Probate and Trust Law Section Newsletter

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Report of the Chair

By MARILYN C. SANBORNE

I am very pleased to be writing my first column as Section Chair. I am even more pleased to be working this year with three wonderful officers---Julia Fisher (Chair Elect), Mary Jane Barrett (Vice Chair) and Kathleen Stephenson (Secretary)—and a terrific Executive Committee. We are looking forward to an exciting and productive year.

As always, it is the Section's Committees that carry out the bulk of the Section's work. In particular:

1. The Rules and Practice Committee, chaired by Margie Thompson, is working with Judge O'Keefe and others in the court system to bring e-filing to the Orphans' Court as promptly as possible. This Committee is also working to finalize an updated version of the Section's "Red Book"--Practice and Procedure Before the register of Wills and the Orphans' Court Division in Philadelphia. When completed, the Red Book will be posted to the Section's web site.

2. There is a new ad hoc Outreach Committee, chaired by Kathy Mandelbaum, that will consider different means to interest more young practitioners and law students in careers in the probate and estate planning area. To this end, Kathy has already presented a very successful roundtable discussion, held at Temple Law School, highlighting different career options. Similar events at other law schools are planned for the Fall.

3. The new ad hoc Committee on Financial Product Abuses, chaired by Daphne Goldman, will explore ways to educate the public (through our members) on potential traps found in certain products.

4. The Education Committee, chaired by Judy Stein, will continue to plan and, with PBI, present quarterly CLEs. The Committee strives to plan programs that will address the broad and varied interests of our membership--from basic practice issues to complicated tax planning.

5. The Publications Committee, chaired by Susan Collings, will continue to publish this Newsletter which comes out three times a year. As you can see, in order to reduce costs and to insure more efficient delivery, the Newsletter is now being distributed electronically.

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Inside this Issue...

The Impact of the Pennsylvania Inheritance Tax upon the Proceeds of Wrongful Death and Survival Actions

By EDWIN R. BOYNTON and
STEPHANIE E. SANDERSON
STRADLEY RONON STEVENS & YOUNG, LLP

The purpose of this article is to discuss the Pennsylvania inheritance tax consequences of proceeds recovered based on wrongful death and survival claims.

I. PENNSYLVANIA WRONGFUL DEATH AND SURVIVAL STATUTES

For a wrongful death action to be commenced, eligible persons must exist, and those persons must establish that they have suffered a pecuniary loss. The Pennsylvania wrongful death statute[1] allows only a decedent's spouse, children, parents or personal representative, whether or not they are citizens or residents of the Commonwealth of Pennsylvania, to recover damages for the death of the decedent caused by the wrongful act, neglect, or unlawful violence of another. In addition to other damages, the statute entitles a plaintiff to recover damages for reasonable hospital, nursing, medical, and funeral expenses, as well as certain expenses of estate administration, necessitated by reason of injuries causing death. The statute provides for the damages to be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to the decedent's creditors. To avoid a duplicate recovery, such an action may not be pursued if the decedent obtained the same damages during his lifetime or commenced an action for such damages during his lifetime.[2]

Conversely, survival actions are brought by the administrator or personal representative of the estate to benefit the decedent's estate.[3] Survival actions are designed to compensate the beneficiaries of the decedent's estate for the personal claims of the decedent. Under the Pennsylvania survival statute,[4] any causes of action or proceedings survive the death of the decedent. A decedent may recover damages for pain and suffering, loss of gross earning power from the date of injury until death, and loss of earning power, less personal maintenance expenses from the time of death through decedent's estimated working life span.[5]

It is important to note that the Pennsylvania Department of Revenue will consider all proceeds of "out-of-court" settlements of wrongful death/survival actions to be attributable to the survival action absent proof of eligible wrongful death claimants.[6]

II. PENNSYLVANIA INHERITANCE TAX

Although most litigation commenced as a result of the death of an individual involves both wrongful death and survival actions, it is only the proceeds from the survival action that are subject to Pennsylvania inheritance tax in the estate of the decedent.

Wrongful death proceeds

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[1] 42 PA. CONS. STAT. ANN. §8301 (West 2003).

[2] 42 PA. CONS. STAT. ANN. §8301(a) (West 2003).

[3] *In re Estate of Merryman*, 669 A.2d 1059, 1061 (Pa. Commw. Ct. 1995); *See Kiser v. Schulte*, 648 A.2d 1, 4 (Pa. 1994); 42 PA. CONS. STAT. ANN. §8302 (West 2003).

[4] 42 PA. CONS. STAT. ANN. §8302 (West 2003).

[5] *Walsh v. Strenz*, 63 F. Supp. 2d 548 (M.D. Pa 1999) (holding punitive damages not available under wrongful death actions in Pennsylvania).

[6] Pennsylvania Inheritance and Estate Tax, 5th Ed., Grossman & Smith, Section 9107(b).

