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Sometimes having your cake and being able to eat it too means taking a little time to plan ahead. In this issue, William B. Acker reminds us that with recent federal tax law changes, estate plan documents and LLC Operating Agreements should be reviewed in order to take full advantage of income tax savings opportunities and cost efficiencies. In an excerpt from Mark R. Filipp's Employment Law Q & A, he advises on the value of having an employee handbook for employers that want to reduce their risk and exposure to litigation. Mark R. Filipp and Will Sanford alert companies to an increase in ICE I-9 audits and recommend an internal review to predetermine any potential red flags. While we're on the subject of cake, Robert S. Zawideh explores the recent Supreme Court decision regarding Masterpiece Cakeshop

v. Colorado Civil Rights Commission.

Best Wishes,

Estate Planning and LLCs: Time to Review and Amend LLC Operating Agreements, as well as Estate Plans

WILLIAM B. ACKER



Recent federal tax law changes provide important reasons to consider changes to LLC Operating Agreements for multiple member limited liability companies and for

partnership agreements. Estate plans also should be reviewed and in many cases revocable living trust documents should be amended.

The 2017 Federal Tax Act has provided another major income tax reason to consider reviewing and amending LLC Operating Agreements. As readers of the *Commentator* will recall, the 2016 Partnership Tax Audit rules (and subsequent changes) first apply for 2018 tax years and provide important reasons to amend Operating Agreements of LLCs taxed as partnerships and partnership agreements. See "New Tax Partnership Audit Rules: New Rules Require Changes

to Operating Agreements of Multiple Member LLCs and Partnerships," Acker, *Kemp Klein Commentator*, 2017 Issue 3, Summer/Fall 2017 at <https://kkue.com/resources/newsletters-articles/>.

Estate Planning Review.

The 2017 Act has reduced federal estate tax exposures for many taxpayers (at least until 2026), and expanded estate planning for income tax savings. Now, estate plan documents should be reviewed to make important changes to trusts to seize income tax savings opportunities and cost efficiencies.

For many estate plans, depending on client priorities, the structure of marital trust and family trust allocation provisions should be amended to capture potential substantial income tax advantages for beneficiaries.

LLC Operating Agreement Review.

Likewise, as part of this estate planning, LLC Operating Agreements should be

reconsidered, and many should be amended to restructure member rights important in valuation of LLC member interests.

Under prior law, member transfer and termination rights were important reasons for the application of valuation "discounts" that were favorable in reducing federal estate tax. Now, income tax planning for opportunities under the 2017 Act make the application of "discounts" unfavorable in many cases at death. Discounts are not optional, nor applied based on election, but rather are based on applicable facts and rights established by the LLC Operating Agreement.

Kemp Klein attorneys are ready to assist you with the analysis and amendments needed.

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Masterpiece Cakeshop v. Colorado Civil Rights Commission: SCOTUS Rules it's About the Cake, Not the Customer

ROBERT S. ZAWIDEH



On June 4, 2018, the United States Supreme Court issued its decision in the case of *Masterpiece Cake v. Colorado Civil Rights Commission*.

That case involved

Colorado bakery owner Jack Phillips, an expert baker and devout Christian, who in 2012 told a same-sex couple that, although he would sell them anything else his bakery offered, he would not create a cake for their wedding because of his religious opposition to same-sex marriages. The couple filed a discrimination charge with the Colorado Civil Rights Commission, claiming the baker engaged in illegal discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.” Phillips’ argued unsuccessfully in the lower courts and before the Commission that under the First Amendment, requiring him to create a cake for a same-sex wedding would (1) violate his right to free speech

by compelling him to exercise his artistic talents to express a message with which he disagreed, and (2) would violate his right to the free exercise of religion.

In a 7-2 decision which produced one majority opinion, two concurring opinions and a dissenting opinion, the Supreme Court deftly avoided the underlying issue all together. Instead of deciding whether a sincerely held religious belief can ever be a basis to deny goods or services to gay persons in the marketplace, the Court found that Colorado failed to consider Phillips’ religious objections with the neutrality required by the Free Exercise Clause.

In the majority opinion, the Court held that the Constitution can, and in some instances must, protect the civil rights of gay persons and gay couples. However, religious and philosophical objections to gay marriage are protected views and in some instances protected forms of speech or expression. The Commission and the Colorado courts failed to recognize the latter, and in some of the hearings, condoned open disdain for Phillip’s religious beliefs.

Justice Thomas wrote separately to make clear that, while he agreed with the majority, the opinion did not adequately address Phillip’s free speech arguments, and went on to rule that wedding cakes are a form of expression, stating that the court previously rejected as the “antithesis of free speech” the notion that governments can “mandate thoughts and statements acceptable to some groups or, indeed, all people”. In her dissent, Justice Ginsberg rejected the majority and concurring opinions, stating “[w]hat matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.”

For the time being, a majority of the Court is walking a fine line by encouraging all sides to this dispute – individuals, businesses, governments and the courts – to be respectful to all parties. Mutual respect and patience is absolutely required, as the courts are a long way from hearing an end to this debate.

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Client Success Story

Zawideh Successfully Defends Trustee Against Claims of Fraud

Twenty years ago, the Settlor, a widow, established a trust for the benefit of her daughter, “Jane Doe” (“Jane”), Jane’s two sons, and the Settlor’s son, “John Doe” (“John”), and daughter-in-law, “Mary Roe” (“Mary”). The Trust nominated Jane as the successor trustee of the trust, except as to that portion of the Trust that was to benefit John and Mary; for John and Mary’s trust, the Settlor nominated her CPA as the successor trustee. Under their trust, on the Settlor’s death, John and Mary received two cars and the Settlor’s home, or the proceeds of that home to be used to purchase another home, plus their trust was to be funded with cash to be used for John and Mary’s benefit.

