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Brooke Hunter



Ross Uehara-Tilton



Na Lan



Andrew Kim



Joanna Zeigler

Our Growing Team

Our law firm's founders, Frank Damon and Henry Shigekane, taught us more than fifty years ago that in the practice of law, creative thinking and problem-solving are just as important as aggressive representation. We are pleased to continue this tradition and announce that five lawyers have joined the firm. We welcome Na Lan, Joanna Zeigler, Brooke Hunter, Andrew Kim, and Ross Uehara-Tilton to Damon Key. Our new attorneys are all graduates of the University of Hawaii's William S. Richardson School of Law. Beyond this commonality, we think you will find the newest members of the Damon Key team to be multifaceted.

Na Lan joins the firm as Of Counsel, bringing a unique combination of capabilities and experience in condominium and community association law, immigration, business and real property transactions, and dispute resolution for Mandarin-speaking investors and business owners. Born and raised in China, she is fluent in both Mandarin Chinese and English. Na is a member of the Hawaii Chapter of the Community Associations Institute. She is an active member of the Legislative Action Committee, and has testified before the

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Hawaii legislature on behalf of homeowners associations. She is also active in the community, providing timely legislative updates and insights on condominium and community association law and related topics. She earned her law degree *cum laude* and was the Managing Editor of the *Asia Pacific Law & Policy Journal*, and also served as an intern for Chief Judge Craig Nakamura of the Hawaii Intermediate Court of Appeals. Na earned her B.S. in Atmospheric Science from Nanjing University of Information Science & Technology in China. She also has a real estate license and is a member of the Honolulu Board of Realtors. Na is active in the Chinese Chamber of Commerce, serving on the Business Development Committee.

Joanna Zeigler joins the firm's Trial & Appellate Litigation, and Arbitration & Mediation practice groups. She served as Law Clerk to Judge Lisa Ginoza of the Hawaii Intermediate Court of Appeals. Joanna was an editor and staff writer for the University of Hawaii Law Review. She earned a Certificate in Environmental Law to accompany her J.D., was a member of the National Environmental Law Moot Court Team and Co-Director of the Environmental Law Society.

While in law school, she was an extern with the State of Hawaii Department of the Attorney General and a summer intern with the Intermediate Court of Appeals. Additionally, Joanna served as summer clerk with Earthjustice and summer intern in the Office of the General Counsel at the National Oceanic and Atmospheric Administration. Joanna, who originally hails from California, earned her B.S. in Environmental Science, *cum laude*, from Humboldt State University. Outside of the courtroom, she helps keep our beaches clean by joining community beach cleanup events, and enjoys hiking, learning to surf, running, and most outdoor activities.

Brooke Hunter is an associate in the Estate Planning, Probate Litigation and Real Property practice groups. She earned her law degree to combine her interests in history, writing, policy, and current affairs into a single, meaningful profession. During law school, she served as Co-Editor-In-Chief of the University of Hawaii Law Review.

Brooke earned her B.A. in International Relations with a concentration in International Systems & World Order and European Regional Affairs from Boston University. She was accepted into Boston University's prestigious Geneva Internship Program, which allowed her to attend courses at the University of Geneva. There, she worked for Human Rights Information and Documentation Systems, a Swiss-based company servicing human rights organizations primarily in Africa. In conjunction with the Institute for Human Rights and Development in Africa, Brooke worked to code hundreds of documents in English and French to create the first African Human Rights Case Law database, an intuitive information system that provides free access to a multilingual collection of African human rights law. Brooke graduated from Punahou School, where she participated in varsity kayaking and outrigger canoe paddling. She is active with the Punahou Alumni Association.

Andrew Kim is an associate in the firm's Family Law and Estate Planning & Probate practice groups. With a passion for teaching already established, Andrew understands that the practice of law and teaching are similar in many ways. Both require patience, good communication, knowledge of the area and the ability to create rapport. Armed with the understanding that a good lawyer is a good teacher, Andrew pursued and earned his law degree from the University of Hawaii, where he earned his J.D., *magna cum laude*.

While in law school, Andrew served as an editor of the University of Hawaii Law Review and was a member of the Wagner National Labor and Employment Law Moot Court Team. He also served an externship with Circuit Judge R. Mark Browning in Family Court, where he researched and wrote memoranda, provided client intake services for the TRO Unit, and assisted in the Legal Documents Department. Andrew earned a B.A. in Business Management Economics from the University of California, Santa Cruz. He then traveled to São Paulo, Brazil, where he taught English as a second language. He is a graduate of Mid-Pacific Institute and an active volunteer with Hawaii Literacy, providing individual tutoring sessions to those who want to learn to read and write.