Report of the Chair, continued

6. The new Policy Committee, chaired by Julia Fisher, will review and organize existing Section policies and, where appropriate, suggest new policies.

As you can see, there is a lot going on. However, if there is something else you would like to see happen, please let me hear from you.

Impact of Inheritance Tax, continued

are not taxable for Pennsylvania inheritance tax purposes, as such proceeds are not property owned by the decedent at death but rather are considered compensation to individual members of the decedent's family for the pecuniary loss sustained by the death of the decedent.[7] Under Pennsylvania's inheritance tax provisions, awards pursuant to wrongful death actions pass outside of the decedent's taxable probate estate.[8]

On the other hand, survival action proceeds are taxable for inheritance tax purposes. In *Doris Parsowith v. Commonwealth*, 723 A.2d 659, 662 (Pa. 1999), the Pennsylvania Supreme Court held that a widow's settlement payment, which was receivable due to a survival action claim based on the wrongful death of her deceased husband, was taxable for Pennsylvania inheritance tax purposes at a rate of six percent, the rate of tax that was in effect at her husband's death.

Other cases have supported the taxability of survival action proceeds under the Pennsylvania inheritance tax regime. In *Walsh v. Strenz*, 63 F. Supp. 2d 548, 550 (M.D. Pa. 1990), the court held that punitive damages were not recoverable under Pennsylvania's wrongful death statute but instead recoverable under Pennsylvania's survival statute. The significance of the ruling lies in the imputed rule that only survival action proceeds are subject to the Pennsylvania inheritance tax.

[7] *Doris Parsowith v. Commonwealth*, 723 A.2d 659, 662 (Pa. 1999); *Merryman*, 669 A.2d at 1061 (citing *Tulewicz v. Southeastern Pa. Transp. Auth.*, 606 A.2d 427 (Pa. 1992)).

[8] *Merryman*, 669 A.2d at 1061.

Furthermore, in *In re Estate of Merryman*, 669 A.2d 1059 (Pa. Commw. Ct. 1995), the Commonwealth Court found that only the survival action settlement proceeds were taxable for Pennsylvania inheritance tax purposes. Eventually, eighty percent of the total settlement proceeds were allocated to the wrongful death claim and twenty percent to the survival claim.[9]

III. ALLOCATION OF PROCEEDS BETWEEN WRONGFUL DEATH AND SURVIVAL CLAIMS

Since the Pennsylvania inheritance tax implications are distinctly different for wrongful death and survival action proceeds, there is a tax advantage to maximizing the wrongful death recovery and minimizing the survival recovery.[10] The trial courts, however, have broad discretion in allocating the proceeds between wrongful death and survival actions.[11] The courts have found that each claim should have an amount apportioned to it that bears a relationship to the calculated values of the claims according to the evidence and the allowable elements of damages in each.[12] Although some practitioners believe that the courts generally assign two-thirds of the proceeds to the wrongful death claim and one-third to survival, the trend of the courts in wrongful death and survival action settlements is toward a case-by-case, fact-based apportionment of the proceeds.[13]

[9] *Merryman,* 669 A.2d at 1063.

[10] Vicki Ann Trimmer, Esq., *Allocation of Wrongful Death and Survival Action Litigation Proceeds For Pennsylvania Inheritance Tax*, available at www.pennattorneys.com/news397.

[11] *Trimmer*, supra note 10, (citing, *Wilson v. Bensalem Township*, 367 A.2d 397 (Pa. Commw. Ct. 1976); *Wexler v. Philadelphia*, 3 D.&C.2d 122 (O.C. Phila. 1955)).

[12] *See Ringler Estate*, 29 Fiduc. Rep. 499, 514 (O.C. Somerset 1979).

It is important to note that local rules of some courts require the Pennsylvania Department of Revenue's consent to the allocation of settlement proceeds between the wrongful death action and the survival action. Under the Pennsylvania Probate, Estates, and Fiduciaries Code, the Pennsylvania Department of Revenue is an interested party in any orphans' court proceeding along with any taxing authority whose interests would be affected adversely by the proceeding.[14] As the Pennsylvania Department of Revenue is an interested party in the allocation of wrongful death and survival action proceeds for Pennsylvania inheritance tax purposes, some courts require by local rule that the Pennsylvania Department of Revenue consent (usually by letter) to the proposed distribution.[15] If such consent is not sought, the courts will delay disposition of

[13] Telephone Interview by Stephanie E. Sanderson with J. Paul Dibert, the Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue (Dec. 12, 2003). *See also Trimmer, supra* note 10.

[14] 20 PA. CONS. STAT. ANN. § 767 (West 2003).

