CECB Carnahan, Evans, Cantwell & Brown, P.C.

on the Subject

May 2014

CECB is excited to announce that Courtney L. Fletcher has recently joined the firm's Estate Planning Group. Courtney concentrates her practice in the areas of estate planning and administration, probate, trusts and elder law, including Medicaid Planning and Special Needs Trusts. She has experience in the preparation of Trust Agreements, Wills, Powers of Attorney and Health Care Directives. Additionally, she handles probate estates, including guardianships and conservatorships.

Courtney is a member of The Missouri Bar and a member of the Greene County Estate Planning Council. She is a past director of the Missouri Chapter of the National Academy of Elder Law Attorneys and a past chairman of the Springfield Metropolitan Bar Association Probate and Trust Committee.

Courtney received her undergraduate degree from William Jewell College where she graduated with honors. She received her law degree from University of Missouri at Kansas City, Missouri.

Choice Of Entity – Active Business And Real Estate New Business Ventures

John M. Carnahan, III

The choices of business entities are now almost too long to list. There are several historical ones, as well as some fairly recent ones, which have now become the entity of choice

The alternatives include:

- C Corporation
- S Corporation
- General Partnership
- Limited Partnership
- Limited Liability Limited Partnership
- Limited Liability Company
- Series Limited Liability Company
- Professional Limited Liability Partnership.

Once again there are other types of entities, some which have very limited use, for example Professional Corporations for law firms, accounting firms, and dental practices. With the recent increase in income tax rates, and the implementation as of 2013 of the Medicare Surtax (3.8% on certain types of investment income), dramatically increased exemptions for Federal Estate Taxes, and a strong likelihood of additional tax law changes in the future, the choice of your business entity as you set up a new structure for an active business becomes far more important. The income tax planning aspects, especially minimizing exposure to the Medicare Surtax, the double taxation involving C Corporations and so forth is far more important than it was during the period from the Reagan tax period through the end of the Bush tax cuts.

Your goal is to minimize exposure to double taxation, application of the Medicare Surtax, as well as getting any benefits that might result in the future as a result of the death of an owner. For example, a step-up-in-basis in both the outside ownership interest as well as what is known as a Section 754 Election to increase the basis inside a pass-through or partnership type entity. In some cases you can depreciate assets three times including when you first purchased it, on the death of the first to die of a husband and wife, and then on the death of the survivor as the asset pass downstream to children and grandchildren. The ability to re-amortize or re-depreciate assets which have already been depreciated once is an extremely beneficial tax planning tool.

One structure, that we are seeing more of in our practice, as clients come in to discuss either an entity to acquire an active business with real estate or the parties are setting up a new business, involves a Limited Liability Limited Partnership wherein the General Partner is a Limited Liability Company which makes a Subchapter S Election. Underneath the Limited Liability Partnership you set up at least two single member LLC's, one to conduct the active business and isolate the liability there and the second to own the real estate which is then leased to the active business. This allows you to avoid the Medicare Surtax on rental income, which is very difficult to plan around, and at the same time move the income upstream with a large part of it not subject to Social Security taxes, and at the same time hopefully having the majority of the owners active participants and employees of the general partner receiving salaries and thus minimizing the exposure to the Medicare Surtax on the total income from the business enterprise.

This type of structure takes more planning, but it minimizes the need for annual meetings of shareholders and directors, possible application of franchise taxes, as well as offers maximum flexibility from an income tax planning standpoint and certain benefits, in the event of the death of an owner.

Any of the members of the Transactional Group of Carnahan, Evans, Cantwell & Brown, P.C., would be more than happy to discuss with you, your family and business partners, the possible use of this fairly new business structure for future transactions.

