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In Brief

Recent Tax Law Changes Make Income Tax Planning More Important Than Ever

Jonathan Samel, Esquire

One universal and challenging objective in wealth preservation planning is reducing taxes. Recent tax law changes have in many cases shifted the focus of such planning from estate and gift tax reduction to income tax reduction.

On January 1, 2013, Congress passed the American Taxpayer Relief Act of 2012 (ATRA) which, among other things, increased certain income tax rates. ATRA established a new top rate for ordinary income of 39.6% (up from 35%) for taxpayers with taxable income in excess of $400,000 for single individuals, $450,000 for married couples filing jointly, and only $12,150 for estates and trusts in 2014. In addition, the top long term capital gain and qualified dividend tax rate was increased from 15% to 20% for taxpayers in the above mentioned highest ordinary income tax bracket.

The Patient Protection and Affordable Care Act ("PPACA") which was originally enacted in 2010 established a new 3.8% surtax on investment income which first became effective in 2013. For purposes of this tax, investment income includes interest, dividends, rent, royalties, capital gain and passive activity income. This additional tax applies to taxpayers with an adjusted gross income in excess of $200,000 for single individuals, and $250,000 for married couples filing jointly. For estates and trusts, this tax applies to the lesser of (i) undistributed net investment income or (ii) the excess of adjusted gross income over the amount at which the top income tax bracket for trusts and estates begins (only $12,150 in 2014). Considering this additional 3.8% tax, for taxpayers in the highest bracket, their effective ordinary federal income tax rate (not considering state income tax rates) can be as high as 43.4%, and the top long term capital gain and qualified dividend tax rate is now effectively almost 24%.

While income taxes have increased, particularly for estates and trusts, the imposition of federal estate and gift taxes on individuals has been significantly reduced. ATRA made permanent the $5 million estate and gift tax exemption that was first introduced in 2011. The exemption is indexed for inflation, and in 2014, an individual can shield up to a total amount of $5.34 million of assets either transferred during lifetime or at death from federal estate and gift taxes. ATRA also made permanent the portability feature, which

continued on next page

Lisa A. Shearman Receives 2013 Milton O. Moss Public Service Award

Lisa A. Shearman, Esquire, was recently awarded the ***Honorable Milton O. Moss Public Service Award***, presented by the Montgomery Bar Foundation for her work with the Wills for Heroes Foundation as the National Affiliate Director and as a statewide Coordinator for Pennsylvania. Since the beginning of the Bar Foundation in 1987, the Foundation has honored Judge Moss by presenting the award to a Montgomery County resident who has provided exceptional service in support of the justice system. The Wills for Heroes Program provides free wills and other estate planning documents for emergency responders.

For over 20 years, Ms. Shearman has advised clients throughout the Commonwealth on matters involving estate planning, estate administration, and tax and business succession planning. She is a member of the Pennsylvania and New Jersey Bars, and the Pennsylvania (PBA) and Montgomery Bar Associations and the Montgomery County Estate Planning Council. She serves as the National Affiliate Director of the "Wills for Heroes Foundation," a program that provides free wills and other estate planning documents for Pennsylvania's emergency responders. In 2011 Lisa received the *Verdina Showell Award*, presented by the PBA to recognize a lawyer's outstanding community service and commitment to the Wills for Heroes Program. She has been recognized by other organizations for her pro bono service. A graduate of Villanova's Graduate Tax Program (LL.M. 1994), Ms. Shearman received her law degree from Widener University in 1992 and her undergraduate degree from the University of Scranton in 1989.

now allows a surviving spouse to use his or her deceased spouse's unused exemption. This gives a married couple the ability to protect up to $10.68 million in 2014 from estate and gift taxes. The use of all or a portion of the exemption for gifts made during each person's lifetime will correspondingly reduce the amount that is available to shelter assets from estate tax after that person's death. ATRA increased the top marginal estate and gift tax rate from 35% to 40% to the extent the total value of assets gifted and passed upon death exceeds the available estate and gift tax exemption.