[15] *See* Buck's County Orphans' Court Rules, Petition To Settle Wrongful Death and Survival Actions (where a true and correct copy of correspondence from the Pennsylvania Department of Revenue agreeing with the

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Impact of Inheritance Tax, continued

the petition.[16]

On the other hand, some courts, in policy or practice (rather than by rule), require the Pennsylvania Department of Revenue's consent to the allocation of the proceeds while other courts do not look for consent from the Pennsylvania Department of Revenue.[17] Philadelphia county has a unique situation where the courts do not require the Pennsylvania Department of Revenue's consent to the allocation of the proceeds, but instead the Pennsylvania Department of Revenue is not bound by the court's determination of the allocation.[18]

Where a jury has allocated the proceeds between the wrongful death and survival actions, the Pennsylvania Department of Revenue does not usually object or disagree with such determination.[19]

IV. PENNSYLVANIA INHERITANCE TAX: VALUATION OF SURVIVAL ACTION PROCEEDS

For inheritance tax purposes, the expected proceeds from a survival action are valued at the decedent's date of death.[20]

A recent decision of the Court of Common Pleas of Montgomery County, Orphans' Court Division, outlined a date of death valuation method for the value of survival action proceeds. In *Leonard Pearlstein Estate*, 23 Fiduc. Rep. 2d 301 (O.C. Div. Montg. 2003), a wrongful death and survival action was settled five years after the decedent's date of death. That court approved the allocation of settlement proceeds between the wrongful death and survival action, with $4,076,023 representing the proceeds of the survival action received by the estate. A supplemental inheritance tax return was filed, reporting the value of these proceeds at the date of the decedent's death as $1,823,115. The original return did not include the claim. The Pennsylvania Department of Revenue appraised the value of the survival action at the actual proceeds of $4,076,023 and the Department's Board of Appeals affirmed the appraisement. The Montgomery County Orphans' Court found that the survival claim had a date of death value of $1,120,887.

The court interpreted the definition of "value" in Title 72, Sections 9121(a) and 9102 to mean that the expected proceeds of a survival action must be valued at the decedent's date of death and con-

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proposed allocation must be attached as Exhibit "E"); Leh.R.C.P. 2206(f)(8)(where the Petition for Allocation of Proceeds must include as an exhibit a written response from the Office of Chief Counsel on behalf of the Department of Revenue approving or disapproving the proposed allocation of proceeds between wrongful death and survival actions). Telephone Interview by Stephanie E. Sanderson with J. Paul Dibert, the Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue (Dec. 12, 2003)(Mr. Dibert named the following counties whose courts require the Pennsylvania Department of Revenue's consent to the allocation of the proceeds: Berks, Lackawanna, Lancaster, Northhampton, Pike, Westmoreland, Wyoming, and York).

[16] Mary Jane Barrett, Probate and Estates Practice Tips for Litigators: Wrongful Death and Survival Actions, Compromises Re Minors and Incapacitated Persons, Select Estate Administration Issues, and Estate, Inheritance and Income Taxes, Pennsylvania Bar Institute, 2002, at 93.

[17] Telephone Interview by Stephanie E. Sanderson with J. Paul Dibert, the Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue (Dec. 12, 2003)(Mr. Dibert named the following counties whose courts, in practice, require the consent of the Pennsylvania Department of Revenue before allocation of the proceeds: Dauphin, Lebanon, Montgomery, and Schuykill))(Mr. Dibert also named the following counties whose courts do not require consent from the Pennsylvania Department of Revenue: Allegheny, Chester, and Delaware). See also Barrett, surpa note 16, at 93.

[18] Telephone Interview by Stephanie E. Sanderson with J. Paul Dibert, the Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue (Dec. 12, 2003).

[19] Telephone Interview by Stephanie E. Sanderson with J. Paul Dibert, the Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue (Dec. 12, 2003).

[20] *See* PA. STAT. ANN. tit. 72, §9121(a) (West 2003); *Leonard Pearlstein Estate*, 23 Fiduc. Rep. 2d 301 (O.C. Div. Montg. 2003).

cerned itself with how to determine the date of death value. The estate's expert witness testified that by using factors that were known as of the date of death, with a reasonable degree of professional certainty, the expected proceeds could be valued at the date of death. The following factors were used in the expert's analysis:

a. Liability was questionable and disputed;

b. The decedent's income tax returns showed income of seven to eight million dollars – a significant portion of the income was from an S Corporation;

c. Venue was in Philadelphia;

d. The identity of the attorney who would represent the Estate was unknown, but was expected to be above average because of the size of the estate and because the executor was knowledgeable;

e. Results of discovery, not being known, were neither favorable nor unfavorable;

f. Delay damages were not considered;

g. There were close questions of law and evidence that could greatly affect the damage outcome of the case;

h. The identity of the judge was unknown; and

i. The composition of the jury was unknown.

