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Real Estate Report

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New Real Estate Law - Probate Avoidance Tool?

By: Robert J. Silverman, Esq., R. Silverman Law Group

After many attempts during recent years, the California legislature passed and the governor signed an interesting new bill - AB139. Effective January 1, 2016, the law makes available a new kind of deed, called a "revocable transfer on death deed", that enables an individual real property owner to designate a grantee who will, on the owner's death, become the legal owner of the property. Furthermore, no court probate proceeding will be required.

I've often written about the many disadvantages of probate, which include significant attorneys' fees, costs and inconvenience. This legislation was an attempt to create a consumer-friendly way for individuals (not couples) to transfer real estate to a loved one simply, without needing to hire an attorney to draft a Will and/or a Revocable Living Trust.

Until enactment of this new law, no methods have been available to enable a non-probate transfer on death of real estate owned by an individual. While one has always been able to deed/transfer a "joint tenancy" interest in a property to a loved one, this can cause serious problems, including that: a) the owner exposes her equity in the property to the creditors of the added joint tenant (co-owner); b) the joint tenant loved one could force the sale of the property and take half of the sale proceeds!; and c) the future sale by the loved one can potentially result in substantial income tax liability that would not have been triggered if the loved one had instead received the property on the owner's death by Will or Trust.

The appealing part of this new law is that since the property transfer is effective only upon the owner's death, the above disadvantages do not exist. So, does the new law mean that Wills and Trusts are no longer necessary or desirable or, furthermore, that the need to engage in estate planning has gone away? Definitively, "no!" Is this new method of transferring real estate on death by deed a magic bullet? Again, a resounding "no".

While it can be useful in certain, limited circumstances, the revocable transfer on death deed has important limitations and potential problems. First, it creates a relatively easy way for a predator to take advantage of an elderly property owner by persuading the elder to sign such a deed. The law contains some protections against such abuse, but the protections are certainly not foolproof. This type of fraud could cause a huge problem and be difficult and expensive to try to remedy. If an elderly owner instead engages in more conventional estate planning - such as working with an attorney to establish a comprehensive estate plan, including a Revocable Living Trust – this potential fraud damage is avoided.

Another critical limitation is that, unlike a Trust, this simple deed is not suitable if an owner wishes to add appropriate or necessary conditions. If the desired grantee is a minor or young adult, or the owner might prefer that the distribution be delayed or controlled rather than given to the grantee outright (i.e. with no "strings attached"), and thus using this new kind of deed would be unwise. Instead, a Trust, prepared and executed with proper legal formalities, can create meaningful control and protection, including probate avoidance, for such loved one.

What happens if the named grantee in the deed dies before the property owner dies? This question leads to the most fundamental shortcoming of the new law. Let's suppose, for example, that the grantee dies and the owner is then incapacitated or unable to revoke the deed prior to her death. In that event, if the owner had no valid Will, the real estate would go to the owner's next of kin. That applicable "intestacy" statute could result in the real estate being distributed to a blood relative whom the owner would have never wanted to inherit her property. Typically, this is not a problem for people who establish a Living Trust (or a Will) because they routinely designate one or more contingent beneficiaries. Accordingly, if the primary beneficiary dies before the owner does, the property is alternatively distributed per the owner's wishes.

The "bottom line" is that this new law, if used when appropriate and after consulting with legal counsel, can be helpful; but it is only one limited tool, among many, that might be useful in any particular estate plan.

This article is intended to provide information of a general nature, and should not be relied upon as legal, tax and/ or business advice. Readers should obtain specific advice from their own, qualified professional advisors.

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Can the New Retail & Restaurant Safe Harbor Rules Under Rev. Proc. 2015-56 Help You?

By: Amy Conger, Tax Manager

The IRS has attempted to mitigate disputes under the new Tangible Property Regulations (TPR) by coming out with Revenue Procedure 2015-56 for retail & restaurant remodel-refresh projects. Under the new procedure's safe harbor, eligible taxpayers are permitted to deduct, in the year of remodel or refresh, 75% of all eligible costs and capitalize the remaining 25%. This can be done without further analysis under the tangible repair regulations (TPRs). The safe harbor applies to all eligible costs and must be used going forward on all eligible costs incurred unless and until IRS approval is obtained for an accounting method change.

Although favorable to many taxpayers, the TPRs have increased complexity and uncertainty for many. This safe harbor hopes to alleviate some of this as it applies to the entire building and eliminates the need to apply the rules separately to each building structure and each building system. No analysis is required to determine if the project adapts the property to a new or different use as long as the new or different use is limited to less than 20% of the building. It also eliminates the need for a separate Code Sec. 263A analysis to determine if the remodel-refresh costs and interest need to be capitalized as the 25% is automatically determined to be subject to 263A.

Under the safe harbor, a remodel-refresh project is defined as a planned undertaking to alter a building's physical appearance and/or layout. This includes activities to maintain an attractive appearance, more efficiently locate functions and products, conform to current building standards, standardize the consumer experience among locations, offer the most relevant and popular goods within the industry, or to address changes in demographics by changing product or service offerings and their presentations.

Please note some common costs will not qualify under this procedure. For instance, costs associated with section 1245 personal property (cabinets, counters, etc.), adapting more than 20% of the building to a new or different use, rebranding activities within two years, the initial build-out of a leased building for a new lessee, the initial acquisition or lease of a building, or costs to correct a material defect that existed prior to acquisition.

To see if your retail or restaurant business is eligible and qualifies for the new safe harbor procedures, please contact your RINA representative.

2016 Real Estate Advice Series Presentation

Construction Allowances & Leasehold Improvements: Maximizing the Tax Benefit

Wednesday, May 18, 2016

11:30 am - 1:30 pm

Construction allowances are often critical to the negotiation of a lease; rarely, however, are the associated tax consequences fully considered. Please join us for this complimentary luncheon seminar to learn about different approaches to construction allowances and the tax effects of each. We will cover how to "get the deal done" by finding tax-beneficial terms for both tenants and landlords. The discussion will follow the "life" of the lease, ranging from effective funding methods to the tax consequences at the end of the lease.

Location:
The City Club of San Francisco
155 Sansome Street, 9th Floor, Library Room
San Francisco, CA

Our Speaker:

Greg Novotny is a partner with Greene Radovsky Maloney Share & Hennigh LLP in San Francisco. Greg specializes in federal and state income tax law in the corporate, individual, and pass-through entity context.

RSVP: Amanda Vergara at, (925) 627-2829, avergara@rina.com or www.rina.com/rsvp/may-18-16

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