Firm News

LGP is pleased to announce that, in December, 2004, Allen B. Koenig joined the firm as of counsel. Allen specializes in estate and wealth transfer planning, trust and estate administration, probate practice and business planning. He was formerly Peter Puciloski's partner in the law firm of Hovey & Koenig LLP in Boston, Massachusetts, and is licensed to practice in Massachusetts and before the U.S. Tax Court. Allen is co-author of the following West Publishing Massachusetts Practice Series: Volume on, Real Estate Transactions, Business Organizations and Domestic Relations, Estate Planning, Wills, Trusts and Powers of Appointment, and Specialized Forms. Allen will divide his time between the Boston and Great Barrington offices Partner Peter Puciloski was appointed to the newly-formed Real Estate Litigation Committee of the Massachusetts Real Estate Bar Association.

Partner Alexandra Glover, a Director of the Southern Berkshire Chamber of Commerce, has been elected Secretary of the Chamber. Alex has also been chosen to serve on the Land Protection Committee of the Sheffield Land Trust.

"The Country Lawyer" newsletter is published by Lazan Glover & Puciloski, LLP and is designed as a news reporting service to clients and other friends. For help with these or any other legal issues, please call the firm today.

All articles in this newsletter have been written by members of this firm.

The information in this newsletter should not be construed as and does not constitute legal advice, is intended solely for your information and should not be relied on without a discussion of your specific situation with an attorney.

Maple Syrup time in the Berkshires.

LAZAN GLOVER & PUCILOSKI, LLP
Attorneys at Law

2 Blue Hill Road, Great Barrington, MA 01230 Ph. 413.644.0200 Fax 413.644.0201

2 Blue Hill Road, Great Barrington, MA 01230
Attorneys at Law
LAZAN GLOVER & PUCILOSKI, LLP
THE COUNTRY LAWYER

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LAZAN GLOVER AND PUCILOSKI, LLP, *Attorneys at Law*
2 Blue Hill Road, Great Barrington, MA 01230 • Telephone 413.644.0200 • Fax 413.644.0201
350 Lincoln Street, Suite 2400, Hingham, MA 012043 • Telephone 617.227.2600 • Fax 617.227.2440

Well Water Problems

Groundwater is a plentiful and widely distributed resource in Massachusetts. The Statistical Abstract of the United States contains a schedule which shows the percentage of each state that is water covered (excluding areas such as the Great Lakes). Massachusetts ranks ninth with 5.6% of the Commonwealth being water area. Altogether, about two million Massachusetts residents or one-third of the Commonwealth's population rely upon groundwater for all or part of their water supplies.

Until recently, the groundwater in Massachusetts was managed haphazardly if at all. The state had followed the common law doctrine that the owner of the surface owns "absolutely" the underlying groundwater and may pump without limit even to the detriment of other well owners affected by the resulting cone of depression. Similarly, pollution of groundwater was not regulated other than intentional "well poisoning" and victims of industrial contamination or leaking storage tanks were left to inefficient and unpredictable common law remedies.

Since 1979, Massachusetts in tandem with the Federal Government has begun to focus state-level attention upon its groundwater resources. Some of the major statutory results were The Massachusetts Hazardous Waste Management Act of 1979, The Aquifer Land Acquisition Program, Underground Water Source Protection Regulations, The Massachusetts Water Management Act of 1985 and a bill to regulate land uses in the nonpublic portions of the three primary watersheds.

Groundwater comes from rain and snow that soaks into the ground, passing between particles of soil, sand, gravel or rock until it reaches a depth where the ground is fill saturated with water and the top of this zone is called the water table. The water table may be near the ground surface or hundreds of feet deep.

When purchasing land in the Berkshires, the practice has been not to drill a well until after you own the property. Drilling a well can cost thousands of dollars and the probabilities of failing to find a usable water source so slim that buyers have not required a contingency that allows a purchaser to terminate his or her purchase and sale agreement

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ANNOUNCING ADDITION OF TRUSTS, ESTATES AND TAX ATTOR-

Allen B. Koenig joined Lazan Glover & Puciloski, LLP as of counsel in December, 2004. Allen specializes in estate and wealth transfer planning, trust and estate administration, probate practice and business planning. He was formerly a partner in the law firm of Hovey & Koenig LLP in Boston, Massachusetts, where he counseled high net worth individuals and privately held businesses and served in numerous fiduciary positions. He is licensed to practice in Massachusetts and before the U.S. Tax Court.

