

Burns, Figa & Will, P.C.

Geoffrey P. Anderson
Michael P. Barry
Colleen R. Belak
Karin E. Borke
Scott A. Clark
Matthew B. Dillman
Dana L. Eismeier
Candace Cole Figa
Bernard F. Gehris
Alix L. Joseph
Stephen H. Leonhardt
Herrick K. Lidstone, Jr.
Theresa M. Mehringer
Lee E. Miller
Michael J. Norton
Jennifer M. Osgood
D. Merc Pittinos
Alexander R. Rothrock
Lindsey N. Rothrock
Rachel Thomas Rowley
D. Sean Velarde
Tracy M. Villecco
Peter F. Waltz
J. Kemper Will

At Burns, Figa & Will we view our unique mix of size and expertise as the key to providing exceptional legal services with integrity and professionalism. Established in 1980, Burns, Figa & Will attorneys have provided exceptional legal services, practical business-focused solutions and individualized attention for our clients.

While focusing in our primary areas, our attorneys maintain expertise in a broad range of specialized practice areas and subspecialties including:

- Business law and transactions
- Securities law
- Commercial litigation
- Environmental law
- Water law
- Real estate
- Estate planning
- Legal ethics

These materials should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult an attorney concerning your own situation or any specific questions. Promotional material. © 2006 Burns, Figa & Will, P.C.



ATTORNEYS AT LAW

6400 S. Fiddler's Green Circle
Suite 1000
Greenwood Village, CO 80111

P: 303 796 2626
F: 303 796 2777
www.bfw-law.com

PRSR STD
U.S. Postage
PAID
Englewood, CO
Permit N. 1171

Briefly

. . . from Burns, Figa & Will, P.C.

Fall/Winter 2006



**Burns
Figa &
Will** P.C.

ATTORNEYS AT LAW

6400 S. Fiddler's Green Circle
Suite 1000
Greenwood Village, CO 80111

P: 303 796 2626
F: 303 796 2777
www.bfw-law.com

contents

Estate Tax Exemption 2

Federal estate tax benefits are in question.

When is a Wetland Subject to Regulation Under the Clean Water Act? 3

Efforts to clarify and standardize regulations under the Act.

Rock, Paper, Scissors: An Alternative Dispute Resolution? 5

Can legal disputes be resolved using this 50,000 year-old game?

Firm News 7

Seminars, books, and charities: the latest from Burns, Figa & Will.

Briefly . . . from Burns, Figa & Will, P.C.

is published periodically to provide general information to our clients and friends about legal issues and new developments in the law. Additional articles prepared by our attorneys can be found on our website at www.bfw-law.com.

What is Going to Happen with the Federal Estate Tax Exemption

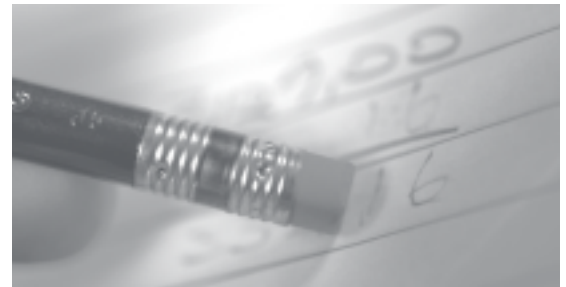
By Michael J. Norton

For some time now, pundits have jokingly said that anyone with a net worth in excess of \$1 million should plan on dying in 2010 so as to take advantage of the one year repeal of federal estate taxes. Current law exempts an estate, the value of which is \$2 million in 2006, 2007, and 2008, or \$3.5 million in 2009, from federal estate taxes also known as “death taxes.” These “death taxes” are temporarily repealed in 2010. Then, in 2011, unless the Congress acts in the meantime, the exemption, known to most as the “unified credit,” returns to \$1 million.