Ross Uehara-Tilton has joined our Tax Planning, Compliance and Audits, Trust and Probate Litigation, Estate Planning, Business and Commercial Law, Appellate Litigation and Family Law groups. With an affinity for both math and law, Ross is currently earning his Master of Laws in Taxation at Boston University, an internationally-recognized postgraduate law degree, to further his skills in tax planning, compliance, and audits. He holds a Certified Public Accountant Certificate and will be eligible for licensure as a CPA following completion of mandatory work experience requirements.

While in law school, Ross served as Co-Editor-In-Chief of the University of Hawaii Law Review and as a Judicial Extern to Judge Susan Oki Mollway, Chief Judge of the U.S. District Court, District of Hawaii. Ross earned his B.A. in Political Science from the University of Hawaii, *magna cum laude*, concurrently with his B.B.A. in Accounting from the University of Hawaii West Oahu, *magna cum laude*. He is a graduate of Punahou School. Ross volunteers with the Family Court's Court Appointed Special Advocate (CASA) and Kids First programs.

Together with the rest of the firm, our new attorneys look forward to helping to advance your goals in 2018 and beyond.

Three Steps for Condominiums and Community Associations to Minimize Disputes

By Na Lan

As general counsel to common interest communities, we advise condominium and community associations regarding day-to-day operations, including interpretation and enforcement of governing documents, fiduciary duties of directors, statutory compliance, amending and restating governing documents, preparing and enforcing vendor contracts, delinquency collection and foreclosure, covenant enforcement, and dispute resolution with unit owners, vendors, and other third parties.



We recommend and can assist you in taking the following three steps to minimize future disputes:

First, update your project documents package and adopt effective policies to address your project's specific concerns.

Effective January 1, 2019, Chapter 514A of the Hawaii Revised Statutes will be repealed. If your condominium project was developed prior to July 1, 2006 and has not opted into Chapter 514B, you should update the Declaration and Bylaws. Is your collection policy effective and appropriately tailored to the size and delinquency status of your project? Has your project adopted a priority of payment, rent collection, and termination of utilities and other common privileges policies? Do you have procedural guidelines for your staff on when and how to correctly enforce such policies? Do you have a confidentiality agreement for your directors and officers? Do you have a high risk component policy in place and are your members familiar with the requirements? Is your fining policy and appeal procedure effective, efficient, and enforceable? Are your house rules in compliance with FHA and ADA? Are they up-to-date to address assistance animals and medical marijuana issues? Have you adopted policies on installation of solar energy devices and electric vehicle charging systems? Have you considered how to address issues relevant to aging in place?

For each new association client, we offer a free one-hour initial on-site meeting with your directors and property manager to identify your project's specific concerns and challenging issues.

Second, train your new directors, committee volunteers, resident manager, general manager, property manager and project accountant so that they can deliver quality services to meet the satisfaction of association members.

HB832 passed in 2017 provides that any condominium board of director's violation of the mandatory mediation or

arbitration statutory provisions may constitute a violation of the fiduciary duty. Do your directors know how to correctly respond to a mediation or arbitration request? Does your manager or accountant know what they can do and cannot do after a delinquent owner files for bankruptcy? Are you aware of the deadline and statutory requirements for the association to respond to an owner's request for access to certain documents? Do you have a convenient checklist for your staff on the deadline and procedural steps to process an owner's application to the design review committee or appeal of any committee or board decision? Does your resident manager or security staff know how to write an effective incident report on house rule violations?

For each new association client, we provide a free 30-minute training session and materials at our office to suit your needs upon your request.

Third, improve your communication with members, plan in advance and help them make an informed decision when ownership approval is needed.

Use your association website, newsletter, or email list to keep owners posted on your project operation, remind owners and tenants of your project rules on pets, smoking, and transient accommodation rentals, provide them with a simple checklist on items that they need to seek board approval before making modifications, and clarify your association's policy on HO6 insurance and allocation of the responsibility to pay the deductible amount for a property damage claim made under the Association's master policy.

Our mission is to help your organization solve problems expeditiously within your legal budget, prevent and reduce future disputes, and provide legal support for your directors and managers to guard all members' investments in your building or community.



For more information on this article, please call Na at 526-3617, email her at nl@hawaiiilawyer.com or scan the code with your smartphone.

