Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1964
Date: 17-May-12
From: Steve Leimberg's Estate Planning Newsletter

Subject: **Baskies & Savioli on US v. Land: A Cautionary Tale for the Zealous Advocate**

"According to the plea agreement, in January of 2010, Ms. Land drafted an amendment to the operating agreement, backdated it to October 10, 2003, and affixed signatures of the client and the son from unrelated trust documents the client and the son had signed in April of 2000. It was averred in the plea agreement that Ms. Land took these steps because she feared a malpractice suit from the administrator of the client's estate.

US v. Land serves as an important reminder that not all mistakes can be fixed, and that pressure can make even the best attorneys exercise poor judgment. Ms. Land is set to be sentenced on August 7, 2012, and faces up to three years in prison."

This week, **LISI** provided members with two newsletters focusing on professional liability:

- In Estate Planning Newsletter #1960, **Lee Slavutin** commented on French v. Wachovia Bank, where beneficiaries of an ILIT were unsuccessful in their suit against a trustee for breach of fiduciary duty involving a 1035 exchange of a life insurance policy.

- In Estate Planning Newsletter #1962, **Jay Adkisson** and **Richard LeVine** reviewed Florida Bar v. Doherty, a case where the Florida Supreme Court disbarred an attorney who sold annuities to an elderly couple.

We close this week with **Jeff Baskies** and **Justin Savioli's** commentary on US. V. Land, another case involving professional liability that they refer to as "a cautionary tale for all estate planning attorneys."

Jeffrey A. Baskies is an honors graduate of Trinity College and Harvard Law School. Jeff is a Florida Bar certified expert in Wills, Trusts and Estates law who practices at **Katz Baskies LLC**, a Boca Raton, FL, boutique trusts & estates, tax & business law firm. In total, Jeff has more than 100 published articles. He has been a frequent LISI contributor, and his articles have also been published in Trusts & Estates, Estate Planning, Probate Practice Reporter, Probate and Property, the Florida Bar Journal,

Lawyers Weekly USA and other journals. He's been frequently quoted as an expert estate planner in the Wall Street Journal, the New York Times, the Boston Globe, Forbes Magazine and other news publications. Jeff has been listed in Best Lawyers in America, three times in the Worth magazine list of the Top 100 attorneys, in Florida Trend's Legal Elite, in Florida SuperLawyers (including listing as one of the "Top 100" attorneys in Florida – 2009, 2010 and 2011) and in other similar publications. He can be reached at www.katzbaskies.com.

Justin M. Savioli is a graduate of the University of Miami (B.A.) and University of Miami School of Law (J.D., cum laude). He served as an Articles and Comments Editor on the University of Miami Inter-American Law Review and was a member of Phi Alpha Delta, a professional law fraternity. He received his Masters of Laws in Taxation (LL.M.) from the University of Florida. Mr. Savioli is a member of the Florida Bar, the South Palm Beach County Bar Association, the Greater Boca Raton Estate Planning Council, and is an active member of the Council's Speakers Bureau. He participates in the Estate Planning Committee of the Real Property Probate and Trust Law Section of the Florida Bar. Mr. Savioli has served as an adjunct faculty member at Florida Atlantic University, teaching both estate planning and probate administration.

Before we get to their commentary, members should take note of the fact that a new **60 Second Planner** by **Bob Keebler** was recently posted to the **LISI** homepage. In his commentary, Bob reviews the decision in Kim v. Commissioner, which held that early withdrawals from an IRA that were not used to pay educational expenses were subject to a 10% early withdrawal penalty. You don't need any special equipment - just click on this link.

Now, here is Jeff and Justin's commentary:

EXECUTIVE SUMMARY:

A recent case serves as a cautionary tale for all estate planning attorneys. Even if your natural instinct is to try to fix your client's problems, the facts here show that you can't fix all of your client's errors in the face of an IRS investigation without consequences. The case is called United States v. Land, S.D. Ohio, No. 1:12-cr-00030, plea 5/02/12.

Suzanne Land appears to be a very highly regarded, experienced and successful trusts and estates practitioner. She was a partner with the Cincinnati law firm of **Dinsmore & Shohl LLP**, Peer Review Rated AV in Martindale-Hubbell, Listed in The Best Lawyers in America®, Selected for the Ohio and Kentucky Super Lawyers® List, listed in the Worth Magazine/The Robb Report – Top 100 Estate Planning Attorney in the Nation (2005-2007, 2009) and an Adjunct Professor at the University of Cincinnati School of Law teaching courses in Estate Planning and Gift and Estate Tax since 1998.

However, on May 2, Ms. Land pled guilty to obstructing and impeding the IRS while representing the estates of two deceased clients, the Justice Department and IRS announced.

FACTS:

The Department of Justice Press Release[i] summarizes the facts as follows:

> According to the plea agreement and statements made in court, to conceal from the IRS the deficiencies in the documents that she drafted for her wealthy clients, Land forged the posthumous signatures of both her deceased clients and their living children on amendments to the documents.
>
> Land also misled an appraiser as to the value of the estates, created fake legal invoices that reflected work she never performed, and lied to the IRS about the circumstances surrounding the creation of the amendments.
>
> According to the terms of the plea agreement, Land admitted that the "relevant and foreseeable" tax loss that could have resulted from her obstruction was approximately $1,140,636.

