

QWarterly Chronicles

Winter 2007

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You Be the Judge

On August 10, 2003, Jack Ahn and Johnny Shin were playing golf at Rancho Park Golf Course as part of a foursome. After the players had finished playing the twelfth hole, Ahn was the first to head to the thirteenth tee. Shin then moved to the vicinity of the cart which was located to the front and left of where Ahn was setting up to hit his drive. Shin claims that Ahn had made eye contact with him before striking the ball. Ahn claims that he was already concentrating on setting up for his shot before Shin came over to the tee area at the thirteenth hole and was unaware that Shin was in the area. Ahn proceeded to tee off. Unfortunately, the ball found the head of Johnny Shin.

Shin filed suite against Ahn seeking damages for his personal injuries. Ahn asserted in his answer the affirmative defense of assumption of the risk. A summary judgment motion was filed by Ahn based on this defense. In support of the motion, he submitted an expert declaration stating that golfers are instructed not to take their eyes off the ball until they hit it. Otherwise it would be very difficult to make contact. As part of his opposition to the motion, Shin countered with an expert declaration citing the Rules of Golf. Specifically, the first safety rule requires a player to make certain that no one is standing close enough to be struck by the club or ball.

The assumption of risk doctrine consists of two components. Primary

assumption of the risk applies to inherently dangerous activities and acts as a complete bar to recovery since the doctrine holds that no duty of care is owed. Secondary assumption of the risk arises where one party owes a duty of care, but the other party knowingly places himself at risk of being injured if care is not exercised. Under secondary assumption of risk, an injured party's recovery may be diminished but is not barred by his negligence in exposing himself to the risk.

Initially, the trial court judge granted the motion filed by Ahn stating that under the doctrine of primary assumption of the risk Shin had assumed the risk of being hit merely by going out on the golf course. Shin filed a motion for new trial claiming that the court failed to consider previously uncited California law as well as out-of-state cases. The trial court was convinced by Shin's arguments and reversed its previous order granting the summary judgment motion. Ahn appealed the ruling.

Should Ahn be liable for the injuries of Shin? Is golf so inherently dangerous that the primary assumption of risk doctrine should bar Shin from recovery? What should be the duty of the player when teeing off? What about the responsibility of those playing in the same group to remain in a safe location? How do you think the court of appeal ruled?

Please see "Ruling" on page 6

**Unfortunately,
the ball found
the head of
Johnny Shin.**

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NEW RULES FOR GIVING TO CHARITY

On August 17, 2006 the Pension Protection Act of 2006 was signed into law. This Act marks the most significant changes in pension legislation since the Employment Retirement Income Security Act of 1974 (ERISA) was enacted. In addition to many changes in the pension arena, the Pension Protection Act made changes to other areas of tax law, including the strengthening of prior rules relating to the substantiation of certain kinds of charitable contributions.

The changes to charitable contribution rules have been overlooked by many but they will affect most of us who make small donations to Good Will or drop money in the Salvation Army buckets during the holiday season.

Cash Donations

For cash donations (donations consisting of cash, checks, or other monetary contributions) made in tax years after August 17, 2006, the Pension Protection Act now requires taxpayers to keep records of all cash donations regardless of

the amount. Thus, an individual must show a receipt from the charity, a canceled check, or a credit card statement to prove the donation. The documentation must provide the amount of the contribution, the contribution date, and the name of the donee. No tax deductions will be allowed if the taxpayer cannot provide the required supporting documentation.

Donations of Clothing and Household Items

For donations of clothing and household items made after August 17, 2006, the Pension Protection Act requires such items be in at least "good" condition or better. However, the Act did not provide a definition of "good condition." This requirement does not apply to claimed deductions of \$500 or more for a single item of clothing or a household item **and** the taxpayer includes a qualified appraisal with respect to the item for which the deduction is being claimed. Household items include furniture, furnishings, electronics,

appliances, linens, and other similar items but do not include paintings, antiques, other objects of art, jewelry, gems, or collections.

Sarah A. Kirland, J.D., LL.M.

SPOTLIGHT



We are pleased to announce the following additions and promotions:

Julia A. Mouser

Senior Associate

Julia has joined our litigation department and brings nearly 20 years of experience in the areas of insurance defense and civil litigation. As a stress-reliever to her busy practice, Julia competes in racquetball on the local, state, and national levels. She is equally at home on the courts as she is in the Courts.