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Protecting Your Digital Assets

Courtney L. Fletcher

If you pay your bills, access financial information and bank accounts and/or conduct business online, you need to consider who can access these accounts or even access your computer, notebook or smart phone in the event of your death or incapacity. The ability to conduct financial transactions and pay bills online has evolved in the last few years and, consequently, more and more people are choosing to conduct a majority of their financial transactions online. Unfortunately, few people have a road map in place which provides any of the necessary passwords and data allowing a spouse or other fiduciary the ability or authority to access their digital accounts or digital assets. The term “digital assets” includes data, Internet accounts and other rights in the digital world. This data may be stored on your personal computer’s hard drive or it may be stored remotely and accessed by the Internet. Given that a study conducted by McAfee in 2011 found that Americans value their digital assets at more than $54,000 on average, it is important for you to put in place a plan with respect to these type of assets. There are several steps that you can follow to ensure that you have created a digital road map for your fiduciary to follow with respect to your digital assets.

First, keep a detailed list of all online accounts, including a list of all computers (including personal computers, notebooks, smart phones and other digital devices) that you use, as well as the passwords that you create for your accounts and devices. This list needs to be updated as you create new accounts, change passwords, or conduct transactions on the Internet. If something happens to you, this will greatly assist a properly appointed fiduciary’s ability to access your accounts and to ensure that there is no lapse in the payment of your bills. Your list should be kept in a very secure location, which is known only to a trusted family member or fiduciary.

Second, keep a list of all of your e-mail addresses and indicate what the e-mail address is used for (business or personal), as well as the password for those accounts. This ensures that your fiduciary will be able to access those accounts in the event of your death or incapacity. Since your internet accounts are governed by a contract between yourself and the service provider, a failure to provide your fiduciary with the valid password for your account may result in your fiduciary being denied access to your e-mail account. This becomes a problem if important correspondence is received via your e-mail account and no one has the authority to access that account.

If you conduct banking or financial transactions (including paying bills to certain service providers), it is wise to create a list of each bank/brokerage account, as well as your username and password. You should also keep a list of all service providers that you pay online or in which you receive online statements only. This ensures that your fiduciary is aware of all bills that need to be paid.

Third, keep a record of where your data is stored. Data can be stored on your computer’s hard drive, on removable media (such as a Flash memory card or disk) or on a remote Internet site. You should list where such data is stored and where the removable media is located and stored. If you use a remote site for storage, make sure to list the site, as well as your username and password.

Fourth, provide a list of all of your blogs, domain names and webpages and list the registrar/hosts for each. You should also provide instructions to your fiduciary as to whether you would like these sites to be continued in the event of your death or disability and, if so, by whom. You should also be sure to list any accounts or digital information that you consider important or valuable. This might include any domain names that you own or virtual currency, such as Bitcoins, that you possess.

It is important to realize that some digital assets may have nominal monetary value, but nonetheless may be priceless to you and your family. Digital assets such as photo storage sites, social media sites and email accounts may have great sentimental value to your loved ones. Again, it is vital that you provide a list of online sites used, as well as your usernames and passwords, so that these accounts can be accessed in the event of your death or disability. You should also consider providing instructions to your fiduciary regarding what you would like to happen to these accounts in the event of your death or disability. If you want your profile to be maintained, you need to list who is to be responsible and what you want them to do with it. You should also consider whether there is any sensitive information in your online accounts that you want to keep secret from family or friends. If so, you need to provide instructions to your fiduciary regarding how tha information should be handled and by whom.

Finally, it is important to revise your estate planning documents to give your fiduciaries the power to manage your digital assets. Unless your estate planning documents have been updated recently, it is unlikely that these documents provide your fiduciary with the power to properly manage and dispose of your digital assets. Taking the steps outlined in this article will help ensure your fiduciary’s ability to manage your entire estate, which is likely to include more and more digital assets as technology advances!