Allen is co-author of West's Massachusetts Practice Series, Volumes entitled: Real Estate Transactions, Business Organizations and Domestic Relations, Estate Planning, Wills, Trusts and Powers of Appointment, and Specialized Forms.

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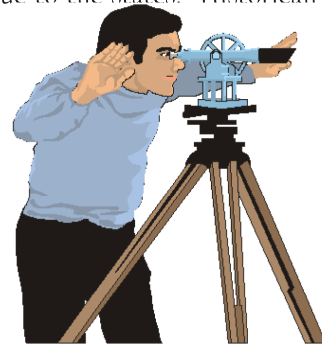
Charting Unknown Territory: Estate Planning in Uncertain Tax Times

By Allen B. Koenig

The last six years have brought unprecedented changes to both the federal and state wealth transfer tax systems. Beginning in 1998, the longstanding federal applicable credit amount (the amount of property each individual could transfer by gift or at death, free of tax) of $600,000 was set free by the Taxpayer Relief Act of 1997 ("TRA") to rise to $1,000,000 over 9 years. Then, in 2001, the Economic Growth and Tax Relief and Reconciliation Act ("EGGTRA") provided for the estate tax to be completely phased out over 9 years, so that, in 2010, the present system would be replaced by a new system which mostly eliminated the "step-up" in basis for capital gains purposes afforded property passing at death, and with the present $1,000,000 gift tax exemption remaining in place. Just to keep things interesting, on January 1, 2011, EGGTRA "sunsets", and the estate and gift tax system reverts to as would have been in 2006 under TRA - a $1,000,000 applicable credit amount for each individual for both gift and estate tax purposes.

In order to offset the loss in federal tax revenue resulting from these changes, Congress shifted a portion of the lost revenue to the states. Historically, a



credit against federal estate taxes was allowed for state estate taxes paid up to a certain limit. As a result, most states instituted a "sponge" tax – a state estate tax of the same amount as the federal credit for state death taxes. The taxpayer simply paid to the state the amount of the federal tax credit for state death taxes, and paid the IRS that much less. However, as part of the phase out of the federal estate tax, the state death tax credit was eliminated as of January 1 of this year. To offset this loss of revenue, most states, Massachusetts and New York included, have de-coupled their estate tax system from the federal system, resulting in additional complications for planning designed to minimize death taxes.

Many of our clients have expressed concerns over the uncertain state of the transfer tax system. To better help you understand how these affect you and your family, here are the most common questions we are asked, with our answers.

Q: Now that the amount I can leave

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Well Water Problems (continued)

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if insufficient water is found. In the eastern portion of the state, wells are often drilled prior to closing, and the availability of sufficient water is a contingency. Obviously, the cost of placing a well on land you don't own can be substantial and we suspect that because of the few instances when sufficient water is not found, the water contingency is rare in the Berkshires.

In 1999-2000, contaminated private well water caused 26% of the drinking water outbreaks that made people sick. The U.S. Environmental Protection Agency's (EPA) rules that protect public drinking water systems do not apply to privately owned wells. Although Massachusetts has rules for private wells, it is up to the property owner to make sure that their well water is safe to drink.

Germs and chemicals can get into your well water and contaminate it in different ways. Some germs and chemicals occur naturally while others come from human and animal waste resulting from polluted storm water runoff, agricultural runoff, flooded sewers, or individual septic systems that are not working properly. To find out if a well is contaminated, you must test it.

Total coliform is the microbes found in the digestive system of warm-blooded animals, in soil, on plants and in surface water. These microbes typically do not make you sick. Because microbes that do cause harm are hard to test for, the "total" coliforms are tested instead. If the count is high, then the tester knows that harmful microbes may be present. They are found in the digestive systems of humans and warm-blooded animals. Fecal coliform bacteria (E. coli) is a kind of total coliform and is usually harmless. However, a positive test may mean that feces and harmful germs have found their way into your ground water. These harmful germs can cause diarrhea, dysentery and hepatitis.