Who is Responsible for the Repair and Maintenance of a Seawall?

By Joanna C. Zeigler



Usually, when people fight about owning beachfront property, each party wants ownership for themselves. But here's a case where the opposite was true: each alleged the *other* party owned the seawall. In *Gold Coast Neighborhood Association v. State*, the Hawaii Supreme Court concluded among other things, that under the doctrine of implied dedication, the State of Hawaii had obtained an easement across a Waikiki seawall. This was important because whomever owned the seawall was also responsible for maintaining it.

The seawall in the *Gold Coast* case runs along what is known as Waikiki's Gold Coast, an area of condominiums and apartments located near Diamond Head at the end of Kalakaua Avenue. The seawall was constructed by private parties over eighty years ago and since about 1930, the seawall has been used by both residents and the public to access the ocean and traverse the coastline.

In addressing whether there was implied dedication, the court stated that an implied dedication requires an offer and an acceptance of dedication. Further, when there is no express offer, the offer may be implied under the circumstances and the acceptance may also be implied by the nature of the public use. For public use to effectuate an implied dedication, it must continue for a period longer than the number of years required to result in a prescriptive easement (twenty years). Finally, the effect of a common law implied dedication is the creation of an easement over the relevant property in favor of the State.

The court concluded that the facts involved in the case were more than sufficient to raise a rebuttable presumption of implied dedication. For example, the parties stipulated to extensive evidence regarding the State's repairs to the seawall in at least 1982, 1984, and 1993 and that

local and state appropriations were made several times in contemplation of further repairs. The parties also agreed to the entry of documents into evidence in which representatives of the State asserted, among other things, that the State had the responsibility to maintain the public right of way over the seawall. In addition, testimony at trial demonstrated that members of the public have continuously and freely used the seawall for recreational use since at least 1952.

The court concluded that the State has the right and the duty to maintain the surface of the seawall over and across which it has an easement. However, the court went on to note that joint use of an easement and any improvements thereon may give rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance. Thus, the State in this case will be jointly responsible with the relevant property owners for the repair and maintenance of the surface of the seawall—over and across which the State has an easement—in accordance with equitable considerations relating to their relative use, enjoyment, and contributions to the seawall.

Therefore, although the State has an easement over the seawall pursuant to implied dedication, the supreme court left it to the trial court to sort out the exact apportionment of responsibility for the maintenance of the seawall between the residents and the State.



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Estate Planning: Contemplation. Preparation. Communication.

By Brooke H. Hunter



These three things are key to a thoughtful, thorough, and effective estate plan. An expertly drafted estate plan can only go so far as to ensuring one's intentions are effectuated. This article highlights the importance of the estate planning process and the use of Damon Key Leong Kupchak Hastert's Trustee/Personal Representative Checklist. A fillable version of this checklist is available at <http://hawaiiattorney.com/publications/trustee-personal-representative-checklist>.

Contemplation. Reflection upon one's life and legacy is only one component of thoughtful planning. Careful consideration is due when creating a plan, as well as when nominating an individual or individuals to carry out the necessary tasks of trust and estate administration. Many people opt to nominate a spouse or close relative as Trustee or Personal Representative as a means of honoring or acknowledging how special their relationship is. Serving as Trustee or Personal Representative can be an overwhelming responsibility for some, and can unduly burdensome, especially for those who are grieving. In addition to being an emotional responsibility, a Trustee or Personal Representative must handle matters of taxation, accounting, and marshaling and distributing assets. Contemplation of an individual's capacity to handle such affairs is a crucial component to ensuring that your trust and estate will not only be efficiently administered, but that the experience is no more burdensome for the people involved than it has to be.

Preparation. Engaging in estate planning services and executing a Will, trust, power of attorney, advance healthcare directive, and deeds, may leave one feeling satisfied that they have ensured their affairs will be properly handled upon their incapacity or passing. However, preparation goes far beyond execution of documents. First, an individual should prepare an inventory of assets, investments, and accounts, so that a Trustee or Personal Representative has a comprehensive understanding of what is to be administered. Second, an individual should prepare their estate by establishing valuable relationships with competent professionals such as with attorneys, accountants, investment advisors and physicians. By solidifying relationships, an individual will have a network of people who have a keen understanding of an individual's wishes and will be able to guide the Trustee or Personal Representative in the individual's absence. Finally, an individual should verify with professionals or institutions that their assets such as life insurance and retirement benefits or accounts are either owned by their Trust, or designate the intended beneficiaries. By designating the Trust or beneficiaries, an individual is taking steps to further ensure a swift administration and distribution of assets that a Trustee or Personal Representative may not have otherwise realized existed.