The majority of the plea agreement is under seal. However, we did obtain two pages of the plea agreement. The part of the plea agreement obtained revealed at least one of the errors made in this matter.[ii]

In October of 2003, Ms. Land apparently helped one of her clients create a limited liability company. The members of the LLC were the client, who owned 2.5 voting units and 995 nonvoting units, and the client's son, who

owned 2.5 voting units. The operating agreement for the LLC provided that the company would be dissolved upon the decision of the "Majority Members" to dissolve the company.

The client died in August of 2006. At the time of the client's death, the LLC owned approximately $2,784,768 in assets. In May of 2007, Ms. Land retained an appraiser to value the client's 99.75% interest in the LLC and instructed him to interpret the term "Majority Members" to mean the "majority in interest of the voting members." Under this interpretation, the appraiser applied lack of marketability and lack of control discounts and concluded that the client's interest in the LLC had a value of $1,874,475.

In May of 2007, Ms. Land signed, as preparer, the estate tax return for the client's estate and the return listed the client's LLC interest at the discounted value.

In the summer of 2009, Ms. Land apparently learned that the IRS was conducting an audit of the estate tax return, although it appears the matter was being handled by successor counsel. It is unclear from the portion of the plea agreement we reviewed how or why there was a change in counsel. Apparently, however, during the audit, the IRS had concluded that the lack of control and lack of marketability discounts did not apply because the client had retained the unilateral right to terminate the entity.

Throughout the summer and fall of 2009, Ms. Land represented to the new attorney for the estate that the client and the son had executed an amendment to the operating agreement requiring the agreement of both the client and the son to dissolve the entity but that the amendment could not be located.

In January of 2010, Ms. Land drafted an amendment to the operating agreement, backdated it to October 10, 2003 and affixed signatures of the client and the son from unrelated trust documents the client and the son had signed in April of 2000. It is averred in the plea agreement that Ms. Land took these steps because she feared a malpractice suit from the administrator of the client's estate.

COMMENT:

Ms. Land is set to be sentenced on August 7, 2012 and faces up to three years in prison. Based on the facts presented, it appears issues with her prior representation came to light that Ms. Land chose to cover up rather than reveal or admit.

Obviously, forging signatures and misleading the IRS with fake invoices (alleged in the Department of Justice's Press Release) represent serious offenses. We do not know the full extent of the facts. We do not know what defenses if any Ms. Land presented. For that matter, we also don't know what defenses she perhaps chose to forego in exchange for a plea agreement. The bottom line is we clearly don't know the "inside story" behind this case.

However, based on what has been published and what little we can discern from the pages of the plea agreement, we do know that the pressure of an estate tax examination of an apparently botched estate planning representation led to the downfall of an otherwise successful trusts and estates lawyer. And we should all remember that we are not above the law in this respect.

If an attorney's practice is loose on issues involving dotting "I"s and crossing "T"s let this case remind you that spending extra time and/or money in the planning process might avoid a great deal of aggravation after a client dies.

One problem is where to draw a line. It seems easy in hindsight to say forging signatures in the face of an IRS exam is over the line. But what other practices may be closer to the line? I'm sure we have all seen documents with "effective dates" that are hard to verify. Can executing documents with "back-dated" effective dates be distinguished from outright post-death forgery in the face of IRS examination?

One could easily imagine a scenario where a client comes into an attorney's office and explains a recent transaction that may have terrible tax consequences down the line. As lawyers, counsel and advocates, our inclination is to help the client and cure the problem. In that effort to fix the potential problem, the attorney may draft documents having an effective date

prior to the date the document is executed – perhaps it is effective "as of" the date the transaction took place.

Certainly, certain agreements among clients can be reached and binding on a date prior to the date they sign a formal agreement. Yet, one wonders if drafting such documents which form the basis of a position taken on a tax return (and maybe an audit) could be seen as misleading the IRS if the transaction were ever investigated. We hope there is a bright line between creating backdated effective date documents and forging documents post-death. But practitioners should be cautious and careful. And remember: zealous advocacy should never require jail time.

US v. Land serves as an important reminder that not all mistakes can be fixed, and that pressure can make even the best attorneys exercise poor judgment.

As attorneys, we are in the business of solving our clients' problems whenever possible. It appears that in this case, Ms. Land was perhaps trying to solve both her clients' problems as well as her own.

However, never forget where to draw the line between solving problems and creating them. Some problems must be met head on and simply cannot be fixed.

Another terrific trusts and estates practitioner and frequent **LISI** commentator has been known to say:

"Whatever you do, don't let your client's problems become your problems."

HOPE THIS HELPS YOU HELP OTHERS *STAY OUT OF HARM'S WAY!*

Jeff Baskies
Justin Savioli

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CITE:

United States v. Land, S.D. Ohio, No. 1:12-cr-00030, plea 5/02/12.

CITATIONS:

[i] http://www.justice.gov/opa/pr/2012/May/12-tax-570.html

[ii] The authors would like to thank John A. ("Jack") Townsend, Esq., of Townsend & Jones, L.L.P. for his assistance in obtaining the portion of the plea agreement discussed herein.