The court held that the method of valuation utilized by the estate's expert witness was correct and, in doing so, adopted a new valuation method for the date of death value of survival action proceeds. However, there is speculation that the *Pearlstein* decision will be strictly construed to apply **only** in Montgomery County. Therefore, it is important to note that the Pennsylvania Department of Revenue might not acquiesce to such valuation methodology in other counties.

V. REPORTING REQUIREMENTS

Under Section 9136(a)(1) of the Pennsylvania Inheritance and Estate Tax Act, a personal representative is required to file a return concerning "property of the decedent administered by him and additional property which is or <u>may be subject to</u> inheritance tax, of which he shall have or acquire knowledge." (emphasis added.) Thus, before litigation commences, it may be advantageous for the practitioner to engage the services of a valuation expert to determine the value of and allocation between wrongful death and survival actions of any potential claims. This approach would enable an estimate to be included in the Pennsylvania inheritance tax return, thereby avoiding the potential need for the estate to seek a refund of monies at a later point in time.

Another important point is that litigation proceeds do not earn interest.[21] However, interest on unpaid tax will start thirty days after the estate receives the proceeds.[22]

In addition, unlike under federal law, the Pennsylvania inheritance tax does not provide a definite statute of limitations. Under Title 72, Section 9137:

> The department shall have supervision over, and make or cause to be made, fair and conscionable appraisements of property the transfer of which is subject to tax under this article. The appraisement, unless suspended until audit, shall be made within six months after the return has been filed and, if not so made, shall be made within an additional period as the court, upon application of any party in interest, including the personal representative, shall fix.

The Pennsylvania Commonwealth Court, however, held that the Pennsylvania Department of Revenue could not assess tax eight and a half years after the relevant inheritance tax return was filed because the department had not sought a court appointed new time period for assessment, and because of the equitable defense of latches.[23]

VI. CONCLUSION

For Pennsylvania inheritance tax purposes, only survival action proceeds are taxable. The courts tend to allocate the proceeds of wrongful death and survival actions based upon the facts of the case and the evidence presented, with some counties requiring notice to or approval by the Pennsylvania Department of Revenue of the allocation, or both. The survival action proceeds received by the estate are valued as of the date of death of the decedent and the *Pearlstein* court has adopted definitive factors to determine this amount. However, the Pennsylvania Department of Revenue may choose to narrowly construe the *Pearlstein* valuation method to apply only to Montgomery County estates.

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21 PA. STAT. ANN. tit. 72, § 9143 (West 2003).

22 Barrett, *supra* note 16, at 26.

23 *Estate of Leitham*, 726 A.2d 1116 (Pa. Commw. Ct. 1999)

Interplay Between Final Regulations' Definition of "Income" under Sec. 643(b) and the Pennsylvania Principal and Income Act of 2002

By ROSE KENNEDY
SCHNADER HARRISON SEGAL & LEWIS

The Internal Revenue Service ("I.R.S.") has issued final regulations revising the definition of "income" under the Internal Revenue Code ("I.R.C.") §643(b) for fiduciary income tax purposes for tax years ending after January 2, 2004. This article discusses the highlights of the final regulations and the implications of the final regulations as they are applied to trusts governed by Pennsylvania's Principal and Income Act.

The New Final Regulations

The final regulations reflect recent changes in state laws defining trust accounting income, enacted in response to both the significant decline in dividend yields and the changes in investment philosophies in recent years. In addition, the final regulations accommodate the administration of trusts under the prudent investor standard adopted by many state legislatures, including Pennsylvania.

"Income" under §643(b) is defined as the amount of income "determined under the terms of the governing instrument and applicable local law." Treas. Reg. §1.643(b)-1. However, trust provisions that depart fundamentally from traditional principles of income and principal accounting will not be recognized. Otherwise, the final regulations recognize computations of income that comply with the governing state statute, but only if such statute provides for a "reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation" as discussed below. *Id.*

Power to Adjust

One such "reasonable apportionment" between income and principal recognized by the final regulations is a trustee's adjustment between principal and income that treats the income and remainder beneficiaries impartially as long as the apportionment is allowed under both the governing instrument and an applicable state statute. Pennsylvania's 2002 enactment of the Principal and Income Act has afforded trustees of Pennsylvania trusts the power to adjust between income and principal as well as the option of converting the trust to a unitrust. Specifically, 20 Pa. C.S. §8104(b) requires a trustee to consider a number of factors before making such an adjustment such as the nature, purpose and expected duration of the trust, the intent of the settlor, the circumstances of the beneficiaries, the economic conditions, the anticipated tax consequences of the adjustment and other factors. *See* 20 Pa. C.S. §8104(b). Once the power to adjust is implemented, a trustee can allocate all or some of the capital gains to income.

