Fall / Winter 2018

LEGAL ALERT

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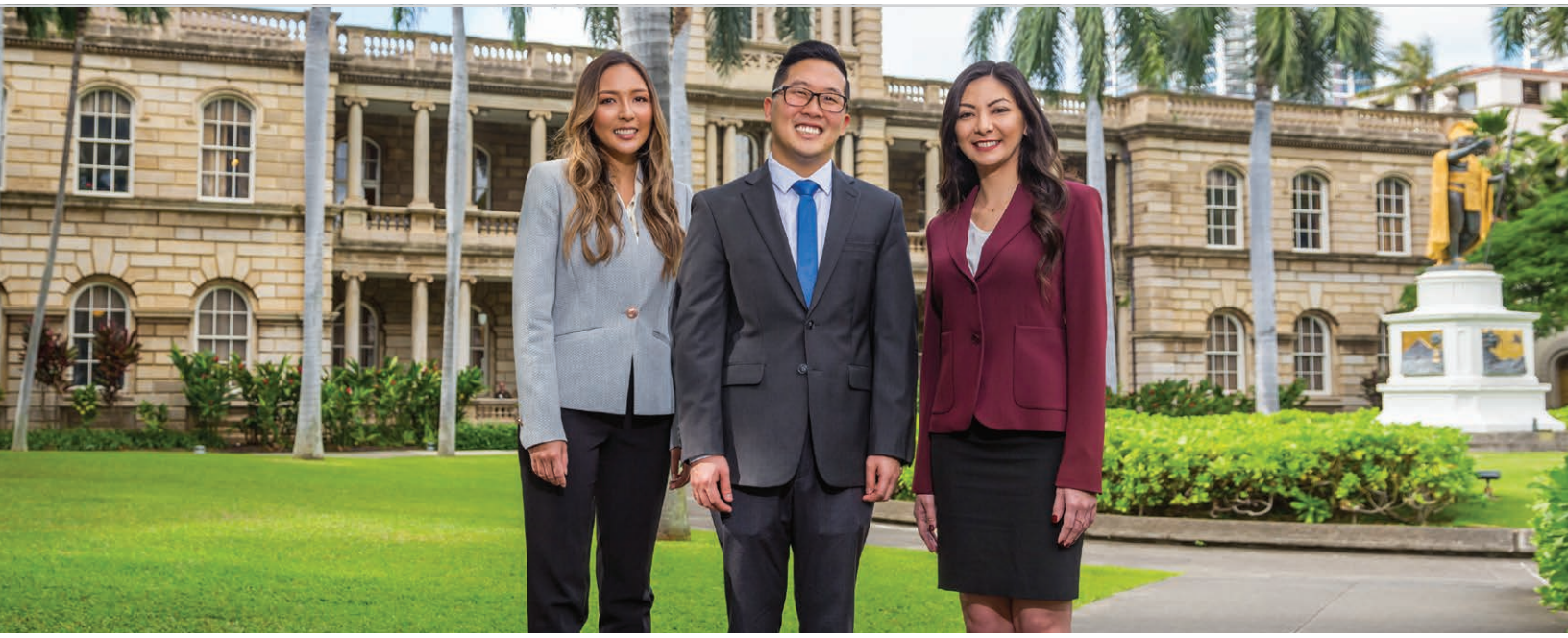

Kayla Fajota Travis Moon Laurel Pepe

Welcome to the Firm!

Damon Key is proud to announce the addition of three new attorneys to the firm. Laurel Pepe, Travis Moon and Kayla Fajota add their diverse skill sets to several of the firm's practice groups. The new associates are recent graduates of the University of Hawaii William S. Richardson School of Law and arrive at Damon Key with wide-ranging backgrounds.

Kayla Fajota is an Associate in the firm's Family Law practice group. She finds practicing family law extremely rewarding and fulfilling because she has the opportunity to assist clients through the divorce process, which can be one of the most emotionally and psychologically challenging times of their lives. Kayla's empathy, attention to detail, and strong work ethic help her find creative workable solutions for her clients and their families.

While in law school, Kayla served as a Family Law Clerk with a Honolulu law firm. There, she was immersed in all areas of the practice of family law and gained experience in attorney-client meetings, mediation sessions, settlement negotiations and motion hearings. She also served as a Legal Research Assistant for Professor Eric Yamamoto's

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Scholars Advocacy Project where she performed legal research, analysis, and writing for the book "In the Shadow of Korematsu: Democratic Liberties and National Security."

