

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2785**

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Subject: Ken Jefferson & Linda Kotis on Retitling Assets - "Look! Up in the Sky! It's a Transfer Tax on Your Plane!"

"Utilizing a revocable trust as a Will substitute and transferring one's assets into said trust is a customary, and generally, simple estate planning practice. This is not intended to suggest it is without potential pitfalls, however. There are instances when transferring property into a revocable trust is inadvisable.

As demonstrated by the recent decision in Shakman v. Department of Revenue, an attorney representing himself came across such a pitfall in executing what might have seemed to be a routine retitling of his aircraft to his revocable trust. Nonetheless, a careful reading of the statute, its exemptions, and consultation with an estate planning attorney would have confirmed that the retitling would result in a 6.25% transfer tax on the value of the aircraft, allowing Mr. Shakman to avoid financial harm and the headache of litigation."

Ken Jefferson and Linda Kotis provide members with commentary on [Shakman v. Department of Revenue](#), which examines the pitfalls that can arise when retitling assets to a revocable trust.

Ken Jefferson is an associate in the Washington, DC office of **Ivins, Phillips & Barker**, a firm ranked by Chambers in its 2019 *High-Net Worth Guide*. Ken joined the firm in the fall of 2018 having previously worked for the Internal Revenue Service (IRS) as an Estate and Gift Tax Attorney. He is a member of the District of Columbia and California Bars. During his time with the IRS, he examined numerous estate, gift and fiduciary income tax returns. Now, Ken utilizes the knowledge and experience gained at the IRS to advise clients on their estate plans as well as to analyze and advise on income and transfer tax obligations. Ken's practice also includes advising on and implementation of trust modification techniques, the handling of probate matters and administration of high net worth estates, and business planning and entity formation. Ken is a former collegiate football player and scholarship member of the Virginia Tech Hokies, an

NCAA Division I program. He was also a member of the Hokies' Champions club and earned the privilege to serve as a captain during his senior year.

Linda Kotis is Of Counsel in the Washington, DC office of **Ivins, Phillips & Barker**. She is a member of the District of Columbia, California, Indiana, and Maryland Bars. Linda advises clients on forming and revising their estate plans and analyzes estate, income, generation-skipping transfer, and gift taxation matters for high net worth individuals and families. Linda's significant experience includes analysis of complex state trust administration and non-tax issues, the administration of high net worth estates, formation of private foundations, marital agreements, complex guardianships, post-mortem planning, probate matters and court pleadings regarding fiduciary administration issues. For **LISI**, Linda has written [*Modification Mania: Avoid Trust Code Trip-Ups and Draft Documents to Facilitate Change*](#) (October 31, 2019), [*Reset of the District of Columbia's Estate Tax Exemption*](#) with co-authors Andrea Dykes and Carolyn Rogers of Howard Insurance (January 9, 2019), [*Minding the Gap: The Mismatch Between Maryland's 2019 Estate Tax Exemption and the New Federal Estate Tax Exemption*](#) (June 25, 2018), and [*Reform School: Lessons on Rescuing an Undesirable Tax Plan after Death*](#) (April 27, 2017). She is the author of *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, Probate & Property magazine (March/April 2017), and other articles in *Washington Lawyer*, *Bloomberg BNA Daily Tax Report*, and *Wealth Strategies Journal*. Linda's most recent presentations on estate planning were *Lemons to Lemonade: Making Use of the Delaware Tax Trap* (November 13, 2018) with Kasey A. Place of Ivins, Phillips & Barker at the DC Bar Communities, Estates, Trusts, and Probate Lunch Series, and as a panelist with Robin Solomon of Ivins, Phillips & Barker at the *Women, Influence & Power in Law* conference (October 4, 2018). Past presentations include meetings of the American Bar Association and the District of Columbia Bar, as well as law firm briefings. Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

Here is their commentary:

EXECUTIVE SUMMARY:

Utilizing a revocable trust as a Will substitute and transferring one's assets into said trust is a customary, and generally, simple estate planning practice. This is not intended to suggest it is without potential pitfalls,

however. There are instances when transferring property into a revocable trust is inadvisable. As demonstrated by the recent decision in *Shakman v. Department of Revenue*, an attorney representing himself came across such a pitfall in executing what might have seemed to be a routine retitling of his aircraft to his revocable trust. Nonetheless, a careful reading of the statute, its exemptions, and consultation with an estate planning attorney would have confirmed that the retitling would result in a 6.25% transfer tax on the value of the aircraft, allowing Mr. Shakman to avoid financial harm and the headache of litigation.

