LeBlanc & Young

Four Canal Plaza, Portland, Maine 04101
fax (207) 772-2822 · phone (207) 772-2800
leblancyoung.com · info@leblancyoung.com

Memorandum

TO: LeBlanc & Young Clients

DATE: January 2018

SUBJECT: Transfers Between Spouses for Estate Planning

During the course of estate planning discussions, we often discuss the possibility of spouses dividing their assets between them so that ownership will be changed from the original structure. It is often a goal of estate planning to segregate the assets owned by the first spouse to die in a trust to make use of his or her estate tax exemption and avoid having those assets taxed in the surviving spouse's estate. Most couples do not hold their property divided proportionately between them in separate names, and many hold a majority of assets in joint tenancy with right of survivorship. Thus, a transfer of assets between spouses may be considered during the estate planning process so that each spouse will have enough assets in his or her own sole name to ultimately flow into their respective trusts. In addition, couples sometimes want to transfer assets between them to facilitate who is to receive particular assets after one or both of the couple has died. There are many issues that couples should consider when contemplating such transfers, ranging from the desired tax consequences to personal preferences as to how assets are held, where they should ultimately pass, and convenience of use, but the most peculiar and perhaps startling issues are the Maine domestic relations law ramifications. The purpose of this memorandum is to explain very generally how Maine domestic relations law may regard transfers between spouses, and what measures should be considered if it becomes clear that a transfer between spouses is otherwise desirable.

Property owned by married couples can have different classifications in the event of a divorce. Under Maine law, couples can hold "marital property," which is to be divided between them upon divorce, and "separate property," which is not to be divided and remains the property of the original owner/spouse. Examples of separate property are: (i) assets owned by one spouse immediately before the marriage that are still in that spouse's name at the time of divorce; (ii) assets inherited by one spouse before or during the marriage that remain in that spouse's name; and (iii) assets received by one spouse as a gift. Examples of marital property are assets acquired during the marriage other than by inheritance or gift, typically as a result of marital efforts. A marital residence which is purchased with funds obtained through the employment (during marriage) of one or both spouses is a classic example of marital property. Title

to marital property can be held in the name of one spouse or the other and still retain its character as marital property for divorce law purposes. Joint property is marital property unless another property regime applies (for example, community property as the result of history in a community property state). Transfers between spouses can inadvertently convert marital property to separate property since such a transfer is a gift to the recipient spouse. Couples can, however, agree to classify assets as they may agree, if the agreement is legally sufficient to change what might be an undesirable result.

If one spouse desires to transfer assets to the other spouse in order to fund the other spouse's estate tax exemption, that transfer (being a gift) could have the unintended result that the transferred property becomes the **separate** property of the recipient spouse in the event of a later divorce. Division of joint property can also have the result of creating separate property. This is very rarely the desired result for transfers and divisions that are undertaken to address estate planning tax concerns. Typically, spouses wish to transfer property in order to facilitate their tax planning but they want the division to be neutral and the property to maintain its marital property character, or if separate property is being transferred, that it at least becomes marital property. It is noteworthy, however, that if the transferring spouse transfers his or her separate property to the recipient spouse, it is not clear that one can achieve both the appropriate tax objective of funding the estate tax exemption of the recipient spouse and have the property revert to being treated as the separate property of the transferring spouse in the event of a divorce. Spouses may agree between themselves at the time of the transfer to continue to treat the transferred property as marital property, and such a contractual obligation, if clear and in writing, with appropriate consideration, should be binding in the event of divorce. We should note, however, that we are unaware of any case which challenges the efficacy of such an agreement and, of course, every matter is fact specific and could well become the subject of discussion and litigation in the context of an acrimonious divorce.

Such agreements between spouses to maintain the character of transferred property as marital property should be documented by written contract. The Joint Declaration that we prepare is often used to document this intent and the commitment of the spouses to consider transferred property as marital property under Maine's domestic relations law. You should understand, however, that there is an inherent potential conflict of interest between the spouses in such a situation, due to the division of property; and each spouse should of course feel free to consult separate counsel to discuss the impact of such a transfer and the Joint Declaration on his or her own separate situation, distinct from the marital circumstances. If one spouse is transferring significant separate property to the other, that spouse might choose to have separate representation to bolster the efficacy of the agreement.