

## New Nevada Statute Protects Shareholders of Small Corporations

States compete to make their corporation law more attractive to business owners. Effective July 1, 2007, Nevada became the first state to protect shareholders of a Nevada corporation from “reverse piercing” of the corporate veil by creditors.

In the past, promoters of Nevada corporations claimed its corporate statute provided enhanced asset protection because shareholder information is not public and Nevada does not disclose this information to other states. However, creditors can obtain this information during discovery proceedings in litigation. Senate Law 242 (the “Nevada Law”) provides a more compelling reason to consider Nevada for incorporation.

Typically, creditors of a corporate shareholder can foreclose on the owner’s shares, including the voting rights of the shareholder. If the shareholder owns a majority of the corporation, the creditor can dictate distributions and even liquidate the corporation. Creditors do not have the same rights under partnership law.

A creditor can obtain a “charging order” against the partnership interest, but does not control the voting rights of the partnership interest. A charging order gives a creditor the right to receive distributions that the owner of a partnership interest would otherwise

receive. Without management and voting rights, however, a creditor cannot force the partnership to distribute assets or force its liquidation. This shields the other partners and the partnership from the actions of the debtor partner and may permit the debtor partner to settle with a creditor on more favorable terms.

Nevada is the first state to limit the remedies of creditors against the shareholders of certain small business corporations to charging orders. The Nevada Law applies to Nevada corporations with more than one and up to seventy-five shareholders; it excludes professional service corporations and wholly or partially owned subsidiaries of public corporations from its protections. A private agreement between a shareholder and a creditor also supersedes the protections of the Nevada Law.

The Nevada Law is unique and untested. There may be concerns about whether other states will respect its charging order protections, particularly if a majority of a corporation’s assets are located outside Nevada. Nonetheless, the Nevada Law will increase the attractiveness of Nevada incorporation.

If you have questions about choice of entity or incorporation issues, please contact CC&M.

*by Kenneth W. Clingen and  
Deven S. Kane*



### Clingen Callow & McLean, LLC

Attorneys & Counselors

#### *specializing in*

general business and corporate law  
commercial litigation  
business and succession planning for family businesses, corporations and limited liability companies  
banking and finance matters  
commercial real estate  
estate planning and settlement  
income, estate and gift tax  
intellectual property matters  
employment litigation and labor law

2100 Manchester Road  
Suite 1750  
Wheaton, Illinois 60187  
Telephone 630.871.2600  
Facsimile 630.871.9869  
www.ccmlawyer.com

Kenneth W. Clingen  
Mary E. Callow  
Timothy M. McLean  
Paul M. Fullerton  
Ross I. Molho  
Kenneth J. Vanko  
Colleen M. Healy

Steven A. Marderosian  
Deven S. Kane  
Gregory P. Adamo

Delrose Ann Koch  
Deanna M. Quinn-McCollian

OF COUNSEL

# Choosing the best options when selling commercial real estate

---

Low capital gains tax rates entice real estate owners to sell. Strategies for unwinding a real estate investment depend on the owner's tax objectives. Like-kind exchange of property, installment sales, sale and lease back of the property or outright cash sales are options available and worth consideration.

Like-kind exchanges provide a tax deferral strategy whereby one piece of real estate is "exchanged" for another so that no gain or loss is recognized under Internal Revenue Code Section 1031. "Like-kind" includes improved, unimproved; commercial, industrial, residential and office space. The properties must have a productive use in trade or business. A 1031 transaction requires the sale and the purchase through a qualified intermediary. The exchange property to be purchased must be identified within 45 days of the date of the contract for sale. The sale and the purchase(s) must take place within a 180 day period. The sale can take place prior to, after or simultaneously with the purchase without affecting the tax deferral.

Installment sales are an attractive strategy for an owner who wants to sell a real estate interest and obtain some tax deferral. To qualify as an installment sale, the seller must receive at least one payment after the tax year of the sale.

With a number of payments over a term of years, the taxable gain is spread out over the term of the installment sale.

In a sale lease back transaction, an owner sells real estate to a buyer while simultaneously entering into a long term lease with the buyer for the property. The sale provides the owner with funds to use in the business or to diversify into other investments. The seller can also deduct all lease payments as business expenses for tax purposes.

Finally, real estate owners may opt for an outright cash sale for their property. If the character of any gain from the sale is all or nearly all capital gain, the owner may be willing to pay the tax and "cash out" immediately. The seller of course must ensure that the sales contract property protects the seller's interests and minimizes exposure to liabilities after the closing of the transaction.

---

*by Colleen M. Healy*

## FIRM HIGHLIGHTS

**Ross I. Molho** defeated breach of contract and warranty claims brought against a CC&M client at an American Arbitration Association proceeding in New Jersey and won a counter-claim on behalf of the same CC&M client for \$129,000.

CC&M represented a family member in his successful negotiation and purchase of a family owned manufacturing business from his father's estate. This stock purchase and financing transaction involved attorneys **Ken Clingen** and **Deven Kane** and corporate paralegal **Jean Erhardt**.