MEDICARE

3.8% Medicare Surtax on Real Estate Asset Owned and Managed by Trusts

John M. Carnahan, III

As of January 1, 2013, pursuant to the Healthcare and Education Reconciliation Act of 2010 (also known by its acronym “Obama Care”) a new tax was imposed on certain taxpayers, including individuals and trusts, on their investment income. It is also known as the “Medicare Surtax”, even though the tax is really just a revenue raiser and is not utilized in any way to fund the Medicare System. Individuals are not subject to the tax unless their modified adjusted gross income exceeds $200,000 if single or $250,000 if married. For trusts, the tax is imposed once the trust has adjusted gross income in excess of $11,950 (for 2013). There are several types of trusts, and the two basic tax categories are Grantor Trusts and Irrevocable Trusts and a subcategory thereof known as “Complex Trusts”. The Grantor Trust itself is not subject to the tax or any income tax, but rather the deemed tax owner of the trust, usually the Grantor, pays the tax on income earned by assets owned by the trust. In the case of the Irrevocable Trust which are Complex Trusts, then to the extent income is not distributed out (also called “DNI”), the trust itself is subject to tax. There are ever more complex rules regarding Irrevocable Trusts which own stock in a Subchapter S corporation and which have made an election to be an Electing Small Business Trust (“ESBT”), in that they do not have a deduction against their taxable income for distributions to

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beneficiaries but the trust itself always pays the full tax on its share of the income earned by the S corporation.

The Medicare Surtax is imposed on investment income, which includes:

1. Gross income from interest, dividends, annuities, royalties and rents;
2. Gross income from a passive activity or a trade or business trading of financial instruments or commodities; and
3. Net gain from sale of an asset, for example capital gains.

There is an extremely complex set of rules regarding certain types of characterizations and treatment of income. In determining whether an activity is active or passive, Section 1411 IRC, which imposes the new Medicare Surtax, refers to Code Section 469 IRC which deals with the definition of passive income for purposes of the allowance of loss rules. The two main areas in which tax practitioners have focused for purposes of tax planning, is whether an activity is passive, and then the subcategory of passive income for rental activities. One of the big questions is whether a trust, which owns subchapter S stock, can treat the income earned by the trust as a pass-through from its ownership in a subchapter S corporation, as active? The analysis involves whether the Trustee is active in the business, i.e., as an officer or employee, or especially in a case of a trust for minor beneficiaries (for example children and grandchildren of the owners), can the activities of the trustee be attributed or used to determine whether the income is active or passive, and therefore if passive subject to the Medicare Surtax. An even a more difficult test than determining whether the activity is active or passive, is whether rental income generated by assets owned by the trust can qualify for the rental income exemption from the passive activity rules and thus the rental income would not be subject to an additional 3.8% tax. This can have a significant effect in trust taxation in that the trust income becomes subject to the highest tax rate of individuals, starting at the $11,985 level, so therefore you get very little benefit from tax brackets. The leading case up till March of 2014 was the Mattie Carter decision which held that the activity of the trustees could determine the characterization of ranch and farming income.

On March 27, 2014, the United States Tax Court issued its decision in *Frank Aragona Trust, Petitioner v. Commissioner of Internal Revenue*. This is a major decision that benefits trusts and their beneficiaries subject to tax. The fact situation is very common in the estate planning arena, the Aragona family had accumulated a substantial amount of income producing real estate assets over an extended period of time. The founder of the business, Mr. Aragona, established a trust for the benefit of his children and grandchildren and future generations. Upon his death, his five children and an independent trustee were appointed to take responsibility of management of the trust assets. The trust had extensive real estate activities, conducted primarily in the Limited Liability Company (LLC) format. The trustees met every few months to discuss the trust business and were paid a trustees fee. Three of the children who served as trustees were also employed by the LLC Management Company set up by the trust to manage the trust's rental real estate properties. It included several other people, including a Controller, leasing agents, maintenance workers, accounts payable clerks and accounts receivable clerks. The fthree trustees who worked for the business also received a salary from the management company.

The tax issue was whether the losses for the years 2005 and 2006 from the real estate activities were active or passive. The trust also owned other business entities which reported income and the trust wanted to reduce its income taxes by using its rental property losses to offset the income earned on other activities.

Section 469 (c)(7) IRC, imposes tests including a 750 hour test for real estate to determine whether the activity of the business is active or passive. The primary issue before the Tax Court was whether a trust can qualify for the Section 469 (c)(7) exceptions and thus convert what would normally be considered a passive activity into an active activity. After a very detailed analysis the Tax Court held that the activities of the trustees, including their activities as employees of the management company should be considered in determining whether the trust materially participated in the real estate operations. Basically the Tax Court is allowing the attribution of activity from the individual trustees to the trust itself. This decision would be consistent with the Mattie Carter decision and is a major victory for tax planning purposes for families doing long term business and estate planning involving their real estate holdings. It also should help achieve a similar result for those ESBT's (Electing Small Business Trust), which own subchapter S stock where the trustees that serve as trustees also serve as officers and employees of the S Corporation and are directly involved in the operations or management of the subchapter S corporation.