Nitrate is naturally found in many types of food, but if in high levels in drinking water, it can make people sick. A nitrate test is recommended for all wells. If the level is high, other sources of water should be sought out or the water should be treated. VOC's (volatile organic compounds) are industrial and fuel-related chemicals that may cause bad health effects at certain levels. Which VOC's to test for depends upon where you live.

Finally, the ph level tells you how acidic or basic your water is. The ph level can change how your water looks and tastes. If too low or too high, the water can damage your pipes, causing lead

CHALLENGING A ZONING BOARD DECISION

There exists a misperception that anyone may bring a court challenge to a decision of a zoning board with which they disagree. In fact, only a specific group of people have the legal right to contest a zoning decision. Moreover, filing suit to enforce a misapplied zoning rule can be tricky, as it requires strict adherence to certain procedural steps and short deadlines.

There is a statute governing the procedure for lawsuits to dispute zoning decisions of a town or city. Under the statute, one must have "standing", a legal term meaning that one must have some demonstrable interest in the dispute. The term employed in the statute for such individuals is "persons aggrieved". A person aggrieved is one who has suffered some infringement of his legal rights. Such a person must make a specific showing that he or she have a claim that the zoning issue will violates a private right, private prop-

erty interest, or private legal interest. Persons owning property abutting the property that is the subject of the variance enjoy a presumption that they are "persons aggrieved."

There are several specific findings that a court must make in order for an individual to qualify as a "person aggrieved". First, the court must decide whether the plaintiff plausibly claims that he or she will sustain some actual harm as a result of the challenged zoning decision.

Second, the court must identify the nature of the interests the zoning scheme was intended to protect. Zoning appeals may be brought only to protect those legal rights the zoning ordinance or bylaw was intended to create. The person's property and the use of that property must also be among the class of property and the class of uses the zoning scheme was intended to protect.

Claims that involve matters of general public interest or concern rather than a private right or interest are insufficient to confer standing as an "aggrieved person". Thus, if the claimed injury is one that only affects the general community, but is not specific to the person challenging the zoning decision, the person has no standing to bring suit. For instance, evidence of a general increase in traffic, by itself, is not enough to give a person standing to challenge the zoning decision creating the increased traffic unless the traffic has particularized affect on the person's property.

Despite the strict deadlines and other procedural requirements, court challenges to variances are often successful, as there are by statute few legal bases to support variances. The key is for the plaintiff to be an individual who clearly has standing as an "aggrieved person", and to comply strictly with the vari-

Relocation of Easements

The highest court in the Commonwealth of Massachusetts recently declared a new doctrine regarding the location of easements that may well prove startling, if not alarming, to some persons with rights to use easements across the land of others. It may also provide relief for property owners who have been burdened by an easement which interferes with the properties use.

The Supreme Judicial Court adopted the following rule with certain qualifications: A person who owns land over which there is an easement (such property being legally termed the "servient estate") may move the easement without the consent of the person who has the right to use the easement to access his or her land (the "dominant estate"). The same rule holds true as to easements for purposes other than ingress and egress.

Until this court decision was announced, the law in Massachusetts was generally that, once the location of an easement is fixed, it could not be moved by one or the other party. Any change of the location of the easement had to be agreed upon by the person on whose property the easement was located and by the person who had the right to use the easement.

In the ruling, the Supreme Judicial Court made clear that the owner of the servient estate has the right to make the fullest use allowed by law of his or her property, subject only to the requirement that he or she may not harm any rights of others to use that land. The court stated that an easement is created to serve a particular objective (such as access to his or her property), not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose.

In so doing, the Court indicated that the costs of relocating the easement should be borne by the servient owner desiring to move the easement, and that the change should not significantly lessen the utility of the easement, increase the burden on the easement holder's use and enjoyment of the easement, or frustrate the purpose for which the easement was created.

