LEGAL UPDATE

CLIENT NEWSLETTER OF
CARR, MORRIS & GRAEFF, P.C.

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EVIDENCE
EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE

Ever want to pretend to be a law student? The following discussion could have been plucked from a law school exam on evidence. It is common knowledge that *hearsay* is not admissible in a trial. Very simply, hearsay is a statement made outside of the courtroom by someone other than the declarant. (I would be remiss if I did not also note that the prohibition against hearsay only applies when the statement is offered for its truth). For example a witness cannot report that someone told him "the window was broken" for the purpose of proving that the window was broken. The rule is designed to prevent a witness from reporting what he has heard or relaying second-hand information. The reasons behind the rule are obvious. Like the game "telephone," where each player passes on information he heard and the result is a greatly scewed version of events, information is often miscontrued or unreliable if the person making the statement is not present and available for cross-examination.

But, and this is where the professors had fun, there are exclusions and exceptions. One exception is for "excited utterances." Statements made by individuals who are excited or under great stress as a result of a startling event are considered more reliable and may be admissible. The idea is that you do not have the time or the wherewithal to fabricate or embelish a story if you are speaking while under stress. For

continued on page 3

IN THIS ISSUE

EVIDENCE: Excited Utterance Exception to the Hearsay Rule 1
TAX & PLANNING: Secure Your Family's Financial Future by Gifting Now... 1
ESTATE TAX: Exemption Remains Constant................................. 2
EMPLOYMENT: New I-9 Form Required as of December 26, 2007 2
CRIMINAL: Sentencing Guidelines Update: Abuse-of-Discretion Standard .. 2
STAFF NOTES..................................... 4

TAX & PLANNING
SECURE YOUR FAMILY'S FINANCIAL FUTURE BY GIFTING NOW

Though nothing may match the pleasure you found in your children's or grandchildren's excitement in unwrapping this year's holiday presents, the new year brings a new opportunity to provide your youngest family members with something evermore valuable than a Nintendo Wii or the latest Harry Potter installment. By gifting to your children or grandchildren now you can accomplish two very important goals in the future: 1) reducing the size of your estate and thereby reducing any future estate taxes, and 2) providing a firm financial foundation for your children or grandchildren.

For a person dying in 2008, the "applicable exclusion amount" is $2,000,000, so if the sum of the taxable estate plus the "adjusted taxable gifts" made during lifetime equals $2,000,000 or less, there is no federal estate tax to pay. The "applicable exclusion amount" is $3,500,000 in 2009, unlimited in 2010; and, under current law, it is set to reset to $1,000,000 in 2011. Using the 2008 applicable exclusion amount, this means that each person can pass along $2,000,000 at death tax-free. A husband and wife could pass along $4,000,000 in aggregate tax-free (please note that should a husband pre-decease his wife and everything he owns passes to her at death, the widow's estate is still bound to the $2,000,000 applicable exclusion amount). Any testamentary gifts above the applicable exclusion amount will be subject to a 45% estate tax. Effective estate planning will ensure that a married couple is able to capture every penny of each spouse's exclusion amount. Nevertheless, the one certainty in tax planning is that the tax law will change. Therefore, the fight song of estate planning practitioners is to transfer assets from older generations to younger generations, transfer *downstream.*

A quick primer on *gift tax*: gift tax is a tax imposed on the gratuitous transfer of ownership of property. The tax is generally imposed on the donor (the giver) rather than on the recipient. A transfer is completely gratuitous where the donor receives nothing of value in exchange for the gifted property. Fortunately, transfers of up to $12,000 per person per year are not subject to the tax (this exclusion amount is annually adjusted upward based upon the rate of inflation). An individual can make gifts up to this amount to as many people as they wish each year. A married couple can pool their individual gift exemptions to make gifts worth up to $24,000 per person per year without incurring any gift tax. Thus, every year a married couple may gift up to $24,000 to each child or grandchild – this can quickly add up to lofty sums. For larger gifts the lifetime unified credit will exempt up to $1,000,000 in gifts exceeding the annual exclusion amount over the course of one's lifetime (See IRS Publication 950 for more information).

By gifting you remove the assets from your estate and help secure your family's financial future. Suppose that you and your spouse are blessed with a newborn grandson and are fortunate to have $24,000 which you can donate to his future financial well-being. Assuming you invest the money for your grandson in a broad diversified mutual fund and achieve the historical 10% rate of return, your foresight will yield approximately $177,000 for your grandson at age twenty-one. This is $177,000 that is not in your estate (and not in jeopardy of estate taxes) and which your grandson may use as tuition or as a down payment on a first home. Please note that this does not account for any applicable income taxes or future gifts, remember you and your spouse could gift up to $24,000 each and every year to each and every child and/or grandchild.