**Paul M. Fullerton** and **Steven A. Marderosian** won dismissal of a fraud claim in Lake County regarding a construction loan where the borrower claimed that a CC&M client overpaid the general contractor who failed to perform and pay subcontractors.

CC&M represented the owner of an international freight forwarder in the sale of a controlling interest in the business to a United Kingdom company. This multimillion dollar transaction involved attorneys **Ken Clingen** and **Deven Kane** and corporate paralegal **Jean Erhardt**.

**Paul M. Fullerton** and **Steven A. Marderosian** won summary judgment in Kane County to defeat a rare adverse possession claim of title to the portion of a CC&M client's land on which the plaintiff's business signage had been located for nearly 34 years. To achieve this victory, Paul and Steve constructed a complicated argument based on decisions from the late 1800s and early 1900s.

---

See **HIGHLIGHTS**, page 3

# Congress Grants New Tax Benefit: Inherited IRAs

Before the Pension Protection Act of 2006, only a spouse could roll over money received from a deceased owner's retirement plan or individual retirement account (IRA) to another IRA. However, under the new law, a child or other "designated beneficiary" may be able to make a direct rollover of an IRA or retirement plan benefit received from a deceased relative or friend into a new "inherited IRA."

The goal is the "stretch" payout — to stretch the minimum required distributions (MRDs) from the retirement plan or IRA over the beneficiary's life expectancy and defer payment of income taxes, even if the retirement plan he or she inherited only permits a one-time lump sum distribution. The technical hoops to jump through, however, are many.

The goal is the "stretch" payout — to stretch the minimum required distributions (MRDs) from the retirement plan or IRA over the beneficiary's life expectancy and defer payment of income taxes.

**First, when and who?** Under the new law, only distributions made after 2006 can be rolled over to an inherited IRA. However, the controlling date is the date of distribution, not the date of the decedent's death. The beneficiary must be a Designated Beneficiary under the IRS regulations (an individual or a certain type of trust).

**Where and how?** The benefit must be rolled over into a new "inherited" IRA, not an existing account. The new IRA must be titled in the name of the original deceased owner and the beneficiary, such as "Jane Doe, as beneficiary of Robert Doe, deceased". Any MRD for the year must be taken before the rollover. The funds must

be rolled over by means of a direct trustee to trustee transfer — e.g., a check from the institution holding the original plan or IRA to the new institution. If the check is payable to the beneficiary, the rollover has failed and the entire amount is taxable to the beneficiary.

Consult your estate attorney or other tax advisor to be sure that you qualify. If you do and accomplish the rollover in a timely fashion, you will be able to spread the payout over your life expectancy and accomplish maximum growth of the benefit at the lowest income tax cost.

*by Delrose Ann Koch*

## HIGHLIGHTS

*(continued from page 2)*

CC&M represented a family owned business in the negotiation and sale of its business and associated real estate to a national retail operator. The asset purchase and associated real estate transaction involved attorneys **Deven Kane, Deanna M. Quinn-McCollian** and corporate paralegal **Jean Erhardt**.

**Paul M. Fullerton** won summary judgment in DuPage County to defeat multiple land owners' claims to easements that stood for over 35 years over a CC&M client's land.

**Deanna M. Quinn-McCollian** negotiated and documented several large commercial real estate leases including two for 30,000 and 60,000 square feet of office space and one involving 25,000 square feet of warehouse and office space.

**Timothy M. McLean** and **Steven A. Marderosian** obtained a very favorable settlement in DuPage County in connection with a CC&M client's claim for breach of a commercial office lease.

Kendra and **Steven A. Marderosian** are the proud parents of a baby boy named Brent Halen Marderosian born on April 27, 2007.

**Clingen Callow & McLean, LLC**

2100 Manchester Road  
Suite 1750  
Wheaton, Illinois 60187

*This publication is intended for general information purposes only and does not constitute legal advice. Readers should not act upon information presented in this publication without individual professional counseling. Readers may consult with the attorneys at Clingen Callow & McLean, LLC to determine how laws, suggestions and illustrations contained in this publication apply to specific situations.*

**Clingen Callow & McLean, LLC**

## Choosing the Best Options When Selling Commercial Real Estate

**Colleen M. Healy**, a partner at CC&M, concentrates her practice in corporate, real estate, estate and succession planning, and banking law.



## WHAT'S INSIDE? *Articles & Contributors*

### New Nevada Statute Protects Shareholders of Small Corporations



**Kenneth W. Clingen**, a partner in the firm, practices in the area of corporate law, mergers and acquisitions and estate and succession planning for business owners.

**Deven S. Kane**, an associate at CC&M, concentrates his practice in corporate, banking and securities transactional work. Mr. Kane's practice involves the representation of corporations, limited liability companies and their owners.



### Congress Grants New Tax Benefit: Inherited IRAs



**Delrose Koch**, of counsel at CC&M, concentrates her practice in the areas of tax and estate planning.