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## AN INTRODUCTION TO COLLEGE SAVINGS PLANS

The steady rise in the cost of attending college may have become one of those few absolute certainties in life, along with death and taxes. Tuition and fees for public and private institutions alike can seem overwhelming, especially if parents have done little financial preparation ahead of time. Some solace can be taken in the fact that there is a wide variety of approaches for saving for college. For parents who have some foresight, the use of a plan that is tailored to their circumstances can at least soften the blow of financing a college education.

529 College Savings Plans

With mutual funds as the primary investment option, state 529 plans are best for those looking to contribute substantial amounts to a college fund. Earnings are tax-free, as are later withdrawals for qualified education costs. These plans generally are in the parents' names, which means that the plans have minimal effects on the family's eligibility for financial aid. The drawbacks are limited investment options and relatively high fees.

529 Prepaid Plans

A prepaid tuition plan makes the most sense for families that are reasonably certain that their child will attend one of the schools in a state's plan, and that are satisfied with a rate of return that equals the inflation rate for the costs of schools in the plan. Under prepaid tuition plans, you are buying future tuition at a state's public colleges at today's prices. On the downside, payouts from these plans reduce eligibility for financial aid on a dollar-for-dollar basis. In addition, states dealing with especially tight budgets have been raising the costs of participating, and in some cases have been temporarily closing off enrollment.

For a group of approximately 250 private colleges, there are independent 529 plans. They work like state prepaid plans, including the dollar-for-dollar reduction in financial aid eligibility when funds are distributed. Money from such a plan can be rolled over to a state 529 savings plan or a state prepaid plan without penalty.

Coverdell Education Savings Accounts

If you want the most variety in investment options and lower fees, a Coverdell account may make sense. Joint income tax filers with adjusted gross incomes of up to $220,000 can save up to $2,000 a year, tax-free, for education expenses. No plan is without its weaknesses, and for the Coverdell accounts it is the adverse effect on financial aid eligibility because the accounts are in the student's name, not the parents' names.

Custodial Accounts

A custodial account is appropriate for those who want to transfer assets, including securities, to a young beneficiary in order to reduce taxes. However, be forewarned that the beneficiary will have control over the account upon reaching the age of majority. Funds can be taken from the account at any time and for any purpose benefiting the child, not just educational expenses. Withdrawals are taxed at the child's rate.

Savings Bonds

If the 529 plans are the showhorses of financing in higher education, savings bonds are the workhorses. Returns on savings bonds are usually modest, but the investment could not be safer. Savings bonds may be especially attractive to middle- and low-income households that fall within certain income restrictions. For Series EE bonds issued after 1989, and all Series I bonds, at least some of the interest earned on the bonds is tax-free if used for higher education expenses.

These approaches to saving for college are not exhaustive, and the descriptions here only scratch the surface. Professional advice can help a family craft a plan that is best suited to its needs and priorities.

## GOLF BALLS CAN BE TRESPASSERS

Joyce had nothing against golf or golfers. In fact, she was a regular golfer herself and a member of two different golf clubs. But when her home in a subdivision adjoining a private golf course was continuously pelted with errant golf balls, she and a neighbor with the same predicament eventually took the matter to court and won.

The golf course began operating in the late 1980s, and Joyce moved into her home in the late 1990s. But the fact that she "came to the problem" did not prevent Joyce from winning an injunction to stop, or at least minimize, incoming golf balls and the golfers in search of them. No doubt the court was impressed by the evidence showing the extent of the problem, which went well beyond an occasional Titleist in the flower bed. Among other effects, there were five damaged window screens, one large broken window, dented siding, and a dimpled car hood (only the golf balls are supposed to have dimples). At least one wayward shot struck the house hard enough to trigger a burglar alarm. It got so bad that Joyce all but gave up on using her rear deck, and her young son was instructed to play only in the part of the yard that was shielded from the golf course by the house. The clincher piece of evidence may have been the 1,800 golf balls that Joyce had retrieved from her yard during the five years she had lived in her house.

The winning legal theory for Joyce was continuing trespass. The common conception of a trespass is of someone walking across another's property without permission, but the concept is broader than that. A trespass is any invasion of a landowner's interest in exclusive possession of the property. Propelling physical objects onto someone's property regularly, frequently, and without the owner's consent is a continuing trespass.