Conversion to a Unitrust

The final regulations recognize a trustee's conversion to a unitrust if permitted by the governing instrument and state statute but limits a "reasonable" unitrust amount to a range of three to five percent of the net fair market value of the trust assets. Pennsylvania's Principal and Income Act provides for conversion to a unitrust amount of four percent of the net fair market value of the trust assets and is therefore squarely within the range prescribed by the final regulations. *See* 20 Pa. C.S. §8105(d)(3).

As for what constitutes a permissible calculation of the fair market value of the trust assets for a unitrust, the final regulations require a redetermination of the fair market value, either annually on a particular date or on a multiple-year basis, using an average of the trust's assets

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Impact of Inheritance Tax, continued

Lastly, for reporting purposes, the practitioner should consider employing the services of a valuation expert to determine an estimate of the value of the survival action for death tax return purposes, assuming the litigation has not been disposed of prior to the filing deadlines.

Interplay, continued

over the multiple-year period. Treas. Reg. §1.643(b)-1. Pennsylvania law requires the latter approach, i.e., redetermination of the fair market value using the average value of the trust's assets over the preceding three years, or over the number of years the trust has been in existence if less. *See id.*

Switching from One Method of "Reasonable Apportionment" to Another

The final regulations provide that, should a trustee switch from one method of determining income authorized by state statute to another, such a change would constitute neither a gift from the grantor nor a recognition event for purposes of I.R.C. §1001. Treas. Reg. §1.643(b)-1. However, the final regulations do not provide this favorable treatment when a trustee switches to a method that is valid under state law but not specifically authorized by state statute, for example, a switch pursuant to a court decision. *Id.* Pennsylvania's Principal and Income Act is silent on this issue.

Impact of Final Regulations

Because the final regulations bless Pennsylvania's statutory power to adjust and its unitrust conversion provisions, Pennsylvania trusts that apply either of these rules will continue to qualify for favorable tax treatment under several laws that are dependent on the respective amounts allocable to income and principal of a given trust. For example:

- The marital gift and estate tax deductions' requirement that all income be paid to a spouse or surviving spouse will be met if the trustee meets all of the requirements for determining income under local law. *See* Treas. Reg. §§20.2056(b)-5(a)(1), 25.2523(e)-1(f)(1).

- Pooled income funds, which are split-interest charitable trusts maintained by the charitable remainderman with which the participants exchange their contribution for a pro-rata share of the trust income, may define income to include capital gains if capital gains are allocated to income pursuant to a trustee's exercise of a reallocation permitted under applicable local law. However, the final regulations disallow a charitable deduction in a pooled income fund for capital gains if the income beneficiary's rights to income may be satisfied by a unitrust amount. *See* Treas. Reg. §1.642(c)-5(a)(5)(i).

- A grandfathered trust for federal generation skipping transfer tax purposes will retain its exempt status even if it is converted to a unitrust pursuant to a state statute or if state law permits the trustees to adjust between principal and income. *See* Treas. Reg. §26.2601-1(b)(4)(i)(D)(2).

- Capital gains are included in distributable net income if, pursuant to the governing instrument and applicable state law, they are consistently allocated to income, treated like income for accounting purposes, or used to determine the amount to be distributed to a beneficiary. *See* Treas. Reg. §1.643(a)-3(b).

However, the final regulations do not permit the shifting of principal to income when a charitable deduction is based on the amount of the principal in a charitable trust. Therefore, the final regulations prohibit application of the unitrust concept for computing the income of a charitable remainder unitrust. *See* Treas. Reg. §1.643(a)-1(i)(b)(3).

Conclusion

Since Pennsylvania's Principal and Income Act includes the power to adjust as well as the unitrust option, and since both options have been recognized by the final regulations, trustees and beneficiaries of existing trusts are undoubtedly in a much better position than their counterparts in states whose laws maintain the traditional rigid distinctions between income and principal. The I.R.S.'s issuance of the final regulations can be interpreted as a signal of the Service's approval of these new practical state laws that redefine income. The issuance of the final regulations may also encourage other states to follow Pennsylvania and other states in their enactments of such new laws.

JOIN A COMMITTEE

The Section's Committees depend on the steady flow of people, energy and ideas. Join one! Fill in the form below and send it to the Section Chair:

Marilyn C. Sanborne, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215-864-8307
sanborne@ballardspahr.com

Name:

Address:

E-mail:

Committee Preferences:

First:
Second:
Third:

Common Law Marriage in the Commonwealth

By ELIZABETH F. WARNER
ASTOR, WEISS, KAPLAN & MANDEL, LLP

Pennsylvania's recognition of common law marriage may be ending. The Pennsylvania Supreme Court questioned the validity of the common-law marriage doctrine in 1998, but did not make a ruling because the issue was not raised by the appellant. *Staudenmayer v. Staudenmayer*, 552 Pa. 253, 261 & n.4, 714 A.2d 1016, 1020-21 & n.4 (Pa. 1998). In September, 2003, the Commonwealth Court declared that it would no longer recognize common law marriages. *PNC Bank Corp. v. Workers' Compensation Appeal Board,* 831 A.2d 1269, 1282-83 (Pa. Commw. 2003). State legislators have introduced bills in the current legislative session to end common law marriage.