Kayla holds a Bachelor of Arts Degree in Psychology from Creighton University, where she was on the Dean's List from 2013 to 2015. Born and raised on Oahu, she is a graduate of Maryknoll High School and currently resides in Honolulu.

Travis Moon practices in the Real Estate and Business and Commercial practice groups. An attorney who embraces the challenging and dynamic nature of Hawaii real estate and business law, Travis aims to provide expert service to his clients. Attentive listening, a propensity for problem solving, and a strong work ethic are qualities that clients can count on from Travis.

While in law school, Travis served for two years as a research assistant and one semester as a teaching assistant to Professor David L. Callies. He was also an active team member of the Native American Moot Court for two years and a judicial extern to Judge Derrick H.M. Chan.

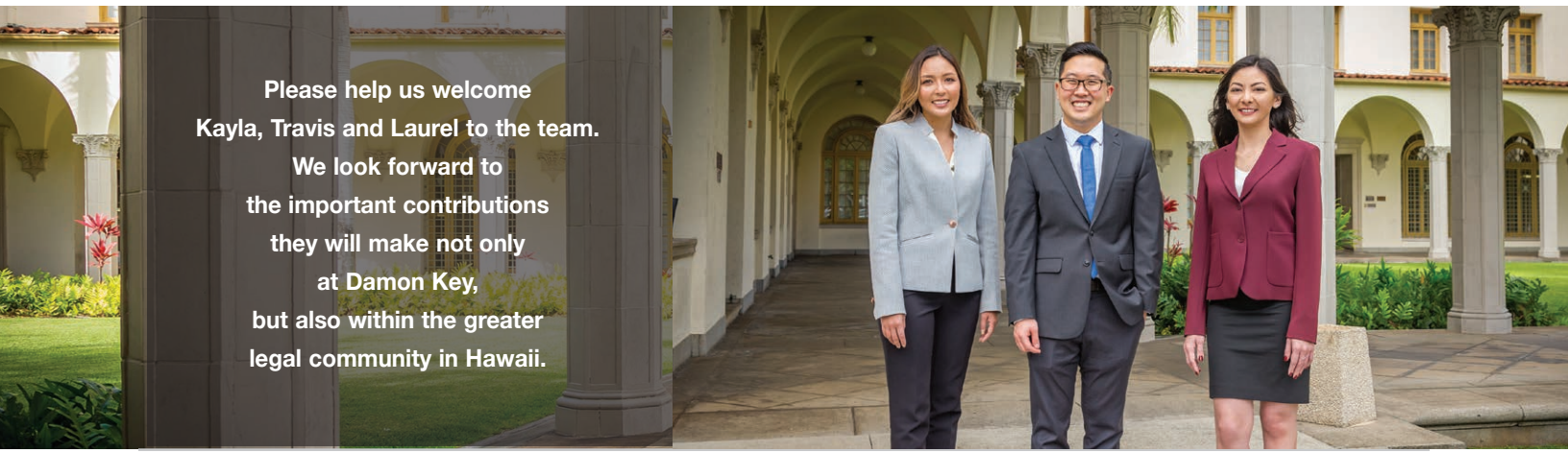
Travis holds a Bachelor of Arts Degree in Political Science from the University of Washington. His post graduate employment was with Title Guaranty Escrow Services, Inc. as an Escrow Associate. During this time, Travis closed property transactions and achieved title report mastery, as well as handled lease to fee conversions, foreclosures and refinances. The position required a high degree of customer responsiveness and problem-solving skills. The in-depth introduction to the world of real estate escrow ultimately led Travis to focus his law practice in the area of Real Estate and Business and Commercial law.

Laurel Pepe has joined the Trusts & Estates practice group and brings to the firm a passion for the complex matters in estate planning. She believes that open dialogue is the basis for building strong client relationships and continual learning is imperative to providing excellent legal counsel.

Laurel, who earned her law degree, summa cum laude served as staff writer and technical editor for the *University of Hawaii Law Review*. Most recently, Laurel served an externship with Judge R. Mark Browning of the First Circuit Court. Previous to that, she served as an extern to Judge Derrick H.M. Chan and a volunteer office assistant with the Access to Justice program.