The modern federal estate tax regime began in 1976 with the implementation of a unified system of wealth transfer taxes. This **unified system consisted of three separate taxes: the estate tax, the gift tax, and the generation-skipping transfer (GST) tax.** Estate and gift taxes are imposed on transfers made at death and during life, respectively. The GST tax is generally imposed on asset transfers that skip a generation, for example, a transfer from grandparents to grandchildren, about a specified exemption amount. These separate taxes were “de-coupled” a few years ago. For example, the gift tax exclusion has remained at \$1,000,000 while the estate tax exclusion has risen to the current \$2,000,000.

An important feature of the current estate tax system is the “step-up” in basis for transferred assets. Most know that the basis of an asset is used as its cost for the purpose of calculating capital gain. Under current law, the basis of an asset transferred by will to an heir is increased or stepped-up to its

then current fair market value. The result is to exempt from capital gains taxation the amount of the step-up in basis or gain prior to the transfer to the heir. Unless the current law is changed, beginning in 2011, such transferred assets would be valued at what is called a “carry-over” basis; that is, the cost of the asset in the hands of the transferor decedent. This little known provision will have a **huge impact on the transfer of wealth from older generations to younger generations** in years to come unless it is changed by the Congress.



In May 2006, Congress' Joint Economic Committee examined arguments for and against the federal estate tax and concluded that its benefits are overstated and that “there is no compelling reason to keep the tax, and [there are] a number of reasons to reduce or abolish it.” This study concluded that the current estate tax system, among other things **(a)** impedes economic growth through high compliance costs and economic inefficiencies; **(b)** hinders entry into self-employment and breaks up family-run businesses; **(c)** is an “ineffective tool for fighting wealth and income inequality;” and **(d)** results in an overstatement of the benefits of charitable gifts.

For months now, the **Congress has been wrestling with what to do about this current law**, including whether to enact a higher and perhaps permanent unified credit, and what to do

about the potential train wreck if carry-over basis comes into effect. The President and some in Congress have supported outright repeal of the “death” taxes. Others in Congress have supported continuation, in some form, of an estate and gift tax regime. In recent weeks, it has appeared that a consensus has developed in Congress for a \$5 million “unified credit.” If enacted, all but a relative handful of estates would be exempted from federal estate taxes. The good news is that there are no Colorado state estate taxes at present.

Additionally, it has been reported that the **government is moving to eliminate the jobs of nearly half the lawyers at the IRS** who audit estate tax returns. Many outside the government view this effort as “a backdoor way for the Bush administration to achieve what it cannot get from Congress, which is repeal of the estate tax.”

If Burns, Figa & Will, P.C., can assist you with your estate planning needs, including charitable giving plans and desires, call our office for information and an initial consultation.



Michael J. Norton

For more information, please contact Michael J. Norton at (303)796-2626 or mnorton@bfw-law.com.

Mr. Norton is a senior member of the firm. His practice areas include complex civil litigation and white collar criminal defense, real estate law, including real estate broker and licensing law, and wills, trusts, and estate planning.

United States Supreme Court Unable to Agree as to Standard for When a Wetland is Subject to Regulation Under the Clean Water Act

By Lee E. Miller and
Alix L. Joseph

In a decision that was anxiously anticipated by land use and environmental professionals, the United States Supreme Court issued its decision on June 19, 2006 in the consolidated cases of *Rapanos v. United States* and *Carabell v. United States*. Many had hoped this decision would offer a definitive and objective test for the definition of “navigable waters” under the Clean Water Act in order to **clarify which waters and wetlands are subject to the Act**. In the words of Chief Justice Roberts, “It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.”

The Supreme Court was unable to agree on a single rationale as to the standard that should be used in determining whether a particular wetland is subject to the jurisdiction of the CWA, but a majority held the Corps’ regulation was too broad in asserting jurisdiction extending not only to all interstate waters, including interstate wetlands, but to all other waters which could affect interstate commerce, as well as any wetlands adjacent to tributaries to streams or wetlands affecting interstate commerce.