Pennsylvania is one of only eleven states and the District of Columbia that continue to recognize common law marriages. *Staudenmayer,* 552 Pa. at 261 n.3, 714 A.2d at 1020 n. 3, 23 Pa. Cons. Stat. §1103. A common-law marriage "can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that." 714 A.2d at 1020. These *verba in praesenti* need not be any particular words or form, but must express an intent to enter into the marriage relationship at the time that the words are spoken and not at some future or past time.

Where testimony is not available on the words of present intent, there is a rebuttable presumption in favor of a common law marriage if clear and convincing evidence presented of "(1) constant cohabitation; and, (2) a reputation of marriage which is not partial or divided but is broad and general'...." *Id*. This usually occurs when one of the parties to the alleged common law marriage is deceased and the Dead Man's Act, 42 Pa. Cons. Stat. §5930, prevents testimony by the surviving party about the *verba in praesenti*. Where both parties are available, there must be proof of the words of present intent. Evidence of cohabitation and reputation may only be used if the court is presented with contradictory testimony on the *verba in praesenti* and must make a credibility determination.

In the context of a claim for workers' compensation, the Commonwealth Court declared in September, 2003 that it would no longer recognize common law marriages and "henceforth, this court will recognize as valid only those Pennsylvania marriages entered into pursuant to the Marriage Law procedures." 831 A.2d 1269, 1282. They applied their decision on a purely prospective basis.[1]

The applicability and extent of the Commonwealth Court's decision is unclear. The decision did not address the issue of persons who entered into a common law marriage prior to the date of the court's decision. The case was not appealed to the Supreme Court and the Supreme Court has not ruled on the continued viability of the doctrine. The Superior Court is not bound by the decisions of the Commonwealth Court and can continue to apply the common-law marriage doctrine.

In response to the Commonwealth Court's decision, bills have been introduced in the current legislative session to terminate common law marriage. House Bill 2165 would abolish common law marriage, but recognize common law marriages entered into prior to the effective date of the legislation and common law marriages validly entered into in another state. Senate Bill 985, as amended, invalidates common law marriages contracted prior to January 1, 2005.[2] Representative Birmelin proposed amendments to House Bill 345 that would have abolished common law marriage. Bill 345 was passed by the House on March 15,

[1] The court found that the parties before it had in fact proved the existence of a common law marriage and the spouse was entitled to benefits under workers' compensation.

[2] The House Bill has not been reported out of committee. The Senate Bill was amended and reported out of committee for first consideration on March 30, 2004.

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Common Law Marriage, continued

2004, without these amendments.[3]

A common law spouse has the same rights as any other married person, including inheritance, insurance and governmental benefits. There is a common misbelief that if a couple is together more than seven years, then they have a common law marriage. Much of the public is not aware of the requirement for the words of present intent. Proponents of abolishing common law marriage want to eliminate the confusion by requiring a formal procedure for all marriages. Most practitioners believe that common law marriages entered into prior to the effective date of any legislation should be recognized. If common law marriage is abolished by court decision or statute, then persons at all income and social levels must be informed through widespread publicity of the change and the need to have a formal marriage ceremony.

[3] The amendments to House Bill 345 on the adoption of special needs children also would have prevented domestic partnership benefits for same and opposite sex partners and adoption by same sex couples. In reponse to substantial opposition, the amendments were withdrawn. Pennsylvania law already limits marriage to a man and a woman. 23 Pa. Cons. Stat. §§1102, 1704.

But I Never Handled an Estate Like this Before: How You Can Quickly Transfer Title in a House "Rich", Cash Poor Estate Case

By JUDY F. BERKMAN
MANAGING ATTORNEY
REGIONAL HOUSING LEGAL SERVICES

When I was handling housing cases at Community Legal Services in the 1970's, my probate lawyer friends at large firms never had answers for my questions about small unresolved estates, where the house was the only asset and the client had no money to open an estate. Over the years, I picked up hints from title insurance agents and their lawyers, as well as guidance from many in the estates bar and the staff at the office of the Register of Wills. Now there is a collaborative Tangled Title program with a body of practical advice for estates lawyers who handle these estates cases as *pro bono* matters, and there are funds to pay the costs to resolve the cases.

For example, your *pro bono* client wants title in her name. The record title to the house is in the client's mother's name. The mother died intestate many years ago and was survived by three children. One child died at a young age without ever marrying or having any children. The second child died two years ago. His children are adults and are cooperative. They would be happy to sign over the deed to the client. The third child is your client and she wants legal assistance to put her name on the deed to qualify for a repair program and make an agreement to pay back taxes.

