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Should You Talk to Your Parents About Estate Taxes?

This year estate taxes do not exist unless Congress acts to change the law before the end of 2010. Next year the estate tax will return with an exemption of only \$1 million unless Congress acts. Often children are afraid to talk with their parents about estate planning for fear of appearing to be after their money. However, helping your parents obtain well-informed planning with an attorney or financial advisor can often lead to reduced taxes and making sure their money is passed on to the beneficiary/ies of their choice.

Mike Cannady of our firm is monitoring the actions of Congress closely as to estate taxes. You may call him at (316) 265-8591 to initiate or review an estate plan.

Introducing Harry L. Najim

We are pleased to announce that **Harry L. Najim** joined Adams Jones as a shareholder effective August 1, 2010. Harry has practiced law in Wichita for over thirty years. His practice areas include: aviation business law; commercial and complex litigation; international law; corporate and due diligence investigations; business transactions; family law (higher asset divorce cases); restaurant/hospitality representation; and administrative/regulatory law. Harry has traveled extensively throughout Europe and the Middle East for a wide range of client business interests.



Harry received his Bachelor of Arts degree from the University of Kansas and his Juris Doctor degree from Southern Methodist University School of Law. Upon graduation from law school he was awarded a Reginald Heber Smith Fellowship. For several years he was a Lecturer and adjunct faculty member at Wichita State University where he taught business law and paralegal courses in the School of Business.

Harry is a member of the Wichita Bar Association and Kansas Bar Association. He has participated as a continuing legal education speaker for the Wichita Bar and has served on its Ethics Committee. He has previously served on the Board of Directors for the Kansas Legal Services Corporation. Harry is a food and wine aficionado and holds a membership in La Chaîne des Rôtisseurs, the Paris-based international culinary society.

Harry has four children: Jamie Najim Koch of London, England; Dr. Claire E. Najim, M.D. of Asheville, North Carolina; Peter L. Najim of Wichita; and Elizabeth A. Najim, who attends the University of Kansas.

Harry received his Bachelor of Arts degree



Seven lawyers from Adams Jones Law Firm, P.A. were recently selected for inclusion in The Best Lawyers in America® 2011, one of the oldest and most respected peer-review publications in the legal profession. Selected were: **Philip L. Bowman**, alternative dispute resolution and real estate law; **Mert F. Buckley**, real estate law; **Patrick B. Hughes**, commercial litigation, land use & zoning law, and real estate law; **Roger D. Hughey**, banking law and real estate law; **Dixie F. Madden**, corporate law and health care law; **Bradley A. Stout**, eminent domain and condemnation law; and **Monte Vines**, commercial litigation, ethics and professional responsibility law, legal malpractice law and real estate law.



Some Thoughts on Buying Commercial Real Estate

by Mert Buckley

Here are a few observations for people interested in buying real estate, based on my experience in representing buyers, sellers and lenders over the last 30 years. I don't have all the answers, but these are my suggestions.

Get help. You may be a successful business person, professional or investor. And you are probably smart and a quick study, but that doesn't mean you know the subtleties of buying and selling real estate. You don't know what you don't know. Get some professional help. You're dealing with a lot of money and could expose yourself to personal liability.

What kind of help? Start with a broker. In most cases, it doesn't cost you anything. Usually, a buyer's broker is paid from the commission paid to the seller's agent at the closing. So get someone to help you find a property. They can also help you with pricing, location, terms, and other facets of evaluating property. You will also need a lawyer and probably a civil engineer (surveyor) unless the seller has a current survey. Depending on the type of property and the circumstances, you might also need to consult with an accountant or insurance agent.

Letter of Intent. I like to begin with a term sheet or letter of intent which outlines the major terms. This allows the buyer and seller to determine if they can agree on the price and other big items before spending time and money drafting a contract. Be sure the letter of intent or term sheet clearly states it is non-binding until a formal agreement is prepared and signed by the parties.