There are several vehicles available with which to make your gift, any one or combination of which can help you to meet your goals.

Uniform Transfer to Minors Act ("UTMA"). Gifts under this structure are made to a special UTMA custodial account. Such gifts can qualify for the annual gift tax exclusion. As long as the donor is not the custodian, the gifted amounts plus future income and appreciation will be removed from the donor's taxable estate. The gifted amounts can be used for the family member's benefit until he or she reaches the age of majority (eighteen in DC & VA, twenty-one in MD). Gifts of cash or securities can be held in almost any financial institution or investment vehicle, with the custodian acting as the

continued on page 3

The articles in this publication are designed to give general information on the matters covered. Space limitations prevent exhaustive treatment or analysis of any topic. The articles are not intended to substitute for advice on specific legal problems.

ESTATE TAX

ESTATE TAX EXEMPTION REMAINS CONSTANT . . . *TEMPORARILY*

For U.S. citizen, resident alien, or domiciliary decedents dying in 2008, the estate and generation-skipping transfer tax exemptions remain at $2 million. These will increase to $3.5 million in 2009. The gift tax exemption stays at $1 million. Estate taxes for decedents dying in 2010 and gift taxes for gifts made the same year have supposedly been repealed; however, all these changes are scheduled to expire (or "sunset") for decedents dying or gifts made in 2011 and the old law reinstated. A one-year repeal is an interesting way for politicians to claim both that they did, and did not, repeal the estate tax. Most estate planning professionals anticipate a revision of this scheme sometime prior to 2009. In light of the changing state of the law and our indeterminate tenure on Earth, all estate planning has to be done with two concepts in mind: maximal use of existing relief provisions combined with maximum flexibility.

In practice this means that a couple with a well-planned estate can currently pass up to $4 million to its beneficiaries free of estate taxes. It also means that couples with an unplanned estate of the same amount will, under certain circumstances, bequeath their beneficiaries an estate tax bill of $970,000. In our experience most couples hold their assets in joint tenancy. By the simple expedients of severing joint tenancies and creating bypass trusts the estate tax can be completely eliminated for married couples with a combined net worth of between $2 million and $4 million. For couples with net worth in excess of $4 million, irrevocable life insurance trusts and/or a lifetime gifting program might be in order.

The annual gift tax exclusion for donations of present interests to noncitizen spouses goes up to $128,000 in 2008, and the annual gift tax exclusion of present interests stays at $12,000. Unfortunately, the applicable exclusion amount for nonresident aliens has not been indexed for inflation and thus remains at $60,000. There are many creative techniques, however, whereby we can help nonresident aliens completely avoid U.S. estate taxes.

At this time it is impossible to predict the final shape or state of the estate tax. We will, however, monitor the situation and keep you informed in these pages. In the meantime the optimal strategy is still to title roughly half of combined assets in the name of each spouse to fully fund two bypass or credit-shelter trusts. When one of the spouses is not a U.S. citizen we need more time to develop an optimal plan because of the denial of the unlimited gift tax marital deduction.

If you have any questions on estate planning please feel free to call Roy Morris or the author.

NÉSTOR CRUZ

EMPLOYMENT

I-9 FORM REVISED: NEW FORM REQUIRED AS OF DECEMBER 26, 2007

The Immigration Reform and Control Act of 1986 ("IRCA") requires all employers to verify the eligibility of all employees to work in the United States. Specifically, IRCA requires all employers to have a completed United States Citizen and Immigration Services ("USCIS") Form I-9 for all employees hired after November 6, 1986.

USCIS Form I-9 allows employers to verify the identity of an individual and to determine whether the individual is authorized to work in the United States. Form I-9 should be completed for every employee within three business days of the date of hire. Employers are required to:

- Ensure that employees complete Section 1 of the I-9 Form when they start work;
- Review document(s) establishing each employee's identity and eligibility to work;
- Properly complete Section 2 of the I-9 Form;
- Retain the I-9 Form for 3 years after the date the employee begins work or 1 year after the employee's employment is terminated, whichever is later; and
- Upon request, provide completed I-9 Forms for inspection to authorized officers of the U.S. Department of Homeland Security, the U.S. Department of Labor or the Office of the Special Counsel for Immigration Related Unfair Employment Practices.

