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ESTATE TAX MEMORANDUM

TO: **CPAs, Clients & Associates**

FROM: **David L. Silverman, Esq.**

DATE: **April 8, 2010**

RE: **Real Estate Title Issues in Estate Planning**

Estate planning and administration frequently involve the transfer of real estate to family members. The choice of deed to convey title is important, as the rights of the grantee may be significantly affected. The use of an incorrect deed might cause title insurance to lapse. It is also important to ensure that title protection afforded by the policy remains effective following intrafamily transfers. Transferring title without considering title insurance coverage could have the unintended effect of terminating policy coverage. Although most title insurance policies extend coverage to grantees who succeed in interest by operation of law, coverage may not be effective where voluntary transfers are made to entities created when planning the estate.

The deed conveying the greatest number of rights to the grantee is the warranty deed. The grantor of a warranty deed guarantees that he owns the property and has a right to convey it. The warranty deed, which purports to convey property free and clear of all encumbrances, creates

liability in the grantor if the title transferred is defective. The guarantee extends to prior owners as well, so that the grantor is guaranteeing title against all claimants beginning from the first owner's period of ownership. Bargain and sale deeds also guarantee that the grantor is the owner and has the right to convey. However, the warranty against defects in title is limited to defects arising through the grantor, and does not extend to defects in title attributable to predecessors in interest. At the other end of the spectrum lies the quitclaim deed, which carries with it no implied warranties, and makes no representations concerning the condition of title. The quitclaim deed conveys only those rights the grantor possesses, but no more. Consequently, the quitclaim deed does not give rise to damages in the event title is defective.

Since liability arising from defects in title would not likely be a concern in most intra-family or post-mortem transfers, it might seem logical to choose a quitclaim deed. Although that deed protects the grantor, it might also extinguish the grantee's right to pursue claims against the grantor's predecessors for defects in title. Rights provided under the grantor's title insurance policy could also be lost. A quitclaim deed would be a poor choice in an intrafamily transfer. Choosing a bargain and sale deed might also be unwise, since remedies against the grantor's predecessors in interest arising from earlier title defects could be extinguished. The best choice might be the warranty deed. Concerns about potential liability of the grantor can be addressed by drafting the deed so that it limits the grantee's right to recover to claims against the grantor's predecessors in interest.

The trend in title policy language is to expand the definition of the "insured" to include entities commonly succeeding to interests owned by family members. Nevertheless, inquiry should be made to confirm that coverage will be effective following the proposed transfer.