Prior to enrolling in law school, Laurel worked as an Honors Intern at the Federal Bureau of Investigation in Kapolei. While there, she assisted special agents with trial preparations for a federal capital murder case. It was during this time that she discovered her affinity for the law. However, it was Laurel's involvement with her grandmother's trust that led her to focus her law career in the area of estate planning. "I served as my grandmother's trustee and realized the difficulties people face when planning and administering an estate. Today, it is satisfying to answer questions people have about sensitive challenges, such as what will happen to their estate if they fall ill, or worse."

Laurel holds a B.A. in Psychology from the University of Hawaii.



Are State or County Government Records Available to the Public?

By Loren A. Seehase

Hawaii's Uniform Information Practices Act ("UIPA") is essentially the state law version of the federal Freedom of Information Act. The purpose of UIPA is to provide public access to government records for the purpose of transparency and accountability. An understanding of your rights, the limits of UIPA requests, and the practical application of the law will arm you with the information you need to successfully navigate the process of a UIPA request.

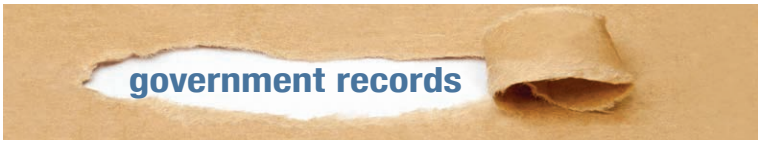
Anyone can submit a UIPA request. The Office of Information Practices ("OIP") provides a request form titled Request for Access to Government Records, which is to be submitted to the agency whose records you are requesting. While not required, it is helpful to submit a letter, along with the request form, explaining more specifically what records are requested, how you are entitled to those records, requesting explanation of denial, if any, and offering payment for any fees associated with the request. The letter lends credibility and seriousness to your request.

All state and county agencies have an affirmative duty to disclose all government records, unless the specific information is restricted. Exceptions include: personal information; information pertaining to an ongoing case; confidential information that would frustrate a legitimate government purpose; any records protected from disclosure (e.g. attorney-client privilege); and legislative working papers.

There are three general time frames in which an agency has to respond to a request. First, if the records are required to be disclosed in their entirety or are available for public access in their entirety then the agency must disclose the entire record within ten business days. Second, if the records requested are not required to be disclosed in their entirety or are not available for public access in their entirety then the agency must provide a Notice to Requestor ("NTR") within ten business days. A NTR confirms the records being requested, states whether the records will be disclosed, the costs associated with disclosure, and states the legal and factual basis for the complete or partial denial of disclosure, if any. Third, if the records requested are not required to be disclosed in their entirety or are not available for public access in their entirety and extenuating circumstances exist then the agency must provide an Acknowledgement to Requestor within ten business days of the request. After which, the agency must issue a NTR no more than twenty days after receiving the request. Within five business days after the NTR or receiving prepayment the agency must provide the documents.

If there are any delays with disclosure, incomplete disclosure, or partial or complete denial of disclosure you are not without recourse. There are two options and you are not restricted to using one or the other. You can either file an administrative appeal to OIP or you can file a civil complaint in circuit court within two years of the agency's denial. OIP will review the documents and determine if the denial was warranted. If not, then OIP will mandate disclosure. Similarly, a civil complaint must be expedited.

On December 21, 2018, the Hawai'i Supreme Court issued a landmark decision upending 30 years of OIP opinions by striking down the OIP created exemption of "deliberative process privilege" utilized by state and county agencies to deny disclosure of pre-decisional records. In the 30 years that agencies have invoked this quasi-judicially created exemption this was the first case the Hawai'i Supreme Court had to review it and the OIP opinion letters that created it. OIP interpreted UIPA's statutory exemption of "frustration of a legitimate government function" as a blanket exemption to include all pre-decisional, deliberative, and any decision-making related communications (both inter-agency and intra-agency) made prior to an agency's decision. The case brought by Civil Beat sought budget planning records for the City and County of Honolulu including internal memorandums, inter-agency and intra-agency records, proposed budgets, revisions, and all the documents related to the City's budget planning process. While an OIP opinion letter is considered precedential in court, it can be overturned if it is palpably erroneous. The Hawai'i Supreme Court determined that such a broad interpretation of a UIPA exemption runs contrary to the plain language, purpose, and legislative history of UIPA, and as such the quasi-judicially created exemption of "deliberative process privilege" is palpably erroneous. The Court went on to reiterate the imperativeness that an agency's denial of disclosure must be accompanied by an articulation of a real connection between disclosure of a particular record and the likely frustration of a specific legitimate government function. While it is too soon to see the effects of this case, it is likely to lead to less agency denials and more circuit court decisions in favor of disclosure.