Security Interests: A Complex Web

A. Jay Preston

What is a "security interest"? It is as it sounds; a security interest is an interest in personal property or fixtures, items of personal property that become substantially intertwined with real property, that secures payment or the performance of an obligation. This article discusses Article 9 of the Uniform Commercial Code which sets forth the rules regarding security interests, and some of the special rules that are often overlooked. The rules of Article 9 are difficult to follow as the language utilized is not commonplace in everyday life, and the sections frequently cross-reference one another.

The basics of the creation of a security interest are: (1) that the party receiving the security interest gives value for the interest; (2) the party granting the interest has rights in the collateral or the power to transfer rights in the collateral; and (3) one of the four specific conditions of Missouri Revised Statute § 400.9-203(b)(3) is met. Generally, the conditions require that the debtor sign a security agreement describing the collateral or the secured party takes possession of the collateral pursuant to a security agreement, oral or written. Once a security interest is created it is not required, but is essential in order to protect oneself, to "perfect" the security interest.

"Perfection" of a security interest ensures that the interest is protected against third parties who may have claims against the debtor. The most common methods of perfection are the secured party taking possession of the collateral or the filing of a "financing statement." A financing statement is a publicly available document, filed with the Missouri Secretary of State, identifying the debtor, the creditor, and giving a general indication of the collateral. The

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Protecting the Attorney-Client Privilege

Christiaan D. Horton

One of the benchmarks in effective legal representation is the truthful and full disclosure of information between attorney and client. Our laws have evolved to protect the attorney-client privilege to foster this purpose, but with the advent of electronic communication and the speed at which information is now transmitted, protecting this privilege can certainly be more difficult. Missouri Courts construe the attorney-client privilege broadly to promote its fundamental policy of encouraging truth and full disclosure. Our legislature has codified this privilege at § 491.060(3) RSMo. This privilege attaches to (1) information transmitted by a voluntary act of disclosure; (2) between a client and his or her lawyer; (3) in confidence; and (4) "by a means which, so far as the client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted." For the privilege to apply, all four of the above elements must be satisfied.

This privilege covers both oral and written communications, but it does not protect disclosure of the underlying facts which may be discoverable through other means. Although the privilege may be invoked by the attorney or the client, it exists for the client's benefit, and most often, it is the client who is called upon to decide whether to assert or waive the privilege.

In the litigation context, the party asserting the attorney-client privilege has the burden to show that the privilege applies to the communication in question. If that burden is met, the communication is absolutely privileged and may not be revealed, even under a claim of substantial need.

The above high-lights the reason and importance of the privilege, and the precautionary measures that should be employed to protect it. Inadvertent waiver or disclosure can often come through the forwarding of electronic communications that are intended to be privileged. Any time clients receive email communications from their attorneys, they should treat such communications as privileged and confidential, and should seek authorization to disclose or forward those communications to third parties by legal counsel so that privilege is not jeopardized. It is a good practice to be cautious with long email chains that could contain a blending of attorney-client communications with other third party messages as well. Sensitive communications could also contain reference in the subject matter to their privileged status which may also assist to prevent advertent disclosure. If disclosure is required to an outside party by compulsion or otherwise, a protective order or privilege preservation agreement may be necessary to limit the use and scope of that disclosure as well. Our attorneys in the litigation and transaction groups here at Carnahan, Evans, Cantwell & Brown, P.C. stand ready to assist with any guidance or needs in this area to insure protection of your most sensitive and privileged communications.

Security Interests: A Comples Web *- Continued from Page 3*

idea behind perfection is to let other possible creditors know of existing obligations of the debtor. By perfecting one does not prohibit another from taking a security interest in the same collateral, but a priority is established in the event that the debtor defaults on its obligation.