FACTS:

In [*Shakman v. Department of Revenue*](#), 2019 IL App (1st) 182197, the First District of Illinois Appellate Court affirmed the decision of the Circuit Court of Cook County which had granted summary judgment in favor of the Illinois Department of Revenue (the “Department”). The Circuit Court held that the Department properly imposed transfer tax liability under the Aircraft Use Tax Law when attorney Michael L. Shakman, as part of his estate plan, changed legal title of an aircraft held in his individual name to himself as trustee of his revocable trust.

In 1990, Mr. Shakman as settlor and trustee created the Michael L. Shakman Revocable Trust (the “Trust”) which was amended and restated in its entirety in 2007. He was sole beneficiary during his lifetime and reserved the power to revoke or amend the trust agreement at any time. In 2008, Mr. Shakman purchased a glider aircraft which he registered with the Department of Transportation, filed a general use tax return with the Department of Revenue, and paid a general use tax of \$7,370. In 2014, as part of his estate planning, Mr. Shakman changed ownership of the aircraft from his individual name to himself as trustee of the Trust. He effectuated the transfer by completing a Federal Aviation Administration (FAA) standard bill of sale for \$1.00 and other valuable consideration. Mr. Shakman then filed the bill of sale with the FAA. The Department, which monitors title records of aircraft in the normal course of business, noticed the ownership change. It sent Mr. Shakman a notice of tax liability for the Aircraft Use Tax, as a result of what it considered a taxable transfer between Mr. Shakman and his revocable trust, in accordance with 35 ILCS 157/10-15:

A tax is hereby imposed on the privilege of using, in this State, any aircraft as defined in Section 3 of the Illinois Aeronautics Act [620 ILCS 5/3] acquired by gift, transfer, or purchase after June 30, 2003. This tax does not apply (i) if the use of the aircraft is otherwise taxed under the Use Tax Act; (ii) if the aircraft is bought and used by a governmental agency or a society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes; (iii) if the use of the aircraft is not subject to the Use Tax Act by reason of subsection (a), (b), (c), (d), or (e) of Section 3-55 of that Act [35 ILCS 105/3-55] dealing with the prevention of actual or likely multistate taxation; or (iv) if the transfer is a gift to a beneficiary in the administration of an estate and the beneficiary is a surviving spouse. The rate of tax shall be 6.25% of the selling price for each purchase of aircraft that qualifies under this Law. For purposes of calculating the tax due under this Law when an aircraft is acquired by gift or transfer, the tax shall be imposed on the fair market value of the aircraft on the date the aircraft is acquired or the date the aircraft is brought into the State, whichever is later. Tax shall be imposed on the selling price of an aircraft acquired through purchase. However, the selling price shall not be less than the fair market value of the aircraft on the date the aircraft is purchased or the date the aircraft is brought into the State, whichever is later.

In protest, Mr. Shakman paid \$7,511.63 in taxes, penalties, and interest, and filed suit with the Circuit Court of Cook County. His complaint included two declarations: (i) the Department's imposition of the tax was improper; and (ii) he was entitled to a refund by the Department for the amount he paid plus interest. He also sought preliminary and permanent injunctions barring the Department from transferring the amount paid under protest out of the protest fund. The Department answered Mr. Shakman's complaint, and both the Department and Mr. Shakman filed motions for summary judgment. The Circuit Court granted the Department's motion for summary judgment. It concluded that when an Illinois owner of an aircraft files a bill of sale with the FAA, unless a statutory exemption applies, the owner will incur a transfer tax under the Aircraft Use Tax Law, and that in this case, no exemption applied.