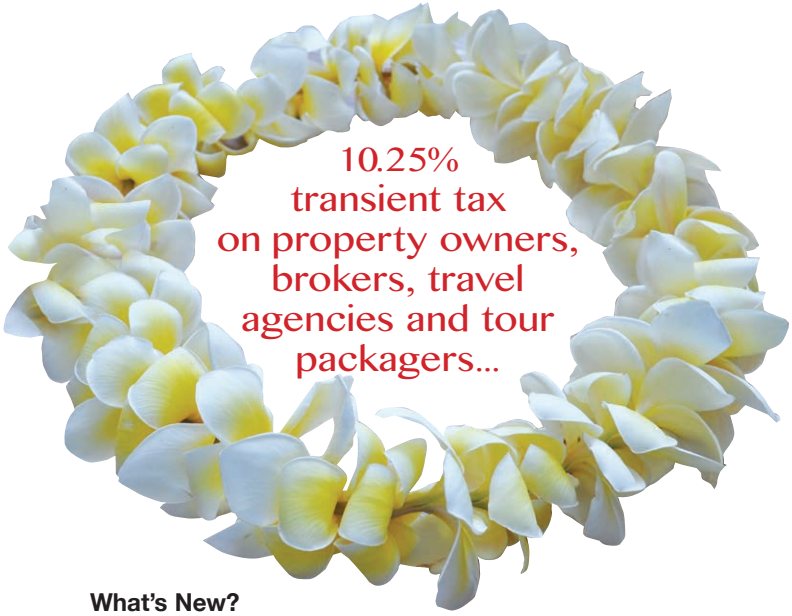


For more information on this article, please call Loren at 531-8031 or email her at las@hawaiilawyer.com.

Do You Furnish Transient Accommodations at Noncommissioned Negotiated Contract Rates?

By Travis T. Moon

On July 10, 2018, the Hawaii State Legislature enacted Act 211 amending Hawaii Revised Statutes Section 237D Transient Accommodations Tax. The new Act will become effective on taxable years beginning after December 31, 2018. Currently, the Statute assesses a 10.25% transient accommodation tax on owners of property that "furnish rooms, apartments, suites, single family dwellings, or the like to a transient for less than one hundred eighty consecutive days…" These owner's must register with the Department of Taxation for a transient accommodation license before conducting business.



What's New?

The new provisions of Act 211 assesses the 10.25% transient accommodation tax not only on owners, but now also on brokers, travel agencies or tour packagers who enter into agreements to "furnish transient accommodations at noncommissioned negotiated contract rates." Businesses that fall under this new category must now register for a separate transient accommodation tax license with the Department of Taxation. The tax assessed by the new Act will be on the broker's "respective portion of the proceeds." Transient accommodation brokers who furnish accommodations at noncommissioned negotiated contract rates and owners of the short-term rental unit must both separately pay the 10.25% transient accommodation tax on their respective portion of the proceeds.

However, to complicate matters, the new Act does not include a definition of noncommissioned negotiated contract rates. A case decided by the Hawaii Supreme Court provides guidance, however the Court bases its definition of noncommissioned rates as it applies to the General Excise Tax statute. In Travelocity.com, L.P. v. Director of Taxation, the Hawaii Supreme Court stated that noncommissioned rates are "… an amount of money paid to an entity or person other than an agent or an employee." In Announcement no. 2016-06, the State of Hawaii Department of Taxation interprets the Supreme Court's definition of noncommissioned rates to mean, "an amount of money paid to an entity or person than an agent or employee." Further, the Department highlights the Court's explanation that "unlike a commissioned transaction, in which a fee is usually paid as a percentage of the income received, in a noncommissioned transaction a hotel has no means of knowing what the travel agent's mark-up will be."

Before Act 211 becomes effective on January 1, 2019, brokers, travel agencies and tour packagers of transient accommodations must verify whether they agree to furnish accommodations at noncommissioned negotiated contract rates. Review your short term rental agreements and plan accordingly for the New Year.

For more information on this article, please call Travis at 531-8031 or email him at ttm@hawaiilawyer.com.

Collection & Foreclosure 101 for New Directors or Property Managers Serving Condominium & Community Associations

By Na Lan

Most associations need to deal with assessments delinquencies. The attorneys usually work with property managers to collect or foreclose on behalf of associations. Directors need to know the basics to fully understand your project's collection progress reports and fulfill your fiduciary duty of care. In 2018, we had major changes on the law governing association's collection and foreclosure. Here is the scoop for new directors and property managers.