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**Scientists say 1 out of every 4 people is crazy.
Check 3 friends, if they are not crazy, you are.**

REAL ESTATE RICH? WHAT TO DO ABOUT THOSE CAPITAL GAINS

Steven L. Cademartori

Associate

Steve has joined our Business section. He comes from a varied background in the business arena from which he gained real-life exposure to many of the situations he encounters daily in the Business Law practice. Away from the office, Steve enjoys the Lakers, real estate investing, body surfing, target shooting, and cooking.

David T. Casados

Paralegal

David, a certified paralegal who has been with QWLLP since 2001, has recently been promoted to paralegal. He has been working as an assistant to the litigation department and has gained the experience necessary to move into the paralegal position.

Jan Y. Nishida

Assistant

Jan has filled the position vacated by David upon his promotion to paralegal. She has a strong background in the litigation arena and stepped into the position with such confidence and ability that we feel she has been part of our team forever.

For more information, please visit our website at www.qwllp.com.

Many of our clients are real estate rich. They adhered to the “buy low - sell high” investment credo and have done very well for themselves and their families. The problem that arises when buying low and selling high is that one can face very serious capital gains. Many of our clients ask if there is anything they can do to reduce their exposure to capital gains. Our answer is that yes, capital gains tax can be optional (with the age old caveat that everyone’s situation is different and they should speak with their trusted advisor).

Perhaps the best known capital gains exclusion is the single filing \$250,000/joint married filing \$500,000 allowance for personal residences, applicable as long as the house has served as the primary residence for two out of the last five years. Unfortunately, many of our clients have experienced great increases in the values of their properties beyond the limits of the capital gains exclusion. So what to do?

Clients ask about the 1031 exchange opportunity in which a piece of property is “exchanged” for a similar

piece of property. The 1031 is only for investment property and can not be used for residential property capital gains. And in regards to investment property, the 1031 exchange only delays the capital gains tax until the newly acquired property is sold or the owner dies (in

which case, except for 2010, the basis is stepped up to the date of death valuation). The 1031 exchange is not the answer for residential capital gains and is not necessarily the best option for reducing capital

gains on investment property either.

Some options available to deal with capital gains are:

Charitable Remainder Trusts (CRT)

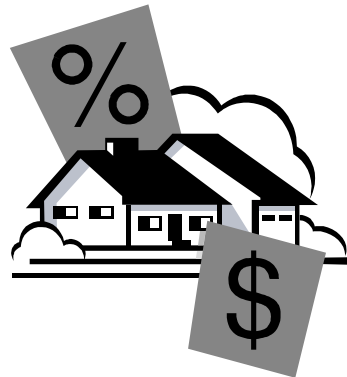
Personal Residences Charitable Buy-downs

Private Annuity Trusts (PAT)

Charitable Gift Annuity

Please contact us with your capital gains issues for an explanation and discussion of your options.

Daniel J. Wexler, Esq.



The word listen contains the same letters as the word silent.

An Education In Private Annuities

Most people are familiar with annuities offered by insurance companies and other commercial institutions; however, few people are familiar with the use of private annuities and the unique estate and gift tax planning opportunities they can provide. Private annuities are typically used to provide a fixed retirement income to an older family member, while shifting assets (which are often highly appreciated) out of the older family member's taxable estate into the hands of a younger family member without paying gift or estate taxes. Private annuity arrangements can be structured between individuals such as a parent and child. In such a case, the parent would be the "annuitant" entitled to receive the annuity payments on a regular basis, and the child would be the "obligor" required to make the payments. Private annuities can also be set up by the transfer of assets to a private

annuity trust in consideration for the right to receive annuity payments from the trust as the obligor. A private annuity trust has many similarities to charitable remainder trusts; however, the corpus of the trust ultimately passes to, and benefits, family members rather than a charity.

With a private annuity arrangement, the annuitant receives the obligor's promise to pay the annuitant a specified periodic sum for an agreed period, which is usually the duration of the annuitant's lifetime, in exchange for the transferred property. The size of the annuity payments is determined by the value of the property transferred, current interest rates and the life expectancy of the annuitant. Internal Revenue Service valuation tables must be used to calculate the payment amount. The obligor's promise to pay the annuity amount is an unsecured obligation.

Although a private annuity may be established through a transfer of cash, this structure often involves the transfer of appreciated property such as real estate or stock in a business. In such case, the annuitant is able to defer the capital gains tax on the appreciated value of the

transferred property since it is spread out over the annuitant's lifetime. Each annuity payment would be broken into three parts: a return of basis (tax free); interest (ordinary income) and capital gains. The tax consequences of a transfer of appreciated property for a private annuity differ from those that would occur if the property was simply sold, since the taxpayer would have to pay tax on the entire capital gain in the year of the transfer. By transferring the property in exchange for a private annuity, the gain is spread out over the annuitant's lifetime.