Contracts. Some commercial contracts are drafted by the buyer's or seller's attorney; other contracts may be presented by the broker for one of the parties on a fairly standard form. Although many terms on these broker forms are standard, a number of the important issues are open for negotiation. These include: Earnest Money—how much and when does it become non-refundable? Inspection Period—how long is it and what is inspected? Survey—what

kind of survey and who pays for it? Warranties and Representations—will Seller make any and what are they? Or is the property sold “as is”? Title Insurance Costs—who pays? Also, state law requires a real estate contract to list the amount of special assessments against a property; some contracts omit this.

Inspection Period. This is a period of time after the contract is signed for the buyer to inspect the property to determine if there is any reason the buyer would want to cancel the contract and not close. It is often called a “free look,” due diligence or feasibility period. It can be limited to inspection of certain things such as financing, zoning or environmental conditions; or it might give the buyer the right to cancel without giving any reason at all. It's all negotiable. The time period varies, usually from 30 to 90 days, longer if re-zoning is required. But it's not automatic. Some contracts are “as is” and the buyer has no inspection period. This is generally true for auctions too, which are recently becoming more popular.

Title Insurance. The contract should provide that you receive a title commitment. This shows you the condition of the title; it is not a guaranty of good title. You have to read the commitment and object to title defects shown on the commitment, if any. Assuming the seller clears any title defects, the title insurance policy will insure that you own the property. But it doesn't insure against such things as encroachments across



boundary lines, lack of zoning for your desired use, a gap on the property, or violation of covenants on the property, to name a few. You need to order special endorsements for coverage against these risks. The

cost for these endorsements can add up, so you need to weigh the cost against the risk for each property.

Survey. Many residential purchasers just order a boundary survey. You'll usually want more for a commercial acquisition, an ALTA/ACSM Land Title Survey or some limited form of one. This shows, among other things, size of the property, building locations, boundaries, encroachments, easements, utility locations, street access, and recorded restrictions on the property. Surveys can be expensive so discuss the scope of the survey with the surveyor, your broker and attorney to determine what you need identified in the survey. These are usually paid for by the buyer, but it's negotiable.

Environmental. Get at least a Phase One environmental assessment. Your lender will require you to have one anyway. It should then qualify you for the innocent purchaser defense under the federal environmental clean-up laws. It's also better to know if you have environmental problems before you purchase the property instead of later, when you sell the property and your buyer conducts an environmental assessment and finds a problem.

Liability. Take title of commercial property in an entity and not your own name to minimize your risk of personal liability. If you already have an entity, you may still want to set up a new entity just to own the real estate, depending on the situation. You may also want to consult with your insurance agent on liability and insurance risk issues depending on the type of property and its intended use.

You can get through the process of buying real estate on your own and might save some money by doing much of the work yourself. But if you do, you won't know how much money you left on the table and if you have exposed yourself to future personal liability. When you are spending hundreds of thousands to potentially millions of dollars to buy the real estate, it makes sense to spend a few more dollars up front and do it right. You'll also sleep better at night.

Know Your Fiduciary Duties

by Pat Hughes



Business people often assume that as long as they don't do an act the law prohibits they are free to act out of self-interest. They may assume that if they are honest and keep their word, and if they don't mislead, trespass upon, or cause physical injury to someone else, they can do what benefits themselves to the detriment of someone else. In short, they may assume that each person is responsible for, and looks out for, his or her own interests. That view is generally correct but like all generalities, it is the exceptions that are important and demand attention.

In some circumstances, the law imposes a duty to act in the best interest of someone else. That occurs when either a contract or the nature of the relationship between two parties requires it. The obligations are called fiduciary duties and they arise in a wide range of settings. A person entrusted with property belonging to someone else has fiduciary duties as to that property. Whenever a person or entity has the power to act on someone else's behalf, whether as an agent, executor, trustee, corporate officer, or member of a board of directors, that person has a fiduciary duty to use that power for the benefit of the other person, not the fiduciary's own benefit. These circumstances are easy to deal with because trustees, agents, officers and directors know they are in such a role and it should be clear to them that they must act accordingly.

However, fiduciary obligations do not arise only in relationships where a person has a contract to be a fiduciary or position that is inherently one in which there are fiduciary duties. Instead, fiduciary duties arise whenever there is a relationship of special trust. This does not mean one may abandon all caution

and responsibility for his own protection and unilaterally impose a fiduciary relationship on someone else. Yet the parties may, without explicitly recognizing it, develop a relationship where fiduciary duties arise. As a result while we can say as a general rule that a creditor does not owe a duty to a debtor, there are times when, because of the special trust that has developed between the two, fiduciary obligations can arise. There is no list of types of relationships in which fiduciary duties arise. Instead there is a broad principle that a fiduciary relationship exists "where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." Such a relationship is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other."