An association needs to follow procedural steps set forth in the Declaration, Bylaws or adopted collection policies before turning over any delinquent account to its attorney. The attorney can advise you if any relevant project document provisions are outdated and help the Board adopt or update the collection policy.

The attorney or managing agent, as a debt collector, is bound by the federal law to send a 30-day written notice meeting specific requirements to a delinquent owner, and shall hold on collection and verify the debt in writing if an owner disputes the debt. The Association collection process is also subject to the automatic stay and other mandates under the federal bankruptcy law, once a debtor files for bankruptcy. Military active-duty debtors may have special debtor rights protection.

If your association has properly adopted relevant written policies under the statutes, you may also collect rents from the tenant of a delinquent unit after giving advance written notice to the unit owner, and terminate the delinquent owner-occupant's access to common utilities or amenities depending on the circumstances, after giving required notices to the unit owner and the first mortgage lender.

Associations have a statutory lien right against a delinquent unit for unpaid assessments and can hold such unit responsible for its collection costs and reasonable attorney's fees. An association should timely record its lien in the Bureau of Conveyances to further protect its creditor's rights. A condominium association's lien has priority over all other creditors' liens except for government liens for real property taxes and liens for any mortgage of record with an earlier recordation date. A community association's lien priority is usually determined based on the lien recording date as compared with other creditors.

A lender or third party purchaser, who obtains title to a delinquent unit as a result of lender's foreclosure, has a statutory obligation to pay the association a special assessment in an amount up to six months regular monthly common assessments during the period immediately preceding completion of the lender's foreclosure. In the case of a voluntary conveyance, the grantee of a delinquent unit shall be jointly and severally liable with the grantor for all unpaid association assessments.

Like a mortgage lender, an association can foreclose on its lien by judicial action, or the alternate power of sale process (i.e., nonjudicial foreclosure), but only if its Declaration or Bylaws expressly provides for such power of sale. The latter is usually cheaper and faster; however, no association may use nonjudicial foreclosure if the delinquency arises solely from fines, penalties, legal fees, or late fees.

The old "pay first, dispute later" principle now applies only to common assessments. A unit owner, who contests the delinquent amounts for fines, late fees, legal fees and other charges, may request a written verification statement from the Association and has 30 days upon receipt of such statement to demand for mediation before paying such contested amounts. After receiving owner's mediation demand, the Association shall cease collection and participate in mediation. If the parties are unable to resolve the dispute in mediation within 60 days, the Association may then resume collection.

Foreclosure

Collection

For more information on this article, please call Na at 526-3617 or email her at nl@hawaiilawyer.com.

Divorce Planning and Mandatory Automatic Restraining Orders

By Kayla M. Fajota

Effective July 1, 2018, all new divorce, annulment or legal separation cases automatically include statutory restraining orders enacted by the 2018 Legislature. The mandatory automatic restraining orders proactively prevents divorcing parties from selling, transferring, removing or hiding real or personal property belonging to either person and from incurring further debt that would burden the other party. This means both parties are prevented from borrowing against any credit line secured by the marital residence, unreasonably using their credit and debit cards or taking cash advances. Exceptions are limited to selling assets or incurring debt for reasonable living expenses, ordinary business expenses, child educational expenses and reasonable attorney's fees and costs.

Divorcing parties are also prohibited from altering any life, auto, disability or health insurance policies involving either spouse or their children and deleting their partner from his/her pension or retirement plans (to include designation as a survivor annuity). Additionally, neither parent can relocate a child off the home island or change a child's school (however special rules apply if the case involves family violence or safety issues).

These restraining orders act as an initial "all stop" to maintain the status quo (however difficult that may be) until the couple is able to finalize their divorce. The new statute does add a level of complexity for parties who own businesses or maintain income producing assets that are often bought and sold (e.g., stocks, real property, etc.) – acts that are now prohibited. The restraining orders are, however, temporary and may be "lifted" if the couple can come to a formal, written agreement or if a party files a "Motion for Pre-Decree Relief" and a Family Court Judge decides what next steps are permitted.

