $500,000, and if he sells it for $500,000 he will have no capital gain and will not pay any capital gains tax. Even though Father's estate did not owe any federal estate tax due to the $11,580,000 exemption, the house still gets a stepped-up cost basis for determining the federal capital gain tax. Gifting the property resulted in capital gain taxes of $112,500 which exceeds the Massachusetts estate savings of $35,200 by $77,300. In this case, it would have been smarter for Father to hold onto the house until his death and pay the Massachusetts estate tax in regard to the house.

The analysis described above applies not only to real estate, but also to all assets subject to capital gain tax, such as stocks. There are many situations where it will still be prudent to gift assets to avoid the Massachusetts estate tax. The asset may have a high cost basis in relation to its value, so the step-up is not important. If Father was giving son a rental property or a vacation home which Son has no intention of selling, then avoiding the Massachusetts estate tax may have a higher priority.

Before making a gift of any assets to avoid the Massachusetts estate tax, it is important to analyze the potential capital gains tax impact of that gift. Sometimes, it is best not to gift. **FT**

Estate Planning After Divorce

by Marisa W. Higgins, Esq. | 508-459-8041 | mhiggins@fletchertilton.com

For most people, the finalization of a divorce feels like an ending. But it is also a new beginning. Don't let your old and outdated estate planning documents control your new life. They may tie you to a past you have left behind—in ways you never intended or wanted. If you do not already have an estate plan, creating one now, after your divorce, is essential.

WILL & REVOCABLE TRUST

Unless your will or trust provides otherwise, divorce automatically revokes your former spouse as beneficiary under the terms of your will and revocable trust. It also revokes any provision of the will granting your former spouse a power of appointment or naming the former spouse as a personal representative of your estate. After a divorce it's imperative to update your will and trust to clearly identify your new beneficiaries and those you want to serve in a fiduciary capacity. In addition, you need be certain that your will and trust are fully consistent with the terms of your divorce judgment.

BENEFICIARY DESIGNATIONS

It is important to understand that many assets pass outside of your will, typically by beneficiary designation or survivorship elections. Examples of these non-probate assets include joint bank accounts, retirement accounts, annuities and life insurance policies. While Massachusetts law eliminates the beneficiary designations of your former spouse and, upon divorce, treats your former spouse as having predeceased you, this law may be preempted by federal law for any retirement plans governed by ERISA and other federally

provided benefits. In other words, with certain non-probate assets, it's possible that your former spouse can inherit the asset upon your death if the beneficiary designation has not been changed after the divorce. As a result, you should review and modify all beneficiary designations as part of your divorce estate planning. Additionally, you may be required to maintain life insurance for the benefit of your former spouse, particularly if you pay alimony or have unemancipated children to support. You will need to ensure the beneficiary designations satisfactorily address your obligations under your judgment of divorce.

HEALTH CARE PROXY & POWER OF ATTORNEY

If you did not name a new agent under your power of attorney or health care proxy while your divorce was pending, those documents should be revised as part of your post-divorce estate planning. You want to be certain that you've named the appropriate person(s) to make significant medical and financial decisions for you in the event you cannot make those decisions due to an impairment or inability to communicate.

MINOR CHILDREN

If you have minor children, your estate plan probably names your former spouse (the other parent) as guardian of the children in the event of your death. After the divorce, you may wish to name someone other than your former spouse as guardian of the children if you die while they are under the age of 18. While, in most situations, the surviving parent will become the sole guardian of the children, if the surviving parent is unable to serve or is determined unfit to parent, the court will appoint a guardian, and it is helpful to the court to know your wishes.

In addition, it is important to review your estate plan to be sure that if your former spouse becomes the guardian of your minor children, he or she does not have automatic access to the funds designated for your children. You may consider creating a trust to fund the children's expenses, including their college education, in the event of your death.

FAMILY MEMBERS' ESTATE PLANS

Finally, if your parents or other family members have estate plans that include you, your children or your former spouse, those estate plans should be reviewed as well. Their plans may need to be amended to protect their assets from your former spouse.