(continued)



At issue in the cases was whether wetlands lying near ditches or man-made drains that eventually empty into navigable waters of the United States were “waters of the United States” subject to the CWA, such that the petitioners could be held liable under the CWA for discharging pollutants into those wetlands. The trial and appeals courts held that these wetlands were subject to CWA regulation and, accordingly, ruled in favor of the United States. The Supreme Court held that the lower courts, in relying on a regulation promulgated by the Army Corps of Engineers (“Corps”), used the wrong standard to determine if these wetlands are covered “waters of the United States.”

Justice Scalia, writing for four of the five justices in the majority, acknowledged that the Corps’ regulation deliberately sought to extend the definition of “waters of the United States” to the outer limits of Congress’s commerce power under the Constitution. The Court majority held that such broad jurisdictional powers were unfounded. Justice Scalia concluded that water courses which flow only intermittently are not “waters of the United States.” Accordingly, his opinion excluded from jurisdiction any wetland lacking a continuous connection to other jurisdictional waters.

Justice Kennedy, in a separate opinion that concurred only in the judgment, applied a different standard. According to Justice Kennedy, jurisdiction under the CWA should be determined based on whether the wetlands, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” Justice Kennedy believes that such a case-by-case test is necessary in light of the over-breadth of current Corps regulations.

Like Justice Scalia, Justice Kennedy concluded that the trial court did not sufficiently analyze whether the wetlands in question had a “significant nexus” to navigable waters as a basis for jurisdiction. Accordingly, Justice Kennedy agreed the lower court must reconsider its decision.

Four dissenting justices signed an opinion authored by Justice Stevens, contending that the current Corps regulations were reasonable and that accordingly, the Court should defer to the agency’s interpretation allowing most wetlands to be regulated under the CWA.

Without an easily understandable and realistic standard, the average landowner is at risk.

Because a majority of the Justices were unable to agree on a single standard, the resulting “*Rapanos* test” will require a case-by-case factual analysis to determine whether a wetland is subject to federal regulation under the CWA. The Clean Water Act is an important part of the firm’s water and environmental practices. Accordingly, Burns, Figa & Will, P.C. is highly qualified to assist property owners and purchasers with Clean Water Act issues and wetland regulations.



Lee E. Miller

For more information contact Lee E. Miller at (303) 796-2626 or lmiller@bfw-law.com.

Mr. Miller is a senior member of the firm. He devotes his practice to water law, natural resources, and environmental law. He represents western natural resource users, particularly agricultural and municipal water providers, before state and federal agencies, Congress and state legislatures, and in state and federal courts. Mr. Miller’s practice ranges from participating in negotiations on an interstate water compact to handling simple administrative appeals.



Alix L. Joseph

For more information, please contact Alix L. Joseph at (303)796-2626 or ajoseph@bfwlaw.com.

Ms. Joseph is an associate with the firm. Ms. Joseph focuses her practice on water law, environmental law, and civil litigation.

Rock, Paper, Scissors and Alternative Dispute Resolution

By Herrick K. Lidstone, Jr. and Rachel T. Rowley

Recently a federal judge from Orlando, Florida, brought the children's game of Rock, Paper, Scissors to national attention through Forbes Magazine and CNNMoney.com. Dated June 7, 2006, Fortune writer Roger Parloff describes **two lawyers in a federal case who could not agree on the place for a deposition even though their offices were four floors apart in the same building.** Rather than deciding the matter, Judge Presnell ordered each attorney to the steps of the federal courthouse on June 30, 2006, accompanied by a paralegal witness, to play one dispositive round of rock, paper, scissors – with the winner to choose the location for the deposition so long as it was in Hillsborough County, Florida. Apparently intimidated by the threat of playing rock, paper, scissors, the World RPS Society (www.worldrps.com) reported on June 9th that “the attorneys have worked out our differences by agreement. We will not have to resort to combat by RPS.” The judge has since withdrawn its order.