Settlor died eighteen years ago. Last summer, Mary brought an action against the CPA demanding an accounting of the trust and claiming that the CPA breached her fiduciary duties to Mary regarding payment of funds for Mary’s maintenance. Six months later, Mary amended her petition to add Jane, claiming that when the settlor died, Jane “fraudulently” underfunded John and Mary’s trust by over a quarter of a million dollars. Jane retained The Kemp Klein Law Firm, and attorney Robert Zawideh immediately noticed up Mary’s deposition. At her deposition, Mr. Zawideh got Mary to admit that Jane owed her no duties, and that she had no evidence to support her claims against Jane. Minutes after the end of that deposition, Mr. Zawideh explained to Mary’s attorney that if he did not immediately dismiss Jane from the case, that both he and his client would be subjected to a claim for sanctions. The following day, counsel wrote to Mr. Zawideh agreeing to have his client dismissed from the lawsuit.

ICE I-9 Audits Increasing

MARK R. FILIPP & WILL SANFORD

As businesses and HR professionals know, employers are required to prove their employees are authorized to work in the United States by use of Form I-9. Derek Benner, acting executive director for ICE's Homeland Security Investigations is reported as having stated that Form I-9 Audits by ICE will be increasing this summer.

USCIS published the newest version of Form I-9 on July 17, 2017, which

became mandatory on September 18, 2017. The updated version contains a revision in the list of acceptable documents, renames the Office of Special Counsel to the "Immigrant and Employee Rights Section," and clarifies a slight timing ambiguity found in the previous form. All employers should now be using the updated form.

We have clients that have been subjected to ICE I-9 audits over the last

few years. We strongly recommend that you take this time to have your I-9s reviewed to determine if your company is in compliance. Better that your legal advisors spot and correct problems with your I-9s than to have the problems first determined by ICE. If you would like your I-9 reviewed please call Mark.

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Employment Law Q & A

MARK R. FILIPP

The following Q & A has been selected from Employment Law Answer Book, co-authored by Mark R. Filipp.

Q 2:32 What are the benefits of an employee handbook?

For those employers that have never assembled an employee handbook, doing so is an educational experience. Employers have general policies for vacations, holiday pay, work rules, discipline, and the like. Putting those policies into writing leads to the creation of better policies and removes any ambiguities and inconsistencies. It also encourages an employer to think ahead to formulate policies for situations that have not yet occurred. In addition, the employer can use a well-drafted handbook as a defense in litigation. For example, most federal civil rights claims begin when similarly situated employees are not treated in the same way. Discrepancies in vacations and payment for holidays, for instance, provide a source for discrimination claims. One way to prevent those claims is to publish a written policy on accumulating and taking vacation time that the employer will apply consistently for similarly situated employees.

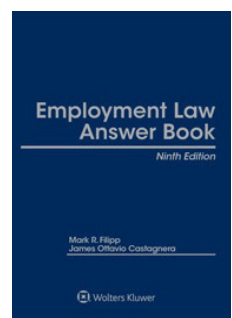
In addition, an employer can use an employee handbook proactively to reduce its risk to exposure and litigation. Proactive policies typically found in employee handbooks include those on sexual harassment, non-discrimination, medical examinations, drug and alcohol, e-mail, confidential information, conflict of interest, and employment at will. Employers that want to reduce their risk and exposure to litigation should strongly consider creating and publishing employee handbooks.

Employers that do not have handbooks generally create policies and procedures on an ad hoc basis when circumstances arise. As a practical matter, employee handbooks can also reduce the potential for legal exposure and the anxiety of dealing with situations as they occur. For example, an employer does not have a drug policy but suspects that one of its employees is using illegal drugs on the job. Having no policy to look to, the employer must decide how to deal with the situation. Should the employee be driven home? Should the employee be tested? What rights do the employee and employer each have? A drug and alcohol policy would provide a road map for dealing effectively with the situation. Without a handbook, the employer must create policy at a moment's notice, a haphazard and ill-advised method of operation.

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Firm News

Rolfe Named President and COO of the Firm

Brian H. Rolfe was elected as President and Chief Operating Officer of Kemp Klein joining Ralph A. Castelli, Jr, who will remain as CEO and Chairman of the Board, in managing the firm. Rolfe handles high dollar complex litigation and has successfully taken numerous trials to verdict, set precedent in contract interpretation matters and has extensive experience in the federal courts. Rolfe also serves his business owner, professional and pro athlete clients in divorce proceedings to ensure their rights are fully protected.

Attorneys Martella and Zawideh Elected to Kemp Klein's Board of Directors

Kemp Klein Law Firm is pleased to announce that attorneys Christopher R. Martella and Robert S. Zawideh have been elected to the firm's board of directors. Chris Martella focuses his practice on real estate acquisition, disposition, development and financing transactions, as well as cybersecurity and information assurance. Bob Zawideh has a successful 27 year litigation and trial practice involving high net worth probate and trust disputes, complex commercial litigation and franchise cases arbitrated in Michigan and California as well as construction litigation matters.

Feed Hungry Kids and Families This Summer

24th Annual Hunger Free Summer Food Fight | Monday, July 15 - Friday, July 27, 2018

Tri-county area Michigan businesses and organizations compete to raise the most meals and donations for Gleaners Community Food Bank of Southeastern Michigan. Participation benefits nearly 300,000 southeast Michigan kids during summer break when they lose access to school-provided meals. Kemp Klein initiated the annual food and fund-raising event to benefit the Food Bank of Oakland County in 1995. Last year, Gleaners raised over 27,600 pounds of food and collected over \$44,000. Help us beat last year's total by visiting www.gcflb.org/hfs_foodfight.