Unfortunately, this is a typical case. Many homes in the City are occupied by those who do not have title in their names, but have the right to title through inheritance. The only obstacle is resolution of a simple estate. Usually a client living in such an "heir property" waits to seek advice until a problem arises and compels action. Lawyers are needed to handle these simple cases.

I call these title problems "Tangled Title." When these title problems occur in disinvested Philadelphia neighborhoods, occupied homes become vacant and abandoned, because the title problem prevents the occupant from selling, or getting a grant or loan to make necessary repairs, or even reaching a payment agreement to pay real estate taxes. The Tangled Title program[1] can help resolve these title problems for eligible clients. The program's definition of "Tangled Title" is broad enough to include a straightforward estate without any "tangles" at all. Most of the cases are very easy, where there is only one heir or where the other heirs are cooperative.

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Handling a Tangled Title, continued

To help resolve the cases, the Tangled Title Fund pays for costs up to $2500 for income-eligible clients to clear title to their homes. Once a volunteer attorney takes a Tangled Title case, the first step is to meet with the client and apply to the Tangled Title Fund. The Tangled Title Advisory Committee then screens the application for:

- Income (the client's *household* income must not exceed 187.5% of poverty);

- House (the house must pass muster – both the structure and the extent of encumbrances);

- Case (there must be a reasonable expectation that the case can be resolved).

The Advisory Committee also helps with strategies to resolve the cases cost-effectively and without unnecessary legal work. In estate cases, since title passes at death, the Tangled Title Advisory Committee provides help with advice about the ability to transfer title without opening estates, since title companies will permit the recording of a deed from the heirs to the client in certain cases. An Inheritance Tax return is also needed. Mentors, including title company attorneys, are available to consult on the best approach for any aspect of a case and even prepare the deed. And, at some firms, estate lawyers team up with real estate lawyers to handle cases so they can share expertise.

Eligible costs paid by the Tangled Title Fund include preliminary investigation expenses, costs to resolve the case, and costs to convey title to the client. The Fund can pay a few dollars for a death certificate, as well as routine costs like title searches, fees and costs to open estates if necessary, and inheritance tax (both interest and penalties). Deed recording, transfer tax, and title insurance costs are also covered. And if a client's costs are less than the maximum grant of $2500, the Fund may, if funds are available, use the difference to make a down-payment on the principal (only) portion of arrears of real estate tax or water/sewer charges to help the client reach affordable payment agreements. Checks can be issued within a short time of the disbursement request.

Tangled Title clients with "heir property" cases need your skills. Please volunteer with Philadelphia VIP or the SeniorLAW Center to take a Tangled Title estate case. You will be helping to preserve stable neighborhoods and strengthen the City's tax base, and your client will be very grateful to be able to stay "home." And a reminder -- the client will benefit from advice to draft a Will when title is transferred.

[1] Funded by the City of Philadelphia's Office of Housing and Community Development, the Tangled Title program is a vacancy prevention program, a collaborative legal services effort which includes Philadelphia VIP, the SeniorLAW Center, Community Legal Services, Philadelphia Legal Assistance, the Energy Coordinating Agency, and Regional Housing Legal Services. It is now administered by CLS and VIP.

TAX UPDATE

By JOAN AGRAN
PEPPER HAMILTON, LLP

I. TREASURY REGULATIONS

Proposed Regs Issued On Taxation Of Charitable Remainder Trust Distributions

Proposed regulations have been issued with new detailed ordering rules under Code Sec. 664(b) for characterizing distributions from charitable remainder trusts. The proposed regulations (Section 1.664-1(d)(1) is revised and (d)(2) is amended) reflect changes made to the income tax rates by recent legislation, including the favorable rates for capital gains and qualified dividend income. Distributions are taxed first as ordinary income, to the extent of current and undistributed ordinary income, then as capital gains and losses, to the extent of current and undistributed capital gains and losses, and then as other income (e.g., tax-exempt income) and lastly, as trust corpus. Items within each category are assigned to different classes, based on their highest potential income tax rate, and the higher-rate items are taxed first. Generally, these rules apply to tax years ending after November 20, 2003, but certain provisions apply to tax years beginning after December 31, 1998.

IRS Issues Proposed Regs For Electing Alternate Estate Valuation Date

The Treasury has issued

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proposed regulations amending Treas. Reg. Sec. 20.2032-1(b) that would revise the election to value a decedent's estate on the alternate valuation date under Code Sec. 2032. The proposed regulations clarify the fact that the election may be made only if it results in a reduction both in the value of the gross estate and in the sum of the Federal estate tax and GST tax liability. The proposed regulations also clarify the rules on the timing of the election and requests for extensions. Under the proposed rules, an estate may elect the alternate valuation date on its estate tax return, whether or not it is timely filed, so long as the return is filed no more than one year after its due date, including extensions. In addition, estates that fail to make the alternate valuation election on the last estate tax return filed before the due date or the first return filed after the due date may request an extension of time to make the election under Treas. Reg. Sec. 301.9100-1 and Treas. Reg. Sec. 301.9100-3. However, the extension will be granted only if submitted to the Service within one year after the due date of the return (including any filing extensions actually granted). The proposed regulations also provide guidance on making protective elections under Code Sec. 2032.