As for the appropriate remedy, the court in Joyce's case offered some guidance. If the golf course operators were determined to keep the course as it was, they either would have to acquire the adjacent land, or the right to use such land, for the purpose of accommodating all of those wayward golf shots. More realistically, the defendant could solve the problem by shortening the hole that adjoined Joyce's property, thereby removing the property from the landing area for all those bad shots. This would be somewhat burdensome for the golf club, but it was not such a hardship as could relieve the club of its obligation to end the continuing trespass and give Joyce back the "exclusive possession" of her home.

## FLSA OVERTIME UPDATE

Unless an employee falls within an exempt category of workers, the federal Fair Labor Standards Act (FLSA) requires the employer to pay the employee overtime at a rate of one and one-half times the regular rate of pay, for hours worked in excess of 40 hours per week. To be exempt is to be ineligible for overtime. The exemption commonly called the "white collar" exemption is for professional employees.

Federal regulations in place since August 2004 have simplified the test for determining which employees come within the white collar exemption. An employee is a professional if each of the following elements is present:

(1) The employee has the primary duty of performing work requiring advanced knowledge, that is, work that is mainly intellectual in nature and which includes the consistent exercise of discretion and judgment;

(2) The employee has advanced knowledge in a field of science or learning; and

(3) The employee has advanced knowledge that is customarily acquired by a prolonged course of specialized intellectual instruction.

### Recent Cases

In one recent case, a company refused to pay overtime to some of its employees who were licensed pharmacists. Much to the dismay of the employees, the company's reliance on the white collar exemption held up in federal court. All of the parties agreed that the second and third parts of the exemption test were met by the pharmacists, leaving a dispute only over whether the pharmacists' work required the consistent exercise of discretion and judgment. The court found that this element also was present.

The pharmacists, with little supervision, routinely made discretionary decisions about dispensing prescribed drugs to patients, and sometimes the process required consultation with the physicians who prescribed the drugs. The only factor suggesting a lack of discretion was the fact that the employees, as a rule, were expected to follow standard operating procedures from their employer. But this argument by the pharmacists was undermined by the fact that they regularly were asked to consult with the employer about the standard procedures and to review them for any suggested improvements. The pharmacists also had the employer's blessing to stray from the procedures if, in their judgment, it was necessary for a patient's health.

Assuming an employee is eligible for overtime pay, questions can arise as to what comprises an employee's regular rate of pay for purposes of calculating the overtime obligation. It is not always as simple as using an employee's base hourly rate or salary. For example, in another recent case, a federal court ruled that the regular pay of municipal firefighters included payments made to them under a city's sick leave buy-back program. A firefighter who had built up a certain amount of sick leave had the right to “sell” it back to the city for a lump-sum payment. Whenever this happened, the employer effectively was paying the firefighters a bonus for good attendance and for work they had already done. It was as much a part of the firefighters' regular compensation as their base hourly wage, so it had to be taken into account in calculating overtime wages.

## JUNK FAX PROTECTION ACT

There may be some finality to the formerly unsettled picture on federal regulation of junk fax transmissions. Since the first federal legislation on the subject, in 1991, there has been an “established business relationship” exception allowing the sending of commercial advertising by fax under certain conditions. In 2003, the Federal Communications Commission issued a regulation that would have effectively removed the exception, requiring express written permission from the recipient for sending any commercial ads by fax. Opposition from business groups prompted the FCC to put off enforcement of that rule three times.

Before the restrictive FCC regulation ever became effective, new legislation has reinstated the established business relationship exemption. It is still illegal to send unsolicited fax advertisements to anyone who has requested that they not be sent. However, unsolicited faxes can be sent if the sender has an established business relationship with the recipient and the fax itself has a conspicuous notice on its first page informing the recipient that it can request not to be sent more such faxes. To combat the sale of fax lists to mass marketers, the law requires businesses to obtain fax numbers either directly from the recipient or from a published source, such as a directory, an advertisement, or a website.