As a result of the recent changes to the estate and gift tax law, planning for these taxes is no longer relevant for most people. Less than one percent of estates are now subject to these taxes. However, this does not alleviate the need for proper and careful estate planning for everyone to assure that property is preserved and passes to the appropriate beneficiaries in the appropriate manner.

Income tax planning, however, is now more important than ever for many more people, including those with modest estates. In many cases, this planning focuses on the adjusted basis of a person's assets.

The adjusted basis is the original cost of an asset which is then adjusted for various tax-related items. Such adjustments include increases for the cost of improvements to property, increases for purchase and selling costs, and decreases for depreciation and amortization, where applicable. In addition, the basis in stock, partnership interests and other ownership interests in certain closely held businesses is adjusted up and down annually based on the amount of any distributions made from the business to the owners, taxable income or losses of the business passed through from the business to the owners, and certain other tax events occurring in the business during the year.

Under the tax law, the amount realized from a sale of an asset is generally an amount equal to the total consideration given for that asset, less the seller's adjusted basis in the asset. If the difference is positive, then the amount realized is a gain. If the difference is negative, the amount realized is a loss. Therefore, taxable gain upon the sale of an asset can be reduced if that asset has a high adjusted basis at the time of sale.

For lifetime gifting of an asset, the general rule is that the adjusted basis of the person making the gift (the "donor") carries over to the person receiving the gift (the "donee"), subject to certain exceptions. One exception to the general rule is that if the basis is greater than the fair market value of the asset at the time of the gift, then for the purpose of determining loss on the future sale of the asset, the basis must be adjusted to the fair market value at the time of the gift. The effect of these rules is that any unrealized gain in the gifted asset will be taxed to the donee when the asset is sold, but unrealized losses are lost to both the donor and donee. The donor's accumulated depreciation, where applicable, on a gifted asset carries over to the donee.

Upon death, the general rule for basis is different. The basis of property which is inherited gets "stepped up" to the then current fair market value of such property on the date of death (subject to certain exceptions). This increase in basis can reduce or eliminate capital gain tax liability on

subsequent sale transactions by heirs, and can also provide heirs with a larger basis for depreciation and amortization deductions going forward.

For example, assume that a father who is seriously ill owns rental real estate worth $500,000 which has an adjusted basis of zero as a result of depreciation of the property over the years. He is thinking about gifting the property to his son. This plan would not be a good idea. If he follows through with the gift, the father's zero basis in the property will carry over to his son. On the other hand, if the father holds on to the property until his death, and passes the property to his son under his will, the son will receive a new "stepped up" basis in the property equal to the fair market value at the time of father's death. A stepped up basis will give the son the ability to receive valuable depreciation deductions against his income if he holds on to the property, or will allow the son to sell the property after father's death with little or no capital gain tax liability.

It is important to obtain detailed documentation of the basis of assets, to store this information in a safe place and to provide the information to family members and advisors. The sale of any asset can occur many years after the asset was received by gift or by inheritance. Without proper records, the tax consequences of the sale can not be properly be determined or reported.

For many years the focus in planning has often been to minimize asset values to reduce estate and gift taxes. Now, many taxpayers will instead focus on maximizing the value of their assets to reduce future income taxes by keeping the adjusted basis of assets as high as possible. The recent income tax law changes will likely make professional appraisals more important for documenting basis, particularly for closely held business interests which do not have an easily determinable fair market value.

Individuals who are no longer subject to estate and gift taxes may have current estate plans that are focused on saving estate and gift taxes, and are not designed to obtain a stepped up basis to save income taxes. Existing plans should be reviewed and updated as soon as possible to be consistent with the new tax law.

We can work with you to review and update your current estate plan and to assure that proper provisions are in place to meet your needs and goals. Wealth preservation planning can involve a number of areas of law, including, estate planning, taxation, business law, litigation, asset protection planning, real estate law and divorce law. HRMML takes a multi-disciplinary approach to wealth preservation planning involving attorneys with expertise in a number of different areas of law. Please contact our office if you have any questions or want to learn more about our capabilities in this area.

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Joan Wean, Editor

If you would like copies of the newsletter sent to someone you know, please contact Sandie at 215-661-0400 or email: Lawyers@HRMML.com.