Mr. Shakman appealed, and the First District of Illinois Appellate Court reviewed the Circuit Court's decision *de novo*. In its analysis, among other things, the Appellate Court examined the Aircraft Use Tax Law and its four specific exemptions, its relationship to other previously enacted and similar statutes such as the Watercraft Use Tax Law and Motor Vehicle Use Tax Law, as well as persuasive authorities. The opinion also contained an extensive discussion of trust law and the fact that under Illinois law and the Aircraft Use Tax Law, a natural individual is legally distinct from the trustee of a trust. Ultimately, the court found that the issue turned on whether the Aircraft Use Tax Law was intended to treat a change of ownership between a person in his individual capacity to himself as trustee of his own revocable trust as a transaction between two different persons and therefore a taxable event.

The court concluded that such a transfer of ownership was intended to be captured by the law because no specific exception or carve-out had been provided for such a transfer by the legislature in crafting the law. The court acknowledged that other states have similar laws applicable to transfers of aircraft. The State of California and the Commonwealth of Virginia, which have such statutes, however, do provide a specific exemption from tax for the transfer of ownership of an aircraft from an individual into a revocable trust. See Cal. Rev. & Tax. Code § 6285(b) and Va. Code Ann. §58.1-1501. The court noted that the Illinois legislature could follow the lead of such other states if it desired to create such an exception.

COMMENT:

The transfer and retitling of assets from ownership by an individual to ownership by one's revocable trust is a routine estate planning practice. It is typically done for one or more reasons:

- (i) to allow for asset management during the settlor's lifetime by the settlor as trustee or by his successor trustee when the settlor is under a disability;
- (ii) to provide privacy regarding ownership of an asset;
- (iii) to fund trusts for a spouse, descendants or other beneficiaries that will be created upon the settlor's death; and
- (iv) to remove assets from the settlor's probate estate at death, so as to minimize probate estate administration tasks, reduce probate fees, and avoid the intrusiveness of certain probate jurisdictions.

Routine aside, it is always imperative, whether a layperson or seasoned practitioner, to peruse the law applicable to the asset being transferred ahead of engaging in retitling transactions, in order to avoid needless and costly missteps. And after such examination of the law, consultation with a qualified attorney familiar with the applicable rules is necessary to confirm initial conclusions about potential taxation on the transfer.

Moreover, while an initial objective of the estate plan may be to transfer all assets into a revocable trust, sometimes the goal and the reality are incompatible. The transfer and retitling process for some assets may be either too arduous and/or costly to undertake in comparison to the potential benefits. For example, types of property not suitable for transfer may include motor vehicles, boats, and certain interests in real property. An alternative to transfer may be the initial purchase of the asset directly by the trust.

In *Shakman*, the facts indicate that the revocable trust was in existence prior to his acquisition of the aircraft. In theory, it may have been possible for Mr. Shakman to have made his initial purchase of the aircraft through his Trust. What's also of note is the question of Mr. Shakman's knowledge and examination of the statute prior to his execution of the transfer, and the fact that he and a partner in his own firm litigated the case on appeal.

The opinion does not tell us whether Mr. Shakman consulted a qualified estate planner before deciding to retitle the aircraft. Assuming he did not seek independent legal advice, then, had he done so, he might have been advised that the transfer of the aircraft into the Trust was not worth the risk of the probable tax liability under the Aircraft Use Tax Law, due to the lack of an applicable exemption. Here, it cost Mr. Shakman nearly \$8,000, not counting court costs and the otherwise billable hours consumed by the subsequent litigation (assuming that his own firm was likely representing him "for free").

Concluding Observation

State and local transfer taxes are not uniform across the nation. Therefore, the transfer of assets into a revocable trust is an exercise that requires the careful examination of the applicable jurisdiction's statutes and regulations. All clients, including those who are attorneys, should consult with a qualified estate planner to ensure that the client understands the law and

receives appropriate advice before attempting to retitle assets into a revocable trust.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Ken Jefferson
Linda Kotis

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CITES:

[*Shakman v. Department of Revenue, 2019*](#) IL App (1st) 182197.