A tricky part of Article 9 is determining when it does or does not apply, in whole or in part. There are some transactions where Article 9 is wholly inapplicable. For example, under Missouri law, one may not take a security interest in a personal service contract, nor may one take an interest in another's personal injury claim. Article 9 doesn't apply to interests in real property. An interest in real property may be taken, but not under Article 9. There are still other transactions where Article 9 applies to the creation of the security interest, but perfection of the interest is governed under a different set of rules. The most commonly known example of this is perfecting an interest in a motor vehicle. In order to perfect an interest in a motor vehicle one must file a "Notice of Lien" with the Missouri Director of Revenue. This notice serves the same purpose as a financing statement under Article 9; it gives notice of one's claim to third parties.

One extremely tricky situation involving Article 9 is in regard to manufactured homes, largely due to the ease in which they may be transported. Under current Missouri law an interest in a manufactured home may not be perfected under Article 9. Just as a motor vehicle, a security interest in a manufactured home is perfected by filing a notice of lien with the Director of Revenue. At first blush this may appear odd because manufactured homes can't be driven on their own; they must be towed or placed on a trailer. However, given their transportability the comparison to motor vehicles is understandable. The first trick to manufactured homes is that once they are affixed to real estate an interest is perfected, in part, by filing in the real property records. To perfect, the manufactured home must actually be affixed to real estate, the owner of the home and the real estate must be the same person, and an affidavit of affixation must be filed with the Recorder of Deeds and the Director of Revenue. The other twist to manufactured homes is that from June 30, 2001 to August 28, 2002 perfection could be achieved under Article 9 by the filing of a financing statement. Thus, before one takes a security interest in a manufactured home one should check the real property records, the UCC filings, and the Certificate of Title on file with the Department of Revenue.

Largely, the point of this article is to make clear that if one is contemplating taking a security interest in the property of another there are a multitude of different places to check for pre-existing security interests and a multitude of different ways to create and perfect security interests depending on the property involved. Unless all the rules are followed one opens up the possibility of losing the security that was likely an essential part of the decision to go forward with the transaction. Article 9 is embodied in the Missouri Revised Statutes § 400.9-101 to § 400.9-809.

What is Elder Law and Why is it Important to You?

Courtney L. Fletcher

Elder Law is the practice of law dealing with issues affecting the elderly. It can range from preparing estate planning documents for clients that desire to ensure that their property passes at their death to their chosen beneficiaries, to counseling families regarding crisis planning due to the concern that a family member may be forced to enter a nursing home. There are 37 million Americans age 65 or older accounting for 12% of the population. This percentage is expected to double by 2030. As a result of the aging population, the issues concerning the elderly will continue to grow and will continue to affect all areas of the practice of law and clients at every financial level.

One of the biggest concerns facing the elderly population is the possibility of paying for skilled nursing home care. For healthy, younger individuals who have significant assets and income, one possibility of planning for this concern is to purchase long-term care insurance to supplement the costs of nursing home care. This is particularly the case where preservation of those assets and income is a primary goal. Depending upon the policy purchased, it is possible to provide for in-home care and lessor degrees of care, such as assisted living. Obviously, there are many personal factors to consider, including the cost of the policy, the benefits the policy covers and the financial solvency of the insurer, just to name a few. It is also important to ensure that the policy qualifies as a "tax-qualified" long term care insurance policy for purposes of deducting the cost of the premiums. It is vital that the individual consult with a qualified advisor to discuss the type of products available and which product, if any, best suits their needs.

If an individual has Medicare Part A, that program can step in and pay inpatient hospital care and skilled nursing care for a certain period of time during a "benefit period" or time of illness. Once this specified time period runs out, Medicare may no longer provide skilled nursing home care. At that point, the individual must either private pay or apply for assistance under the Medicaid program. Since Medicaid is a need-based program and only covers skilled nursing home care (for Vendor Medicaid purposes), there are very specific rules that must be met before an individual can qualify for services. First, the individual must be in need of a nursing facility level of care. Second, the individual must not own more than $999.99 in "countable resources" or non-exempt assets (or, if married, and both spouses are in the nursing home, this limit is $1,999.99). There are several assets that are considered "exempt" and are not counted for purposes of determining eligibility, including the family home (which will remain exempt during the individual's lifetime, subject to some important rules), an irrevocable pre-need funeral plan, burial plot, personal jewelry, household goods and furniture, and one vehicle.