Hamburg, Rubin, Mullin, Maxwell & Lupin's IN BRIEF is intended to provide information on recent legal developments. The information contained in this newsletter is not offered as legal advice or legal opinion on specific facts.

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The "A,B,C's" of a Medical Malpractice Claim

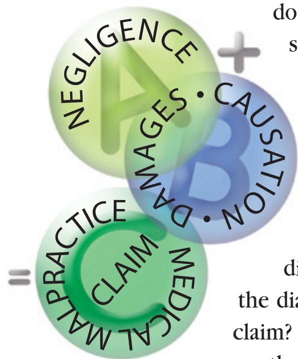
Steven B. Barrett, Esquire

Charging a physician or hospital with malpractice should not be done lightly. Doctors have undergone great sacrifice and have spent many years in training to reach a point at which they can hold themselves out as licensed or board certified practitioners in their respective fields and enter into a special relationship with us as their patients. It is because of their high and extensive training as professionals, in which we put our trust and health, that an ethical, medical and a legal duty exists between a doctor and her patient. The *potential* for a medical malpractice claim is found when the doctor fails in that duty. *Potential*, however, is the key word, because to bring a medical malpractice lawsuit – charging a medical provider with doing something wrong — is appropriately and necessarily difficult in Pennsylvania. For a medical provider to be negligent is not enough for a medical malpractice claim.

A + B = C

Let's take this formula and apply it in determining whether one has a medical malpractice claim. The "C" is the malpractice claim. What, therefore, are "A" and "B" for purposes of making a viable malpractice claim? A is negligence, which is where the medical provider fails in her duty to the patient. Many people, including many attorneys, think that if they have A, then they also have C. But that is not the case. There is still "B" that is needed before we have a malpractice claim. What then is B? B is something that attorneys who practice in the field of medical malpractice know as *causation and damages.* So putting it all together, in order to have a viable malpractice claim (C), we have must have negligence (A) and that the negligence caused or resulted in harm (B). A+B=C.

The example I often use in explaining this to clients is as follows. A woman self-examines her breast and thinks there is something not just right and goes to her family doctor to be checked. The doctor sends her for a mammogram and the radiologist's report, which is sent back to the doctor, states that there is a suspicious mass that warrants a biopsy. The woman's doctor receives the report *but never reviews it or acts on it*. Negligence? Of course. The doctor had a duty to review and treat her patient accordingly in timely ordering a biopsy. The patient, however, returns to her doctor in 6 weeks complaining of additional symptoms. The doctor remembers the mammogram ordered previously, pulls the radiologist's report from the file, and sees that she did not follow through as she should have. The biopsy is performed and the diagnosis of cancer is made. Does the patient have a medical malpractice claim? Most likely not, simply because it will be difficult, if not impossible, to prove that the delay of 6 weeks made any difference to the status of the cancer once diagnosed and, therefore, that the patient's medical outcome would have been any different with respect to the cancer, treatment or effects on the patient. In other words, under these facts, the delay in diagnosis did not cause any additional harm to the patient.



Now, let's use the same facts as to negligence but the patient returns to her doctor a year later with new signs and symptoms. The patient undergoes a biopsy and also undergoes more imaging. The mass of a year ago has increased in size considerably and has spread to other organs in her body. Under these set of facts, it can be argued medically that the delay in diagnosis and thus treatment of the cancer caused a very different and tragic outcome for the patient. Here, we have both A and B – negligence *and* causation/damages – in establishing C — a medical malpractice claim.

The law firm of Hamburg, Rubin, Mullin, Maxwell & Lupin is pleased to announce that **Steven H. Lupin**, Managing Partner of the firm, and **J. Edmund (Ed) Mullin**, Co-chair of the Real Estate and Land Use Department, were selected by their peers for inclusion in *The Best Lawyers in America 2014*. Lupin was selected for the area of Commercial Litigation and Mullin was selected for the area of Land Use and Zoning Law.

Tim Briggs was inducted into the Montgomery County Community College Alumni Hall of Fame on Friday, October 11, 2013 at the College's Central Campus, Blue Bell.