If you are divorced and do not have an estate plan, now is the time to create one. Without one, the Commonwealth will decide how your assets are to be distributed after you die. An estate plan will ensure that your assets are distributed the way you intend and will provide you with peace of mind as you embark on this new chapter in your life. **FT**

DDS Application and Appeals Process: Getting to Eligibility

by Patrick C. Tinsley, Esq. | 508-459-8211 | ptinsley@fletchertilton.com

The parents and guardians of children with intellectual or developmental disabilities face numerous challenges, not the least of which is navigating the process of obtaining support services from the Department of Developmental Services (DDS). This article provides a brief summary of the steps in that process and some suggested tips that can enhance your chances of success.

DDS is part of the Executive Office of Health and Human Services, the most expansive agency in the commonwealth of Massachusetts. DDS provides a range of services for individuals with intellectual and developmental disabilities. Since no two people have exactly the same needs, DDS tailors its services to each individual's unique circumstances. But broadly speaking, DDS services include employment, day program and residential supports for qualified adults, and family support and specialized educational services for qualified children. To apply for services, an applicant – or more typically -- the applicant's parents or guardians fill out and submit the Application for DDS Eligibility form, which can be found on the DDS website. Completed applications must include the following documentation:

- Birth certificate
- Social Security card
- Health insurance card(s) (e.g., MassHealth, Medicare, private insurance)
- Medical reports documenting the diagnosis underlying the applicant's need for DDS services (e.g., Closely Related Developmental Condition, Intellectual Disability, Autism Spectrum Disorder, Prader-Willi Syndrome, Smith Magenis Syndrome)
- A Notice of Privacy Practices Acknowledgement Form
- Proof of Massachusetts domicile (e.g., a Massachusetts driver's license, a Massachusetts ID card, a utility bill with the applicant's name and Massachusetts address).

Most of the required documentation is straightforward, but "proof of Massachusetts domicile" requires some explanation. The concept of "domicile" may be obscure and unfamiliar to some applicants, but it is important to understand because domicile is often the first issue that DDS examines when reviewing an application. If DDS finds that an applicant is not domiciled in Massachusetts, it will deny eligibility on that basis alone and will not proceed to evaluate the application further. Successfully applying for DDS services, therefore, requires an understanding of how to prove that the applicant is domiciled in Massachusetts.

It is not unusual for DDS to provide constructive feedback that can help an applicant cure any deficiencies in the application and obtain eligibility for services.

Domicile refers to a person's primary residence – the place where he or she resides and intends to remain for an indefinite period of time. For applicants who are lifelong residents of Massachusetts or whose parents make Massachusetts their permanent home, proof of domicile is usually easy to obtain. Such applicants typically establish that they are domiciled in Massachusetts

by producing a state-issued license or ID card, a library card, a bank statement or utility bill showing a Massachusetts address, or other similar documentation. But for applicants who moved to Massachusetts from out of state, and whose parents or guardians reside out of state, DDS may not accept that as proof of domicile.

For example, there are children (and adults) whose out-of-state parents have arranged for them to live in a group home, specialized school or other assisted-living facility in the commonwealth. When DDS reviews applications from people in those or similar circumstances, the agency presumes that the applicant is not domiciled in Massachusetts. That presumption can be rebutted, but in many instances the customary proof of domicile – state-issued licenses or ID cards or other official documents bearing the applicant's Massachusetts address – will not suffice. For that reason, applicants who have questions about how DDS may view their domicile status should consider speaking with an attorney who is familiar with DDS regulations.

Applicants who are determined ineligible – whether because of domicile or for any other reason – have a right of appeal, but the applicant must take quick and appropriate action to preserve that right. Applicants must send notices of appeal in writing, within 30 days of receiving the decision, to the regional director for the department region in which the applicant resides.