The USCIS amended the I-9 Form in late 2007 and required use of the new I-9 Form as of December 26, 2007. Employers failing to use the new Form are subject to penalty. The new I-9 Form, which is available for free at http://www.uscis.gov/files/forms/i-9.pdf, is identified by the revision date *(Rev. 06/05/07)* printed in the lower right corner of the Form. While the new I-9 Form appears to be identical to the old Form, there are substantial changes to the last page of the Form, which lists documents acceptable to establish authorization for employment and the identity of the employee.

PHILIP SCHWARTZ

CRIMINAL

SENTENCING GUIDELINES UPDATE: ABUSE-OF-DISCRETION STANDARD

In our June-July 2007 *Legal Update*, reviewing the Supreme Court's decision in *Rita v. U.S.,* we continued our analysis of Supreme Court decisions regarding the Federal Sentencing Guidelines following the key 2005 decision in *U.S. v. Booker*. In *Booker* the Court held that the Guidelines were advisory, not mandatory. As discussed in our last article, *Rita v. U.S.* involved a challenge to a sentence within the Guideline range in which the Fourth Circuit had applied a standard of a *presumption of reasonableness* for sentences within the Guideline range. The Supreme Court affirmed that presumption of reasonableness but left open for future determination a question presented in a second Guideline case before it, *Claiborne, v. U.S.*, which involved a sentence *below* the recommended Guideline range. The question presented in *Claiborne* was whether a sentence that is substantially in variance and below the Guidelines range must be justified by *extraordinary circumstances*. Although we promised an update when *Claiborne* was decided, the *Claiborne* case was rendered moot as Claiborne passed away prior to the Court hearing his case. To address the pending question, the Supreme Court granted *certiorari* in the case of Brian Michael Gall, which was decided by the Court in the decision *Gall v. U.S.*, No. 06-7949(December 10, 2007).

Whereas the decision in *Rita* was applauded by those who support the Guidelines, the decision in *Gall* was hailed by those who believe that the Sentencing Guidelines rendered advisory by *Booker* should be even further limited in sentencing importance. By way of brief background, Michael Gall—for a seven-month period while a college student in 2002—engaged in an enterprise involved in the distribution of a controlled substance known as "ecstasy." While engaged in the conspiracy, Gall himself stopped using ecstasy and any other controlled substance. After withdrawing from the conspiracy, Gall did not use any illicit substance or engage in any other criminal activity. He graduated from college and became gainfully employed. In 2004, over three and a half years after he withdrew from the conspiracy, Gall was named in an indictment returned in the Southern District of Iowa charging him and others with participating in a distribution conspiracy. After entering into a plea agreement with the government, the probation officer prepared a pre-sentence report which recom-

continued on page 3

CRIMINAL

Continued from page 2

mended a sentencing range of 30-37 months imprisonment pursuant to the Sentencing Guidelines. After a thorough review of the background of the case and applying the pertinent sentencing factors listed in 18 U.S.C. §3353A, the District Court Judge sentenced Gall to a term of 36 months probation. On appeal by the United States, the Court of Appeals for the Eighth Circuit reversed and remanded Gall for resentencing, holding that a sentence outside the Guidelines range must be supported by a justification that is proportional to the extent of the difference between the advisory range and the sentence imposed and further holding that in this case such a variance must be supported by *extraordinary circumstances*. On appeal by Gall, the Supreme Court reversed the decision of the Court of Appeals, holding that, because the Guidelines are advisory after *Booker*, appellate review of sentencing decisions is limited to a determination of whether they are *reasonable*. Significantly, the Supreme Court held, "While the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, Courts of Appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse of discretion standard." The Court went on to say that the Eighth Circuit did not give due deference to the District Court's reasoning and that the only question for the Circuit Court to consider was whether the sentence was reasonable, that is, whether the District Judge abused his discretion in his sentencing determination.

The decision in *Gall* is the latest in a line of cases interpreting the United States Sentencing Guidelines. While paying deference to the validity of the Sentencing Guidelines, the Supreme Court's decision in *Gall*, authored by Justice Stevens, gives judges greater latitude in crafting a sentence warranted by all facts surrounding and circumstances presented in a given case.

STEPHEN GRAEFF

TAX & PLANNING

Continued from page 1

fiduciary.

The UTMA structure has some downsides. The donor has no control over the usage of the funds after the family member reaches the age of majority and the custodianship ends. Each account benefits only one family member, so the funds cannot be reallocated for future needs amongst family members. In addition the income is taxable to the minor annually as earned (significant income may trigger the *Kiddie Tax* – applying the donor's marginal income tax rate to the child's income).