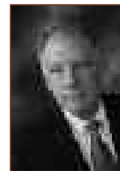
It is important to consult with an attorney who is familiar with Medicaid rules prior to making any transfers of property for eligibility purposes. Medicaid has a five (5) year look-back period for any transfers made of an individual's property for less than full and valid consideration. If an application is made for benefits prior to the expiration of the look-back period, then a penalty period will be assessed and the individual will not be deemed to qualify for services until the expiration of that penalty period. There are some planning options available, especially in situations where the spouse remains at home and does not require skilled nursing care assistance.

It is also vital to have estate planning documents in place, especially a durable power of attorney for financial purposes and a durable power of attorney for health care and health care treatment directive. These documents will ensure that someone is able to make financial and health care decisions in the event the individual becomes incapacitated. This should avoid the need to establish a guardianship or conservatorship for the incapacitated person. A revocable trust will ensure that the individual's property avoids probate and further can provide for creation of ongoing trusts for the benefit of children and descendants.

Whether you are already 65 or a long way from it, it is important to have a conversation with your attorney regarding your goals and concerns for your "golden years". Some advanced planning now may make all the difference in the options available to you in providing for your enjoyment of life down the road!

In the News

CECB is pleased to announce that Julie T. Brown has been honored as a recipient of the 2014 Women's Justice Awards in the category of Business Practitioner. The 2014 Women's Justice Awards selection committee includes prominent judges and lawyers from around the state. The list of 43 honorees includes trial judges, in-house counsel, legal scholars and others. Julie is a Shareholder in the Transactional and Estate Planning Practice Groups of Carnahan, Evans, Cantwell & Brown, P.C. She concentrates her practice in the areas of estate planning, banking, corporation and business planning.



The Firm is honored to announce that John M. Carnahan, III was recently appointed as the American College of Tax Counsel (ACTC) Regent for the 8th Circuit. The ACTC is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The College is composed of Fellows (approximately 700 current members) chosen by their peers in recognition of their outstanding reputations and contribution in the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit and two Regents at large. Regents are primarily responsible for assisting in the nomination process for new ACTC Fellows. John is a Shareholder in the Transactional and Estate Planning Practice Groups of CECB. He concentrates his practice in the areas of tax planning, corporate transactions, estate planning, and business succession planning for family-owned businesses.

CECB is pleased to announce that Joseph D. "Chip" Sheppard, III recently named to the Ozark Technical College Board of Trustees. The Ozarks Technical Community College Board of Trustees consists of six members elected from the district at large. Members are elected for terms of six years. The role of the Board of Trustees is to help shape the mission, vision and values of the institution. The OTC system offers associate degrees and certificates in a variety of technical, allied health, and two-year transfer degree programs, as well as workforce development opportunities and community enrichment courses. Chip is a Shareholder in the Litigation/Dispute Resolution Practice Group of CECB. He concentrates his practice in the areas of real estate, business, securities and intellectual property litigation, dispute resolution and transactions.

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Founded in 1979, Carnahan, Evans, Cantwell & Brown, P.C. is a locally owned and operated law firm noted for its commitment to providing superior client service to a diverse client base, including national and regional businesses, financial institutions, not for profit organizations and individual clients. The Firm currently has 20 attorneys, including seven who have their Master of Laws in Taxation. An "A-V rated" preeminent law firm by Martindale-Hubbell, our attorneys are engaged in the general business practice of law with an emphasis in the following areas:

- Business Organization and Planning
- Corporate
- Estate Planning
- Probate
- Trust Administration
- Transactions
- Local Government Law
- Real Estate and Construction
- Taxation
- Employee Benefits
- Banking
- Commercial Litigation and Dispute Resolution
- Environmental and Utility
- Economic Development
- Intellectual Property and Franchise
- Arbitration and Mediation
- Mechanics' Liens and Foreclosures
- Pension and Profit Sharing
- Employment
- Zoning and Land Development
- Wealth Strategies

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