Andrew Grau and **John Iannozzi** were elected to the Board of Directors of the Triangle Club of Montgomery County in November 2013. Since 1964, the Triangle Club has awarded scholarships to high school seniors who have demonstrated excellence in academics, athletics and community service.

Steve Hann spoke at the PEC-TVSSI Municipal Workshop at Villanova University on October 16, 2013 during a seminar entitled *Creating a Municipal Stormwater Authority – Basic Steps, Benefits and "Pitfalls."*

Steve Hann also addressed the Pennsylvania Municipal Authorities Association Administrative/Environmental Issues Seminar in Gettysburg, PA on October 22, 2013, where he presented the seminar's Solicitor's Update, focusing on the latest cases and legislative/regulatory developments impacting Pennsylvania municipal authorities, including issues relative wastewater treatment plants, water plants and stormwater.

In addition, **Steve** is going to be a speaker at the Pennsylvania Bar Institute's Environmental Law Forum on April 11, 2014. The topic of his session is "Municipalities and Clean Water Act – CSOs and SSOs."

Steve Lupin was elected to a second term as the Montgomery Bar Foundation President.

And **Steve**'s daughter, **Elyse**, is expecting her first child at the end of April.

In January 2014, **Joe McGrory** was appointed to Council of the Municipal Law Section of the Pennsylvania Bar Association.

Joe McGrory was part of the panel that conducted a seminar to educate attorneys and judges involved in the mental health system, "Philadelphia Mental Health Court Civil Commitment CLE Update 2013." The seminar, sponsored by the Court of Common Pleas – First Judicial District of PA, was held November 27 at Philadelphia City Hall. The attendees were from the five-county area.

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Ed Mullin, co-chair of the Real Estate and Land Use Department at Hamburg, Rubin, Mullin, Maxwell & Lupin, PC, was recently appointed by the Court of Common Pleas of Montgomery County to be a Master for the Tax Assessment Appeal Mediation Program. The program, designed to reduce the large backlog of assessment appeal cases pending before the court, is entirely voluntary. The results will be non-binding unless the parties reach an agreement and memorialize that agreement in a stipulation.

Merle Ochrach was appointed to the Board of the Montgomery Theater in January 2014. Montgomery Theater is a uniquely intimate, not-for-profit theatrical enterprise dedicated to bringing new life to old tales, and giving age and wisdom to new ones.

Ethan O'Shea was recently named chair of the Montgomery Bar Association's Employment & Labor Law Committee for 2014.

Congratulations to **Bill** and **Meredith Roark** on the addition to their family. Marley Quinn Roark arrived Saturday, November 16, 2013

Jonathan Samel participated as one of several featured speakers for a seminar entitled *Strategic Positioning of the Private Business and Wealth* on Tuesday, October 22, 2013. The seminar was held at the Philadelphia Country Club, and was hosted by Wells Fargo Private Bank.

Lisa Shearman addressed a group of accountants on the Federal Estate Tax and preparation of the Federal Estate Tax Return (Form 706). The seminar was held at the Holiday Inn in Fort Washington in December 2013.

In addition, **Lisa** will be participating in a panel presentation on May 8, 2014 at the Montgomery County Community College for their faculty, alumni and retirees on an estate planning topic, and she will be speaking at the NALS of Pennsylvania Conference on May 17, 2014 on Wills for Heroes which is being held at the Clarion Hotel and Conference Center, Essington, PA.

Joan Wean served as a Chef at Ronald McDonald House on March 9, 2014, with other members of the Independence Chapter, Association of Legal Administrators.

In February 2014, **Carl Weiner**, **Joe McGrory**, and **Bernadette Kearney** addressed zoning hearing boards, planning commissions, and newly elected supervisors at a Montgomery County Zoning Officers' Association Seminar on the topic of zoning law. Representatives from municipalities in Montgomery, Chester, Berks and Bucks Counties were in attendance.

On March 5, 2014, **Carl Weiner** participated in a panel of speakers at the 2014 Legal Symposium of the Pennsylvania and Delaware Valley Chapter of Community Associations Institute regarding recent developments in association case law.

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