The Court also suggested that both parties to a dispute would be well served to resolve the issue of easement relocation without resort to court, a position with which Lazan Glover & Puciloski concurs, if such is practical and such an approach does not impair the position of its client.

In the future, parties agreeing to the creation of an easement should always bear in mind that the location of the easement may be subject to change unless any such relocation is specifically prohibited. And

RESTRICTIVE COVENANTS AFFECT RESIDENTIAL LAND USE

As the residential population of southern Berkshire County continues to grow, building lots are becoming smaller and owners are becoming more territorial. Property owners are concerned more than ever about how their neighbors will develop and use their property.

Restrictive covenants are declarations by a property owner filed in the public records which restrict how that real estate may be used. Typically, they "run with the land", meaning that they will continue to apply to the real estate after the person filing the restrictive covenants transfers the property to another person. A restrictive covenant is enforceable by: the person creating them and his or her successor; an owner of benefited land which adjoins the subject parcel; or a person described in the instrument imposing the restriction as being benefited thereby.

A restriction imposed before January 1, 1962 is enforceable for a period of 50 years from the date of its imposition. A restriction imposed after December 31, 1961 is enforceable for 30 years after imposition. A restriction may however be extended if applicable statutes providing for their extension, are followed.

There are a number of statutes (found in Chapter 184 of the General Laws of Massachusetts) and many cases pertaining to the enforceability of restrictions. Whether or not a particular restriction is enforceable is beyond the scope of this article. Instead, it is our purpose to acquaint you with various types of restrictions which have become common in south Berkshire County.

Two of the most common restrictions designate "no-cut zones" and "building envelopes". A no-cut zone is an area, usually along the perimeter of a property, wherein trees and other vegetation may not be disturbed. The purpose of such an area is to create a buffer between the subject property and adjacent properties. Frequently, the adjacent properties will also have a no-cut zone thus increasing the size of the buffer area. Exceptions are normally allowed to enable the owner to remove dead or diseased trees, fallen branches and certain types of growth.

A building envelope is an area within which a property owner may erect a home or other permitted structures. Where a property has a beautiful field enhancing the view of surrounding owners, a seller may wish to ensure that nothing is erected within that field. To do so, a building envelope may be drawn behind or beside the field and a prohibition recorded that allows building only within the building envelope. Often,

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Charting Unknown Territory: Estate Planning in Uncertain Tax Times (Continued)

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to my children without tax is so large, do I still need an estate plan?

A: Tax considerations aside, a properly drafted estate plan is desirable for a number of reasons:

1. It can specify who receives your "probate" property (property which you own in your name only, and generally, not jointly held property, life insurance proceeds, or money from retirement plans). If you have no will, for example, your state provides its own "estate plan" for you under that state's intestacy rules. In Massachusetts, for example, if you have a spouse and children, your spouse receives the first $200,000, and he or she shares anything above that amount wife the children, 50/50. While it is true that such assets as a jointly owned home automatically pass to the survivor whether or not there is a will, there is often other property which does not pass automatically.

2. If you have minor children, it allows you to nominate a trusted individual to serve as guardian.

3. If you leave property to minor children, it can provide for management and control of such property after the children reach 18 or 21.

4. It can provide for management of your property if you become disabled or incompetent, without the expense, delay and complexity required to appoint a guardian or conservator to do the same thing.

5. After your death, it can preserve valuable family assets (a vacation home or family business, for example) for future generations.

Q: With all the changes and uncertainty in the estate tax system, how can I decide what kind of estate plan I need?

A: You need an estate plan which is both easily amended and which contains tax provisions drafted to maximize flexibility as the estate tax system changes. Many existing estate plans drafted in a time of stable estate tax rules lack this flexibility.

Q: What about state death taxes? Aren't they phased out along with federal estate taxes?

A: Unfortunately, they are not. Many states, including Massachusetts and New York, have altered their death tax systems to unhook them from the federal system. To minimize such taxes, estate plans need to take such changes specifically into account. Otherwise, your estate may pay unnecessary taxes to the state in which you lived when you died.