One may think that the “Rock, Paper, Scissors” game is an “arbitrary” way to make decisions. In *Hindson v. Allstate Ins. Co.*, 694 A.2d 682, 685 (R.I. 1997) the court was faced with allocating coverage among various insurance carriers where none would admit to primary coverage. The court considered using a “rock, paper, scissors” approach to determine which carriers should



provide primary coverage to the claims at issue, but considered that approach to be “arbitrary.” In that case, the court opted to “halt the incessant ‘battle of the draftsmen’ waged by, between, and among the various insurance companies” by finding that the coverage responsibilities of all insurers should be shared on a pro-rata basis.

Notwithstanding the reluctance of the Rhode Island court to use “rock, paper, scissors,” variations of “rock, paper, scissors” have been used for dispute resolution for more than 50,000 years, according to Wikipedia, the free online encyclopedia. According to the *Official Rock, Paper, Scissors Strategy Guide* (available at Amazon.com), early Homo sapiens played a

(continued)

predecessor game about 50,000 B.C. “to resolve food and mating disputes.” This game only involved a rock (scissors were not invented until sixth century Italy). The ‘thrower’ tried to place the fist-rock on the ‘catcher’s’ body, while the ‘catcher’ tried to avoid this by positioning his hand to catch the rock. After switching positions, the ‘thrower’ who placed the most rocks on the ‘catcher’s’ body won.

It appears that the Japanese invented the modern, tripartite game they call *Janken*, based on the Guu Choki Paa way of thinking: “the snake fears the slug; the slug fears the frog, and the frog fears the snake.” Moving away from snakes, slugs and frogs, the Japanese developed a new version where “the tiger feared the warrior, the warrior feared his mother, and the warrior’s mother feared the tiger.” Marco Polo reportedly brought this game back to Europe, and the Venetian traders changed it to rock, paper, blade to settle trade disputes. One of the most amusing variations of the game comes from Indonesia and apparently involved an elephant, a person, and an ant. The elephant can crush the person, the person can crush the ant, but how can the ant win against the elephant? It crawls in the elephant’s ear and drives the elephant crazy.

The game may have migrated to the United States via Jean Baptiste. Jean Baptiste was the French general who helped George Washington during the American Revolution. It is unknown as to why this game came to be associated with the Count of Rochambeau, but it does raise questions as to the means by which Washington secured Cornwallis’ surrender in Yorktown. Nevertheless, this theory may explain why the game is often called, “rochambeau,” or, “roshambo.”

In any event, it is clear that Judge Presnell was **not the first to use rock, paper, scissors to resolve commercial disputes in modern time**. The August 2005 newsletter published by the Institute for Conflict Management (<http://www.icmneutrals.com/news.html>) describes a 75 year-old Japanese businessman who was trying to choose between Christie’s and Sotheby’s to auction off his \$17.8 million art collection – for a commission of more than \$2 million to the successful firm. Believing that both companies were equal and not wanting to insult either, he said that the winner would be determined by a game of rock, paper, scissors. That way, the loser would be considered “unlucky,” not “unworthy.” Sotheby’s said that “this is a game and we really didn’t give it that much thought. We had no strategy in mind.”

The Christie’s representative spent her weekend before the challenge researching the psychology of the game and talking to friends. One had 11 year-old twin girls who offered the following analysis to Christie’s: “Since [Sotheby’s] were beginners, scissors were safest” for Christie’s, because “rock is way too obvious and scissors beats paper.” The girls further explained “that beginners think rock ‘feels’ strong, so they expect you to go for rock, so they choose paper to beat you.” As the girls predicted, Sotheby’s went for paper. Based on the girls’ advice, Christie’s went for scissors and won the \$17.8 million auction contract.

Needless to say, rock, paper, scissors is not a suitable method to resolve all disputes. Where appropriate, though, you may want to consult the World RPS Society, the *Official Rock, Paper, Scissors Strategy Guide*, your young nieces or nephews, or attend the next tournament near you. You can find listings for tournaments at www.usarps.com (held in June 2006 Las Vegas, Nevada with a \$50,000 grand prize) and www.worldrps.com (to be held in Toronto, Ontario in September 2006).



Herrick K. Lidstone, Jr.

For more information, please contact Herrick K. Lidstone, Jr. at (303)796-2626 or hklidstone@bfw-law.com.