The first step in the DDS appeal process is for the regional director to convene the "informal conference." As the name suggests, the informal conference does not take place in a structured setting and is not an adversarial process. Instead, it is an opportunity for the applicant – and/or parents and guardians – to meet with the regional director and other members of the regional eligibility team to discuss the reasons why DDS rejected the application. The conversation can be difficult at times. Applicants are often dissatisfied with the reasoning that led DDS to deny their eligibility. Parents are often weary from years of unceasing advocacy on behalf of their special-needs children and frustrated by the defeats, denials and indignities they and their family have endured along the way. But as difficult as the conversation may be, it is an invaluable opportunity to engage with DDS on a personal level – in an informal, face-to-face conversation with the relevant decision-makers – and collaborate on possible ways to remedy any deficiency in the application. Applicants who may take a jaded view of DDS as staffed by uncaring bureaucrats are often

surprised to see how passionate those bureaucrats are about promoting the well-being of the intellectually and developmentally disabled. It is not unusual for DDS to provide constructive feedback that can help an applicant cure any deficiencies in the application and obtain eligibility for services.

If the applicant is not satisfied with the outcome of the informal conference, he or she may request a fair hearing. Once again, this must be done in writing and within 30 days. A fair hearing resembles a trial in civil court, with each side presenting evidence, eliciting testimony from witnesses and arguing their position. When the fair hearing is concluded, the hearing officer, whose role is similar to that of a judge, will issue a written decision outlining his or her findings of fact and conclusions of law. Applicants are entitled to have a lawyer represent them at the fair hearing and are encouraged to seek out qualified counsel. Even the most sophisticated and savvy applicants who are deeply familiar with the relevant medical and legal standards that govern their situation may find themselves unable to present their case effectively under trial conditions.

The key takeaways are that it is important to understand the DDS application process and its requirements, and that appeals can be made after a denial but must be requested promptly and in writing. **FT**

Using ABLE Accounts to Avoid a One-Third Loss in SSI

by Theresa M. Varnet, Esq. | 508-459-8091 | tvarnet@fletchertilton.com

The following example shows how an ABLE Account can be useful to supplement income without risking the loss of SSI benefits.

If the Social Security Administration (SSA) determines that you are receiving "in-kind support," it will decrease the amount of your Supplemental Security Income (SSI) by one-third. Often parents will not charge rent to their child with special needs who is living at home. Or the parent will subsidize the cost of rent or other housing expenses if the disabled adult child is living independently. SSA makes the presumption that you do not need the full SSI check if someone is assisting you with the cost of food and shelter. Regardless of the actual dollar amount of this in-kind support, SSA values the support to be equal to one-third of the SSI benefit and reduces the full SSI check by that amount.

To avoid having your SSI check reduced by one third, you must be able to show that you are either paying rent or contributing your "fair share" of the cost to maintain your household. In order to determine whether you are paying your fair share, SSA will require you to itemize the following basic household expenses--rent or mortgage, property taxes, heating, electricity, sewer, garbage collection and food--and divide these expenses by the number of people living in the home. This amount is considered your pro rata share of household expenses. If the pro rata share is greater than the total amount of your SSI and earnings, SSA will consider the difference to be in-kind support and will reduce your check by one-third.

There are two ways to avoid the one-third loss of SSI. One way is for you to begin paying rent to your parents to live in their household. This rent charged should be equal to your pro rata share for living in the home. The second way comes into play if your income is not

enough to pay the pro rata share. Then contributions to an ABLE account may fill in the difference and still enable you to receive the full SSI check.

An ABLE account is a special savings account that allows a person who was disabled prior to the age of 26 to save up to $100,000 without losing SSI. ABLE accounts can be used to pay for Qualified Disability Expenses (QDE) which include the cost of housing and living expenses. If your income does not stretch to cover your pro rata share for housing expenses, a contribution can be made to your ABLE account by your special needs trust or a friend or family member. Once the ABLE account is funded, the trust manager can use the funds in the account to pay for your pro rata share of household expenses. The maximum annual contribution to an ABLE account is $15,000.

In summary, if your parent or Special Needs Trust subsidizes the cost of your living expenses, you will lose one-third of your SSI. If, instead, your parent or Special Needs Trust makes a contribution up to $15,000 per year to your ABLE account and then you withdraw the amount needed to pay your pro rata share of household expenses, you will receive the full SSI check. Distributions from an ABLE account for food and shelter will not be deemed in-kind support.