2503(c) Trust Gifts. These trust accounts are very similar to UTMA accounts but are established with a formal trust agreement. Any type of asset can be given to, held by, and distributed from these trusts. Gifts to these irrevocable trusts can qualify for the annual gift tax exclusion. In order to ensure that trust will not be included in the donor's estate, the trustee (equivalent to the UTMA custodian) must be someone other than the donor or the donor's spouse. The trust assets pass outright to the family member at age 21, or the family member must have a right to withdraw all funds from the trust at age 21.

An advantage of a 2503(c) trust over a UTMA account is that the trust can continue if the family member does not demand complete distribution within a specified period after his or her 21st birthday. The trust can also specify the remainder beneficiaries upon the family member's death if a testamentary general power of appointment is not exercised by the family member.

Like an UTMA account, each trust must have only one beneficiary, and gifts cannot be reallocated among family members for future needs. Trust income is taxable to the trust or to the recipient beneficiary as distributed.

Educational Savings (529) Accounts. Gifts to these accounts qualify for the annual gift tax exclusion. Additionally, gifts for prepaid tuition do not use the donor's lifetime unified credit. Account owners can make a lump sum contribution of up to $60,000 per beneficiary or $120,000 if married filing jointly and avoid incurring a taxable gift on this amount by electing to use five years of the annual gift tax exclusion all in one year. Only cash can be contributed to these special accounts, and investments are determined by the brokerage firm chosen by each state. A 529 account permits distributions for books, fees, supplies, equipment and room and board, as well as tuition, but only at post-secondary accredited institutions (college or equivalent).

This option is a great choice for those who wish to direct their gift to educational expenses. Other advantages include: all money grows federal and state income-tax free; the account holder retains control of the assets within the program regardless of beneficiary's age; and, the beneficiary can be changed at any time to another member of the beneficiary's family. Additionally, account owners may receive state income tax deductions for contributions (up to $2,000 in VA; $2,500 in MD; and $6,000 in DC).

Please consider the above information as an introduction to the options available and do not make any gifts without first researching the future implications unique to your family, as there are no universal answers. The financial foresight of gifting now can mitigate the threat of future estate taxes—regardless of the state of tax law, offer creditor protection, and provide your children/grandchildren with the head start needed to realize their goals earlier in life.

JUSTIN BANFORD

EVIDENCE

Continued from page 1

example, "He has a gun!" The circumstances surrounding these types of cases are going to vary. In *Reyes v. U.S.*, Nos. 04-CF-198 & 04-CF-218 (Aug. 16, 2007), the D.C. Court of Appeals examined an illustrative case. In that case Joseph Coe was injured during a robbery. He was forced into a car by two men and during the struggle his finger was sliced by a knife and his money and other belongings taken. Mr. Coe ran to a nearby apartment complex and told an officer on duty at the complex what had happened to him. The police officer later testified in trial. The court admitted the statements Mr. Coe made to the officer about the robbery and kidnapping under the "excited utterance" exception to the rule against hearsay. The alleged robbers unsuccessfully tried to argue that the statements made to the police should not be admitted because they were in response to police questioning and too detailed to be "spontaneous" or "excited" utterances.

A spontaneous or excited utterance is admissible in the District of Columbia if there is a startling event which causes excitement or shock, the statement is made within a reasonably short period of time after the event, and the circumstances suggest spontaneity and sincerity of the statement. The Court reasoned in *Reyes* that at the time Mr. Coe spoke with the officer he was in great pain (bleeding profusely), visibly upset, highly agitated, scared and talking rapidly. Further, even after his hand was treated, Mr. Coe "remained in a nervous and franctic state." In some cases police questioning can require "deliberative and thoughtful answers" and statements made in such a situation would not be admissible. However, responses to preliminary police questions while the declarant is still "under the spell" of the shocking event or emergency do not provide an opportunity for reflection and are admissible. Further, detailed responses can still be excited utterances.

DANA THERIOT

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals–Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Criminal Representation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions–the District of Columbia, Maryland and Virginia.

STAFF NOTES

March 1st marks the firm's 26th anniversary. Once again, Happy Birthday to us!

* * *

Marie and Roy Morris will be motorcycling the Andalusia region of Spain in mid-February. *Roy's high school Spanish will be put to the test.*

* * *

It's official, Roy and Marie Morris's son Robert has completed his 3-year active duty commitment to the U.S. Army and has been released back into the civilian population. *The fruit falling not far from the tree, Robert is soon to set off on a cross-country motorcycle trip.*

* * *

As a member of the Virginia Opera Board of Governors for Northern Virginia, Néstor Cruz is helping organize the 2008 Gala and Concert.

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