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Client Bulletin



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IMPORTANT REMINDER: Complaints against the valuation of real property for tax year 2016 must be filed by Friday, March 31, 2017

Guardians to Have Statutory Authority to Sell Real Estate

Currently, under Ohio law there is no statutory authority for a guardian to sell real property, so a court cannot currently issue an order permitting a guardian to sell real property. This lack of statutory authority for a guardian's sale of real property has forced guardians wanting/ needing to sell real property to file in probate court, as an ancillary case to the guardianship case, a land sale case under the land sale statute (Ohio Rev. Code §§ 2127.05—2127.42), which is a lengthy and costly process. On January 4, 2017, Governor Kasich signed Amended Substitute House Bill 432 containing a new Ohio Rev. Code § 2127.02, which becomes effective April 6, 2017. New Ohio Rev. Code § 2127.02 will allow a guardian, who is appointed by the probate court, to sell real property at public or private sale, grant options to sell, and exchange or otherwise transfer real property belonging to the estate of the ward (the person under the guardianship), as long as the criteria/conditions set forth in Ohio Rev. Code § 2127.02 are met, one of which is that all persons who would inherit from the ward as "next of kin" under Ohio's statute of descent and distribution (Ohio Rev. Code § 2105.06) must give written consent, which is filed in probate court in the guardianship case. A minor may not give consent, nor can anyone give consent on the minor's behalf (a parent or guardian cannot sign for a minor). Thus, if a minor is the next of kin, or one of the next of kin, the land sale process will still have to be used for a guardian to sell real property of a ward.

IRS Reaffirms that for Federal Income Tax Purposes, Someone Cannot be Both an Employee and a Partner

The Internal Revenue Service has long taken the position, announced in 1969 in Revenue Ruling 69-184, that a partner cannot also be an employee of the partnership. This IRS position has also been applied to limited liability companies that elect partnership tax treatment (hereafter simply "LLC"). In a recently issued temporary regulation, the IRS stated that until further notice there is no exception to the Revenue Ruling 69-184 position that a partner cannot be an employee no matter how small the partnership (or LLC) interest of the otherwise employee. The "until further notice" provision of the temporary regulation tends to indicate that at some point, the IRS might issue a Revenue Ruling that would have one or more exceptions to Revenue Ruling 69-184 (such as, possibly, where the employee's interest is de minimis, say less than 5%). In another temporary regulation, the IRS applied its position in Revenue Ruling 69-184 and the reaffirming temporary regulation to preclude the use of a single-member LLC (hereafter simply "SMLLC") with a partnership or LLC as the single member, to avoid the impact of Revenue Ruling 69-184. A SMLLC is a disregarded entity for federal tax purposes, and when the single member is a partnership or LLC, it is treated as an unincorporated branch or division of the partnership or LLC. Revenue Ruling 69-184 and the recent temporary regulation need to be considered when considering what type of entity to be formed for a business that is likely to have employees, when considering whether to reward or incentivize an employee with an interest in the entity, when considering a pension or profit sharing plan, or certain other tax-favored employee benefit programs.

Arbitration Clause-Invalidity of Optional “Loser Pays” Provision

In Ohio, even in consumer contracts such as home construction services, arbitration clauses are generally held by the courts to be valid and enforceable unless the arbitration clause in the contract is found to be procedurally or substantively unconscionable, as the public policy of Ohio favors enforcement of arbitration clauses. However, even though a court may find the arbitration provision to be enforceable, courts can strike a provision or provisions within the arbitration clause as being invalid and unenforceable due to public policy. In *Conte v. Blossom Homes, LLC*, 2016-Ohio-7480, the Court of Appeals for the Eighth Appellate District (Cuyahoga County) had before it a contract with an arbitration clause with a provision that provided for each party to bear its own costs and expenses and an equal share of the arbitrator’s and administrative fees of the arbitration, but with the exception to that provision that the arbitrator “may” (but did not have to) award attorney fees to the prevailing party. That Court of Appeals, in two earlier cases, had ruled that mandatory “loser pays” provisions were substantively unconscionable as contrary to public policy. In the *Conte* case, the Court stated that the unconscionability and public policy concerns that it had expressed in the two earlier cases were not “assuaged” by making the “loser pays” attorney fee award provision “optional yet without condition” and that such a provision effectively nullifies the provisions of Ohio’s Consumer Sales Practices Act (“CSPA”) and Home Construction Service Suppliers Act (HCSSA), both of which provide for the imposition of attorney fees against a consumer only when the consumer acts in bad faith and files a groundless complaint. The Court found the “loser pays” provision to be invalid and struck it, held that it was for the arbitrator to determine whether the contract’s provision that any claim not submitted within one year of its occurrence was barred was reasonable and enforceable and determined that the arbitration clause was otherwise enforceable. It would appear that an attorney fee award provision in an arbitration clause would pass muster and be enforceable in the Eighth Appellate District (and probably other Ohio appellate courts as well) if the attorney fee award provision of the arbitration clause paraphrased or incorporated by reference the applicable attorney fee award provisions of the CSPA and/or HCSSA.

Another Award for the Law Firm

At the Delaware Area Chamber of Commerce’s Annual Meeting and Dinner on February 2, the law firm received an award as one of the Outstanding Chamber Members of the Year. The other awardees were accounting firm Maloney + Novotny, LLC (formerly Wolf Rogers Dickey) and the Delaware County District Library. A number of years ago, Steve Martin was named the Citizen of the Year. This year’s Citizen of the Year, awarded on his birthday, was Dan Boysel, a good friend of the firm and a most worthy recipient.

Notice

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

If you have friends or associates who you think would enjoy receiving a copy of this Client Bulletin, please feel free to forward it on. Thank you.

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