Mr. Lidstone is a senior member of the firm. Mr. Lidstone practices in the areas of business transactions, including corporate law, federal and state securities compliance, mergers and acquisitions, contract law, tax law, real estate and zoning law, and natural resources law.



Rachel Thomas Rowley

For more information contact Rachel Thomas Rowley at (303)796-2626 or rrowley@bfw-law.com.

Ms. Rowley is an associate with the firm. Ms. Rowley’s practice focuses primarily on civil litigation, real estate matters, and appellate work. Ms. Rowley is licensed to practice law in the State of Colorado, the United States District Court for the District of Colorado, and the Tenth Circuit Court of Appeals.

Firm News

- **Herrick K. Lidstone, Jr.; Theresa M. Mehringer;** and **Alec R. Rothrock** will present [Private Placements, The Internet, and Securities Law](#) for the General Practitioner. Friday; September 22, 2006 at the Adam's Mark Hotel, Denver.

For more information contact
Bradford Publishing Co. 800-446-2831 or
cle@bradfordpublishing.com or Herrick K.
Lidstone Jr. at HKLIDSTONE@bfw-law.com

- **Herrick K. Lidstone, Jr.** will present [Advanced Issues in LLC Formation and Operation in Colorado](#), October 18, 2006.

For more information contact Lorman
Education Services 866-352-9539 or
www.lorman.com or Herrick K. Lidstone Jr. at
HKLIDSTONE@bfw-law.com

- **Stephen H. Leonhardt, Lee E. Miller, Scott A. Clark** and **Bernard F. Gehris** will present a [Water Law Basics in Colorado](#) seminar in November 9th in Denver. This is an introductory level course in Colorado water law covering diversion, use, appropriation, adjudication and administration of water rights, the regulation of deep groundwater, water quality and ethical considerations for attorneys. The seminar will be held at the Red Lion Hotel, 4040 Quebec Street, Denver.

For more information contact Lorman
Education Services, Seminar ID: 368485;
866-352-9539 or www.lorman.com or Scott
A. Clark at sclark@bfw-law.com

- NEW BOOK! **Herrick K. Lidstone, Jr.** has published the [Securities Law Deskbook: For Business Lawyers, Public Accountants, and Corporate Management](#). The Deskbook is a practical reference guide to securities law, in one convenient volume. With 17 chapters and hundreds of citations to securities rules, statutes, and cases, it is an essential tool for researching securities regulation, litigation, compliance issues, and much more.

For more information contact
Bradford Publishing Co. 800-446-2831 or
cle@bradfordpublishing.com or Herrick K.
Lidstone Jr. at HKLIDSTONE@bfw-law.com

- **Geoff Anderson** presented "[Case Law Update](#)" a review of significant real estate cases announced by the Colorado Supreme Court and Colorado Court of Appeals over the last year at the annual Colorado Bar Association Real Estate Symposium.

For more information contact
ganderson@bfw-law.com

- **Scott Clark** is serving on the Board of Directors for Habitat for Humanity of Metro Denver. The big event this summer was the kick off of construction at Tollgate Crossing, a new mixed-income development in south east Aurora in which Habitat will build 50 homes. In June Habitat for Humanity of Metro Denver had a builder's blitz at Tollgate Crossing, during which 15 local builders donated their time and resources to build 15 homes in one week.

- **3rd Annual – Turkey Day 5K Family Fun/Walk.** The 2006 3rd Annual Turkey Day 5K presented by Burns Figa & Will is scheduled for Thursday, November 23, 2006 at 9:00am and will start and finish at Shea Stadium in Redstone Park in Highlands Ranch.

A portion of the net **proceeds from the run will again benefit the Colorado National Guard Foundation**, which was established as a result of the Gulf War in 1991 to assist Guard members and their families who have experienced financial hardship due to their employment.

In 2005, the 2nd Annual Turkey Day 5K had more than 1400 participants and a donation of \$10,000 was presented to the Colorado National Guard Foundation.

See www.turkeyday5k.com for more information.