Q: I already have an estate plan. Won't this protect me from unnecessary taxes when I die?

A: The scope and variety of these changes to the transfer tax system have rendered many existing estate plans less than ideal (and in some cases, outright defective), even if drafted

RESTRICTIVE COVENANTS AFFECT RESIDENTIAL LAND USE (continued)

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eral adjacent properties, homes and accessory buildings will be located in a manner that does not interfere with the view or enjoyment of the neighboring property.

More and more frequently, we see prohibitions against noise and light intrusion from adjacent homes as well as building height limitations and restrictions against the use of snowmobiles, ATV's and motorcycles. Also, commercial use and signage is limited as is the keeping of animals other than domestic pets.

Typically, restrictions provide that "no buildings or other structures except one single family residential dwelling with usual accessories, outbuildings, barns, swimming pools, tennis courts, bath houses, gazebos, fencing and landscaping shall be constructed" on a particular property. Square footage minimums are often mandated as well as maximum sizes for garages such as for the storage of up to three (3) automobiles

Where a declaration of restrictions is being recorded covering several lots, it is common to provide that no lot may be re-divided. This can effectively stop a property owner from destroying the character of a neighborhood which can become a consideration as property prices increase. Seeing one McMansion jammed next to another in certain areas of Westchester County makes one appreciate how important such a provision can be. Also, a declaration of restrictions may provide that no improvement shall be erected, altered, added to, or placed on any lot unless plans and specifications have been submitted for approval and approved by a certain designated individual or individuals. The approval provision may contain guidelines as to style and color as well as such other matters as may be deemed important to the person or persons creating the restrictions.

Concern with appearance of adjacent properties is not limited to structures. Restrictions providing that no boats, snowmobiles, campers, trailers, all terrain vehicles, trail bikes or other recreational vehicles or equipment may be stored on a property unless garaged is quite common. Also, provisions that non-operative or unregistered vehicle are not to be kept on the property unless garaged are typical.

To insure safety as well as appearance, a declaration of restrictions may disallow exterior or underground fuel oil tanks but allow underground propane tanks. Also, there may be provisions requiring utility lines serving a property to be located underground. Requirements that all rubbish, trash, garbage, brush, or other waste be kept in closed trash containers, screened from public view, and removed on a regular periodic basis are quite normal as well as a provision which states that if improvements are damaged or destroyed by fire or other casualty, reconstruction of such improvements shall be commenced within a certain period and completed within a certain period after such reconstruction commences.

No restriction is permitted forbidding the transfer of property to individuals of a specified race, color, religion, national origin or sex excepting a limitation on the basis of religion by a religious or denominational institution or organization or by an organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization.

Provided restrictions do not create unnecessary bureaucracy and are carefully thought out and properly drafted, we like to see restrictions covering adjacent properties, especially, as property sizes get smaller. Having a neighbor blast music deep into the night, clear cut his property to expose his less than beautiful home or litter his yard with wrecked vehicles is not a happy situation. Properly drafted, restrictive covenants can protect and enhance a

Excluding Portion of Gain from Tax on Sale of Residence

As prices continue to spiral in the Berkshires, it is important to be aware of the tax law as it applies to gains made from the sale of your home. Not knowing when to sell can be costly.

If you sell your principal residence after owning and occupying it for at least two years during a five year period ending with the date of your sale, you may be able to exclude up to $250,000 ($500,000 if married filing jointly) of any gain you make on the sale. Whether your home is a "principal residence" depends on where you live most of the time. Also, the IRS may look at other factors such as where you vote, where you file your tax return, your driver's license and where you are employed. Absences due to vacations count as time you used your home as a residence (even if you rent it out during the vacation period).

The Internal Revenue Code considers a residence not only a one family home but in addition, a mobile home, trailer, houseboat, condominium or cooperative apartment provided it is your principal residence. In Berkshire County where many larger properties are being subdivided, homeowners should know that if there is adjacent vacant land owned and used as part of the residence and the sale of the land is within two years (before or after the sale of the residence), the sale of the land and residence may be treated as one sale. If the sale of the land and residence occur in different years, the exclusion limit applies first to the