For more information on ABLE accounts, download the related articles on the Fletcher Tilton website. **FT**

ATTORNEY SPOTLIGHT

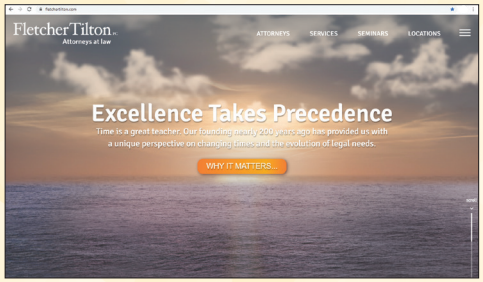
Michael T. Lahti is a Director of the firm and has practiced law since 1995, concentrating in estate planning, taxation, probate, estate and trust administration, elder law and long-term-care planning.

Mr. Lahti is a well-known public speaker and has conducted hundreds of educational seminars with valuable information on how to avoid probate, reduce estate taxes, protect assets from long-term (nursing home) medical expenses, and the essential documents that everyone should consider when doing an estate plan.

OUR EDUCATIONAL WEBINARS REACH MORE PEOPLE

This fall, Fletcher Tilton hosted 5 Special Needs Planning and 4 Estate Planning webinars. This convenient virtual format enabled more attendees to participate. We look forward to seeing everyone online again in 2021.

ANNOUNCING THE LAUNCH OF OUR NEW WEBSITE



The site is easy to navigate, adapts to different devices such as mobile phones, and adds new features.

Not only can you find your attorney easily but you can also browse our hundreds of current articles, pay your bill or fund your retainer online, print or email content from the site to share it with others, enroll in seminars, get interactive directions to our offices and subscribe to our newsletter.

Please take a tour at www.**FletcherTilton.com** and send any suggestions or comments to our marketing department at solutions@fletchertilton.com.

Super Lawyers®

WE ARE PLEASED TO ANNOUNCE THE 2020 *SUPERLAWYERS*® SELECTIONS HAVE BEEN PUBLISHED AND INCLUDE FIVE OF OUR ATTORNEYS.

Richard C. Barry, Jr. - Estate Planning & Probate
William D. Jalkut - Civil Litigation
Frederick M. Misilo, Jr. - Elder Law
Nelson L. Santos - *Rising Star,* Litigation
Scott E. Regan - *Rising Star*, Employment & Labor Law

For this designation, attorneys are nominated by their peers, evaluated by third-party research across 12 key categories, and reviewed by a highly credentialed Blue Ribbon Panel of attorneys.

UPCOMING WEBINARS

Special Needs Planning with attorney Meredith Greene
Wed., January 13, 2021 | 6:30-8:00 p.m. | Live Webinar

Estate Planning with attorney Michael Lahti
Tues., January 19, 2021 | 10:00-11:30 a.m. | Live Webinar
Tues., February 9, 2021 | 10:00-11:30 a.m. | Live Webinar
Tues., March 2, 2021 | 10:00-11:30 a.m. | Live Webinar
Tues., March 23, 2021 | 10:00-11:30 a.m. | Live Webinar
Tues., April 13, 2021 | 10:00-11:30 a.m. | Live Webinar
Tues., May 4, 2021 | 10:00-11:30 a.m. | Live Webinar
Tues., May 25, 2021 | 10:00-11:30 a.m. | Live Webinar

For details and registration, visit FletcherTilton.com/seminars

Fletcher Tilton PC
Attorneys at law
The Guaranty Building
370 Main Street, 12th Floor
Worcester, MA 01608-1779

FLETCHER TILTON TRUST & ESTATE DEPARTMENT ATTORNEYS:

Frederick M. Misilo, Jr., Esq.
Richard C. Barry, Jr., Esq.
Warner S. Fletcher, Esq.
Dennis F. Gorman, Esq.
Meredith H. Greene, Esq.
Marisa W. Higgins, Esq.
Mia H. Lahti, Esq.
Michael T. Lahti, Esq.
John J. McNicholas, Esq.
Lauren E. Miller, Esq.
Mary F. Proulx, Esq.
Dani N. Ruran, Esq.
Sumner B. Tilton, Jr., Esq.
Theresa M. Varnet, Esq.

FletcherTilton.com
508.459.8000