Fiduciary duties fall into two basic categories: duties of loyalty and duties of care. The duty of loyalty is the duty to pursue the interests of the other person. For example, the duty of loyalty requires that the best interests of the corporation and shareholders take precedence over a director, officer, or controlling shareholder's self-interest that is not shared by the stockholders generally. It prohibits fiduciaries from engaging in self-dealing and requires that the other person receive the full benefit of transactions in which the fiduciary engages, without thought to personal gain. In short, it is the duty of the person in whom confidence was placed to act with the utmost good faith and loyalty for the furtherance and advancement of the interests of his or her principal. Kansas sets a higher standard or stricter fiduciary duty for directors and officers of corporations than some other jurisdictions. Any unfair transac-

tion induced by a fiduciary relationship gives rise to a liability with respect to unjust enrichment of the fiduciary and it is the fiduciary who must prove the transaction is fair.

The duty of care is an obligation to exercise the skill, care and diligence that would be exercised by a reasonably prudent and competent person in the place of the fiduciary. What it means to owe such a duty to someone else is that a failure to perform gives the other person a claim to recover whatever damage the failure causes. Therefore fiduciaries, whether trustees or homeowners' association officers, are liable for losses resulting from their malfeasance, misfeasance or their failure or neglect to discharge their duties. The risk of failing to adequately perform fiduciary duties is not limited to having to pay the damages the failure causes. In some circumstances the fiduciary may have to forfeit benefits the fiduciary received, or even the compensation paid to the fiduciary. In other cases a fiduciary may have to pay a multiple of the damages or may be liable for punitive damages. The potential liability for breaching fiduciary duties can persist much longer than for some other types of legal claims. Sometimes the statute of limitations will not start running until the fiduciary relationship ends. For example, a trustee who has served for 10 years may remain liable for acts done at the beginning of that period, even if that statute of limitations for the conduct is otherwise two years.

The best way to control exposure to claims for breach of fiduciary duty is to be sure to understand in what relationships you owe such duties and how they apply. Often the best way to recover for an economic injury is through a claim that a person who contributed to it was a fiduciary and breached fiduciary duties.

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Phil Bowman Retires

Phil Bowman has been one of the premier real estate lawyers in Kansas over the past five decades. He began his practice in Bushton, Kansas (population 500) as a jack-of-all-trades; vice president of the local bank, insurance agent, tax return preparer and lawyer. After a year of little real legal experience and little prospect of any (all the potential litigants were customers and you couldn't sue them), he joined Adams Jones. During his 48 years of practice with Adams Jones he worked on all kinds of matters, but concentrated on real estate, banking, insurance, and commercial litigation in later years.

His real estate and business practice ran the gamut: eminent domain, mortgage enforcement and priority litigation, title examinations, documentation of purchase, and financing transactions and closings. He served as general counsel to a title insurance company and a savings and loan association, litigated values of real estate, and "made new law" in condemnation and mortgage issues in Federal Bankruptcy Court, Kansas Supreme Court, Kansas Court of Appeals and the U.S. Court of Appeals for the 10th Circuit. He has defended institutional lenders against negligence and lender liability claims. Phil represented municipalities, lawyers, doctors, banks, a recycling company, manufacturers, and pipeline operating companies. He was honored to serve as national president of the American College of Mortgage Attorneys. He also served as president of the Wichita Bar Association and was a member of the Kansas Supreme Court Nomination Committee for a number of years.

In more recent years, Phil was an experienced commercial arbitrator for the American Arbitration Association and was often called upon to mediate pending lawsuits. He has also testified as an expert on real estate law, legal malpractice, and attorney fee disputes.

Phil and his wife Barbara have relocated to sunny California where they both enjoy the weather and playing golf, especially during winter months. Phil will be missed by everyone at the firm but still plans to visit us on occasion. We wish him the best in retirement.