Communication. An individual's estate plan should clearly set forth their intentions as to disposition of property. An individual must communicate with a nominated Trustee or Person Representative to ensure they understand and agree to carry out the duties serving as a fiduciary entails. An individual should then introduce their Trustee or Personal Representative to their community of professional advisors, so that the Trustee or Personal Representative will not only know who to ask for assistance, but will feel comfortable doing so. By opening a dialogue among family, close friends, and Trustee or Personal Representative, an individual may achieve peace of mind that their affairs will be handled in a manner that leaves a legacy in their absence.



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Legislative Changes to GET and TAT Taxes That May Affect Your Business

By Ross Uehara-Tilton



On September 5, 2017, the Hawaii State Legislature enacted S.B. 4, making changes to both the General Excise Tax ("GET") and the Transient Accommodation Tax ("TAT") laws, primarily to provide an additional source of funding for Honolulu's beleaguered rail project. These changes may impact filing practices of certain taxpayers. It is important that taxpayers report income at the correct time and at the correct rate during the period of transition from the old law to the new law, because returns filed immediately before and after the new law becomes effective are ripe for audit.

What are the impacts of S.B. 4 on the TAT law?

Beginning on January 1, 2018, the state-wide TAT rate will increase from 9.25% to 10.25% of the rental value of a transient accommodation. During the transition, hotels and vacation rental owners must accurately determine whether they are required to report and pay the TAT at the old 9.25% rate or the new 10.25% rate. The TAT must be reported and the tax paid based on the rate that is applicable when income is "recognized." Thus, correct reporting depends on whether a taxpayer reports income using the cash method of accounting or the accrual method of accounting.

Most individual taxpayers file their tax returns on a cash basis. Under the cash method of accounting, income is recognized when it is received, even if the income is only a "deposit" or is later refunded. Under the accrual method, income is recognized when it is earned (such as when a guest makes a non-refundable booking), even if the funds are not collected from a guest until a later date.

A similar issue arose in 2005, when the City and County of Honolulu first enacted its GET surcharge to pay for the rail project. The surcharge increased the GET rate for Honolulu taxpayers by 0.5%, and taxpayers were uncertain about the timing and rate for GET filings surrounding the transition. The Hawaii Department of Taxation issued Announcement No. 2006-17, which provided guidance about GET reporting to cash and accrual method taxpayers. The directives in the 2006 announcement will likely apply analogously to the impending increase in the TAT rate, so taxpayers can and should look to the 2006 announcement for further guidance.

What are the impacts of S.B. 4 on the GET law?

Although any of the counties could have adopted a surcharge when the GET rates were last amended, the City and County of Honolulu was the only county to do so. S.B. 4 allows the City and County of Honolulu to extend the surcharge an additional three years, through December 31, 2030. It also allows counties that do not currently have a GET surcharge another opportunity to establish a new surcharge. The current base rate for the GET is 4.0% across the state. For business activities in the City and County of Honolulu, the additional surcharge is 0.5%, for a total GET rate of 4.5%.

The other counties had until January 1, 2018 to enact appropriate legislation. Only Kauai County adopted a GET surcharge, raising the GET tax rate in that county to 4.5%. Businesses subject to GET in Kauai County will need to ensure correct reporting for the transition period, but businesses operating in the other counties can continue filing their GET returns as they had been before S.B. 4 became law.

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Divorcing? Be Careful of Tax Consequences

By Andrew Kim



If you're thinking about divorce, saving taxes are probably the least of your concerns. However, addressing the tax implications of dividing property and structuring alimony may save you considerable financial grief in the future. Here are three common tax implications to keep in mind when speaking with your divorce attorney:

Property Transfers Incident To Divorce

Section 1041 of the Internal Revenue Code ("IRC") addresses transfers of property between spouses or incident to a divorce. The general rule is that no gain or loss is recognized on a transfer of property from a spouse, or former spouse, if the transfer is "incident to (part of) a divorce." A transfer of property is incident to divorce if the transfer occurs within one year after the date on which the marriage ceases. In Hawaii, this is almost always the date of filing of the Divorce Decree. The transfer is treated as a gift between the formerly married parties. The person who receives the property takes the value of the item they had before the transfer—including the taxes which might be due. It is critical that these rules be considered before you decide how to allocate valuable properties—because the tax bill will follow.