Prior to this enactment, many divorcing parties found their joint marital bank accounts completely, or partially, drained. There were virtually no consequences for spouses who unilaterally removed and transferred marital funds into separate – and, oftentimes, secret – sole accounts (sometimes located overseas or to a third person "for safe-keeping"). Some financially abusive spouses then used the marital funds as a negotiating tool to bully the other into an "agreement" on other issues, such as custody of the children. These actions are fraud and, thus, the automatic financial restraining orders attempt to prevent this type of financial abuse and stop that flow of money.

This financial abuse can have harmful consequences on the other spouse who may not have any other resources to pay for essential personal expenses, rent, child care, or attorney's fees. This would be financially and emotionally traumatizing for the vulnerable spouse and he/she would be left at a clear disadvantage against the spouse who premeditated this result. The temporary restraining orders, therefore, aims to protect financially vulnerable parties and their children against financial abuse.

The Family Law Practice Group will confidentially assist and educate you if you need to consider divorce planning in 2019.

For more information on this article, please call Kayla at 531-8031 or email her at kmf@hawaiilawyer.com.

Gift and Estate Tax Exemption Goes Up Again in 2019

By Laurel E. Pepe

The Tax Cuts and Jobs Act of 2017 (TCJA) doubled the federal gift and estate tax exemption in 2018, and the IRS has announced another increase for 2019. The estate and gift tax exemption for 2019 is $11.4 million per individual, up from $11.18 million. This means that for large estates, estate tax will only be imposed on assets in excess of the exemption amount. However, the estate tax is hefty, coming in at 40%.

If an estate is at risk of exceeding the exemption amount, here are some things to think about.

The concept of "portability" allows a surviving spouse to use their deceased spouse's unused exemption (DSUE) amount in addition to his or her own exemption. Married couples may shield up to $22.8 million if portability is elected on the estate tax return of the first spouse to die. Portability is not automatic – even if no estate taxes are due upon death of the first spouse, the return must be filed and the election must be made. If the surviving spouse's estate is not currently large enough to warrant use of the DSUE, the decedent spouse's estate may still elect portability. This may be prudent if the surviving spouse's estate is likely to increase, or if there are concerns about the federal estate tax exemption dropping after the current exemption sunsets in 2025. As it stands, on January 1, 2026, the gift and estate tax exemption will revert to the 2017 rate of $5.49 million (adjusted for inflation).

Another thing to consider is the gift tax exclusion. The 2019 gift tax exclusion will remain at $15,000. This exclusion means individuals may give away lifetime gifts up to $15,000, and married couples up to $30,000, to as many individuals as desired. Anything over the exclusion amount counts toward the $11.4 million estate and gift tax exemption. If a gift exceeds $15,000, this must be reported on a gift tax return (IRS form 709). A gift tax return must also be completed any time spouses split a gift, whether or not in excess of the exclusion.

These lifetime gifts can be used to diminish an estate that is in danger of facing the 40% estate tax. When choosing assets to gift, consider the cost basis of the asset. The cost basis generally transfers to the recipient, which means that any increase in value since the original purchase date will be a taxable gain. If the asset has appreciated significantly, your gift may come with some undesirable tax consequences. Retain those assets to transfer as part of your estate, and consider gifting cash or assets with less appreciation. Finally, remember that payments directly to medical providers or educational institutions on behalf of others are not a taxable gift and do not affect the $15,000 gift exclusion.

For more information on this article, please call Laurel at 531-8031 or email her at lep@hawaiilawyer.com.

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Attorneys in the News

Damon Key Leong Kupchak Hastert sponsored an award to the winner of the Hawaii Access to Justice Commission's annual essay contest. Pictured with a junior essayist from King Kekaulike High School is Mark M. Murakami and Chief Justice Mark E. Recktenwald. Damon Key was recognized in The annual Pro Bono Awards by the Hawai'i State Judiciary. Appellate Pro Bono Program volunteers recognized were Robert H. Thomas, Mark M. Murakami, Veronica A. Nordyke and Ross Uehara-Tilton. The firm was also recognized for their help in the self help center.

Tred R. Eyerly's Insurance Law Hawaii blog hit 11 years of blogging in December. The blog started in December 2007, 1,251 posts ago.

Christine A. Kubota was presented with the Consul General Commendation Award for her work by the Japan-America community for Gannenmono activities this year.

Christine is seated next to Consul General Ito and Governor David Ige on the first row.

Mark M. Murakami and **Robert H. Thomas** are on the faculty for the Eminent Domain and Land Valuation Litigation 2019 Conference January 24 to January 26, 2019, in Palm Springs.