## “POP-UPS” ANNOY BUT DON'T INFRINGE

An Internet marketing company provided a free software application that keeps track of computer users' activity on the web in order to deliver targeted advertising for its clients. The software uses an unpublished internal directory with thousands of website addresses and keywords for particular interests of consumers. When the computer user types in particular terms in a browser or search engine, a relevant "pop-up" ad is delivered to the computer.

A company in the contact lens business learned that its website was in the internal directory and that the software caused pop-up ads for competing contact lens retailers to appear on the screens of individuals who visited the company's website. The contact lens company sued the marketing firm on the theory that the marketing firm had infringed upon a trademark in violation of federal law. From the plaintiff's standpoint, the actions of the marketing firm were allowing competitors to take a free ride on the plaintiff's website.

A federal court ruled against the plaintiff contact lens company. A successful trademark infringement lawsuit requires a showing of a protected trademark and a use of that trademark in commerce in connection with the sale or advertising of goods or services, without the plaintiff's consent. The use of the mark by the defendant also must be such as to likely cause confusion between the plaintiff and the defendant. The action brought by the plaintiff failed primarily due to the court's ruling that the defendant had never "used" the plaintiff's trademark in a manner like that in a typical infringement case. First, the defendant reproduced the plaintiff's website address, which was similar, but not identical, to its trademark. In addition, the pop-up ads, which appeared in a separate window prominently branded with the marketing company's mark, had no discernible effect on the functioning of the plaintiff's website.

It was not enough for a successful claim that the defendant and its clients were trying to take advantage of the plaintiff's goodwill and reputation, which had led people to the plaintiff's website in the first place. What the defendant was doing was no more legally objectionable than the low-tech counterpart of chain drug stores placing their own store-brand products on shelves next to the higher-priced and trademarked versions of the same products, so as to capitalize on their competitors' name recognition.

## DO YOU HAVE RESIDENCES IN MORE THAN ONE STATE?

If you spend time in any given year in residences in different states, somewhere in your travels you also may want to schedule an appointment with your professional tax advisor. One topic for discussion would be the legal concept of domicile.

In simplest terms, a person's domicile is the place where he or she intends to return after leaving another location. The special significance of where a domicile is established is in tax planning. An individual's domicile determines which state's income, gift, and estate tax laws apply, and in which state or states a person, trust, or estate is taxable. The rules that will govern the administration of an estate also depend on the state of domicile. Inadequate attention to establishing and documenting an intended state of domicile could mean that even the best-laid estate plan might go awry because the laws of a different state could apply. The end result could be an unexpected tax burden that otherwise could have been avoided.

Although the basic definition of "domicile" is simple enough, many different criteria may be taken into account in pinpointing a state of domicile. No one factor is controlling, and the states differ in the criteria that they use. The address included in a person's will may be a good indicator of the person's domicile. A nonexhaustive list of other factors would take into account in what state a person votes, registers an automobile, has a driver's license, keeps important personal property, pays state and local income and personal property taxes, last applied for a passport, and keeps the bulk of his or her money. Contrary to the old saying, you can go home again, and it is a good idea to make sure that you and the government agree on where that home is.

## CONTRACTOR SHIELDED FROM LIABILITY

A business hired architects for a renovation project involving a parking lot, a retaining wall, and a loading dock. The plans, as drawn up by the architects, did not call for a guardrail along the top of the retaining wall. A construction firm completed the project according to the architects' plans. The contractor had not broken ground until a building permit was in hand, and when the work was done a building inspector gave it his blessing with a certificate of occupancy.

When a pedestrian fell from the retaining wall and injured his knee, he sued the contractor for negligently failing to put up a guardrail. The issue for the court was whether the contractor could defend against liability on the ground that it was "just following orders (or plans, in this case)." A state supreme court sided with the contractor. The court reasoned that builders and contractors are justified in counting on the experience and skill of architects and engineers. To subject contractors to liability under the circumstances of this case would be to unfairly require contractors to follow architectural plans at their own risk and, in effect, to ensure the correctness of specifications given to them, not just their own workmanship.

Of course, there are limits on the extent to which contractors can use the plans as a shield from liability. If the results called for by the plans are so obviously dangerous that no competent contractor would follow them, the contractor can be held liable for building according to those defective plans. The individual who fell off of the retaining wall made this argument, but the court concluded that there was not enough evidence that the wall, even though it had no guardrail, was obviously dangerous.