Sale Of A Principal Residence

Section 121 of the IRC excludes gain from the sale of a principal residence. Generally, you can avoid tax on the first \$250,000 of gain on the sale of your primary home if you have owned the home and lived there at least two years out of the last five years. Married couples filing jointly can exclude a gain of up to \$500,000 as long as either one has owned the residence, and both used it as a primary home for at least two out of the last five years. Divorcing couples should think both long term and short term on the ultimate division of the marital residence and be sure to take advantage of this substantial tax exclusion.

Alimony

Section 71 of the IRC addresses alimony and separate maintenance payments. Payments are included in the gross income of the receiving person ("payee") and are presently deductible by the paying person ("payor"). A cash payment is considered "alimony" if: 1) it is received by a spouse (or former spouse), under a divorce decree or separation agreement; 2) the divorce decree or separation agreement does not designate such payment as not includable in the gross income of the payee and deductible by the payor; 3) the payee and payor spouse are not living in the same household; and 4) it is not payable after the death of the payee (recipient). The present ability to deduct alimony softens the financial burden on the payor and is often needed by the payee. However, this tax treatment of alimony will change on January 1, 2019. The new tax law will not affect divorces entered on December 31, 2018 or earlier. After that, spouses paying alimony can't deduct it, but spouses receiving alimony will get the money tax-free. Some divorce lawyers are speculating that this change may make ending marriages even more drawn-out and expensive.



For more information on this article, please call Andrew at 526-3609, email him at ak@hawaiiilawyer.com or scan the code with your smartphone.

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A D V E R T I S I N G M A T E R I A L

Legal Alert is published periodically by Damon Key Leong Kupchak Hastert to inform clients of legal matters of general interest. It is not intended to provide legal advice or opinion.

Attorneys in the News



Continuing the firm's commitment to public service, Damon Key attorneys staffed the Judiciary's "Access to Justice Room," for the month of November dispensing advice pro bono to self-represented litigants in District Court.

Seated from the left: Hawaii Supreme Court Justice Pollack; Justice Nakayama; Chief Justice Recktenwald; Justice McKenna; Justice Wilson. Standing: Tred Eyerly

Tred R. Eyerly marked the ten year anniversary of his blog, insurancelawhawaii.com. Writing and publishing anything for ten years is an accomplishment, but is especially notable in law blogging where most do not make it a year, much less a decade. Tred's blog posts stories and developments in the critical field of insurance law, and has won many awards over the years.

Tred also presented a session at the Hawaii State Bar Association's Convention in October to the Environment, Energy and Resources Section, discussing environmental insurance coverage. He also co-authored a paper and will be presenting on a panel a discussion on Cyber Policies at the ABA's Insurance Coverage Litigation Committee's annual seminar in Tucson in March 2018.

Christine A. Kubota is serving as co-chair with Tyler Tokioka and Sal Miwa of the Gannenmono Committee celebrating the 150th anniversary of the first arrival of Japanese immigrants from Japan to Hawaii. They kicked off the year long event on January 14, 2018 at the Japanese Cultural Center of Hawaii Ohana Festival with a

Shinto Blessing. Twenty US Japan non-profit organizations comprising the Kizuna Group will be celebrating throughout the year with Gannenmono themed events. The Bishop Museum will have a Gannenmono themed photo gallery from July to December. They are also planning a one day Symposium on June 7, 2018.

Gregory W. Kugle was on the faculty at the January 11, 2018 Managed Retreat Symposium, speaking about the legal and policy aspects of this critical issue for beachfront property. The symposium was part of the State of Hawaii's Ocean Resources Management Plan, addressing appropriate coastal development and management of coastal hazards.

Mark M. Murakami and **Gregory W. Kugle** presented their fifth annual Hawaii Land Use Litigation Update to the HSBA's Real Property Section. The video of their talk is available here: <https://www.youtube.com/watch?v=4-prHfbY-aM>.

Robert H. Thomas recently spoke at the CLE International Eminent Domain Conference in Las Vegas, providing the attendees with the latest trends in eminent domain and property law.

Robert is also the Planning Co-Chair of the upcoming 35th Annual ALI CLE Eminent Domain and Land Valuation Conference in Charleston, South Carolina January 25-27, 2018. This is the yearly three-day gathering of eminent domain and property law experts from around the country, and the premier legal education program on these topics.