The property transferred in exchange for private annuity is removed from the annuitant's estate for estate tax purposes. If the annuitant dies before the age projected in the Internal Revenue Service tables, there is no "forfeiture." There are no federal gift tax consequences in establishing a properly structured private annuity. The property transferred to the obligor is not deemed to be gift; rather, it is treated as sale of property for tax purposes. The annuitant must be prepared to relinquish control over the assets sold, including voting rights and any business or trust.

The primary disadvantage of a private annuity is the fact that

Office Hours:

Our normal office hours are 8:30 a.m. to 5:30 p.m. Monday through Friday, Saturday by appointment only.

Closures:

Monday, February 19th in observation of Presidents' Day

Our best wishes to you for a happy, healthy, prosperous 2007!

the annuitant receives an unsecured promise from the obligor to make the annuity payments. The annuitant must also be prepared to relinquish control over the assets sold, including voting rights and any business or trust. The annuitant assumes the risk of possible financial loss if the obligor fails to continue to pay the annuity. The annuity payment may also cause a financial strain on the obligor, particularly if the annuity runs for the annuitant's life expectancy and the annuitant outlives his or her actuarial life expectancy. If this occurs, the obligor is still obligated to continue making payments under the terms of the annuity. On the other hand, if the annuitant dies before his or her actuarial life expectancy, the obligation to make the annuity payments ceases and the obligor will retain the transferred property with no estate or gift tax consequences.

To ensure that no gift tax consequences result, the private annuity sale should satisfy the following requirements:

- (a) The annuity payments must be calculated to accurately reflect the current value of the property transferred.
- (b) The amount of each annuity payment must be computed using the Internal Revenue Service valuation



tables, unless death of the annuitant is imminent. In such case, if there is at least a fifty percent probability that the annuitant will die within one year, the actuarial tables must be disregarded. However, if the annuitant does in fact survive for 18 months, death will not be considered as imminent and the tables may be used.

(c) There must be a real expectation of payment.

(d) The obligor must actually deliver an annuity check to the annuitant each payment period.

(e) The annuitant may not retain any interest in the property that is exchanged for the annuity form of security for the obligor's promise to make the annuity payments. The estate tax and other advantages of a private annuity can be achieved only if the property is exchanged for the obligor's unsecured promise to make the annuity payments. The estate planning benefits may be lost if the annuitant retains any interest

in the property, or if the payments are tied to the property's income.

The payments made each year under the annuity arrangement will be included in the taxable estate of the annuitant if he or she retains them. Therefore, the annuitant should consider making annual gifts to family members or other donees from that portion of such payments that the annuitant will not consume, using the \$12,000 annual gift tax exclusion.

A private annuity can relieve an individual of the burden of managing business or investment property. In addition, private annuities can reduce by costs of the stated ministrations since the property transferred pursuant to the annuity arrangement is removed from the estate prior to the annuitant's death.

Jacqueline M. Jensen

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QWLLP QUARTERLY CHRONICLES

About Quinlivan Wexler LLP

Patrick “Rick” C. Quinlivan and **Daniel “Danny” J. Wexler** bring almost 50 years of combined legal experience to Quinlivan Wexler LLP. With careful selection and addition of talented professionals to the firm, QW has grown over the years to the point where we now boast of many specialty areas to suit the needs of our clients.

Located near South Coast Plaza, QW engages in a general civil practice that includes civil litigation, business and corporate law, estate planning, probate, conservatorships and elder law.

The breadth of our litigation experience assures our clients’ representation by lawyers who fully understand the techniques, not only of trial advocacy, but of negotiations and persuasion as well. So, while being very meticulous about doing our homework, planning ahead, and writing precise contracts to prevent litigation, we are also fully prepared to litigate when it is in the best interests of our clients.

“Ruling”

The appellate court reviewed at length several previous cases dealing with the assumption of risk issue in connection with sporting activities, including golf. After going through this exercise, the court ruled that Shin’s claim is not barred by the primary assumption of risk doctrine. It seems that a

golfer owes no duty to other golfers except one’s own playing partners. There is generally no chance of recovery when injured by a ball struck by a player on an adjacent fairway. However, a player does owe a duty of care to ensure that his playing partners are not in harms way.

Patrick C. Quinlivan

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you.*

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