IRS Issues Final Regs Revising Definition Of Trust Income

Final regulations have been issued revising the definition of income under Code Sec. 643(b) to reflect changes in the definition of trust accounting income under state laws. Effective January 2, 2004, the final regulations adopt, with certain modifications, proposed regulations issued in 2001. The final regulations also clarify the situations in which capital gains are included in distributable net income under Code Sec. 643(a)(3). Conforming amendments are made to a variety of regulations affecting ordinary trusts, pooled income funds, charitable remainder trusts, trusts that qualify for the gift and estate tax marital deduction, and trusts that are exempt from generation-skipping transfer tax.

II. COURT DECISIONS

Estates Not Required To Include Partnership Assets In Gross Estate.

In *Estate of Eugene E. Stone, III, et al. v. Commissioner,* T.C. Memo. 2003-309, decedent died in 1997, owning both general and limited partnership interests in five family limited partnerships. His wife died the following year. The couple, in conjunction with their four children, had formed five partnerships to hold business interests of decedent and his wife. Decedent's estate tax return reported date-of-death values for his interests in the five partnerships, claiming a 43% combined discount. Wife's estate filed an estate tax return and reported, in addition to her separate property, property held by a QTIP trust including partnership interests. The Service issued deficiency notices to both estates, increasing the value of the partnership interests and also the partnership interest held by the trust, claiming that (i) Code Sec. 2036(a)(1) applied to include the value of assets the couple transferred to the partnerships rather than the value of interests in the partnerships in their gross estate, and (ii) Code Sec. 2044 would apply at wife's death to cause inclusion of the interests in her estate.

The Tax Court noted that because the decedent and his wife made transfers of property to the partnerships in exchange for interests in the partnerships that they owned at death, each made transfers of property under Code Sec. 2036(a). The court found, however, that (i) the transfers to the partnerships were bona fide and arms-length, as each family member was represented during the negotiations and had input into the structure and operation of the partnerships, (ii) the partnerships had economic substance and operated as joint enterprises for profit, and (iii) the coupled retained sufficient assets outside of the partnerships to maintain their lifestyle. On this basis, the court concluded that none of the assets owned by the five partnerships were includable under Code Sec. 2036(a)(1) in either decedent's or his wife's gross estate. Finally, the court found that because the Service's 2036(a)(1) argument was rejected, the court wouldn't address the Code Sec. 2044 argument.

GST Tax Chargeable To Charitable Bequest But Not Estate Tax

In *Estate of Mildred Green, et al. v. Commissioner,* T.C. Memo. 2003-348, decedent, a Missouri resident, died testate in 1997. Her Will provided that a charitable foundation and her grandchildren each receive half of her property after taxes and expenses. The Will directed her personal representative to pay, out of her estate, all transfer, estate and other death taxes other than any GST tax. The Will further directed that any GST tax imposed on a direct skip be paid out of the estate and not charged to the property constituting the direct skip. The estate claimed a charitable deduction for the bequest to the foundation, reported the property transferred in trust to the grandchildren as a direct skip, and allocated and charged all federal and

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state estate taxes to the portion of the estate passing to the grandchildren. The Service challenged the amount of the charitable deduction and ruled that the GST tax should be allocated against the bequest to the foundation.

The Tax Court concluded that, because of the specific wording of decedent's Will, the GST tax was chargeable to the charitable bequest. However, the Will did not clearly express who should bear the burden of the remaining federal and state estate taxes. The court, relying on Missouri state law and applying the doctrine of equitable apportionment, held that no portion of the other federal and state estate taxes were allocable to the charitable bequest.

Marital Deduction Reduced by Estate Tax Paid By Revocable Trust

In *Estate of Robert H. Lurie, et al. v. Commissioner,* T.C. Memo. 2004-19, decedent, prior to his death, exercised powers of appointment over a series of trusts to create sixteen new trusts and funded them with the existing trusts' assets. In addition, he created a revocable trust that poured over into a marital trust on his death. The revocable trust provided that if the assets in the residue of the probate estate were insufficient to pay federal estate tax and legal costs, the revocable trust was to pay the federal estate tax and legal costs from property that would otherwise pass to his surviving spouse. His Will and the new trusts were silent as to the source of payment of federal estate tax and legal costs if the assets in the residue of the probate estate were insufficient to pay the estate tax and costs. The estate claimed a marital deduction and other deductions and did not include the value of the sixteen new trusts. The Service later determined that the values of the new trusts were includable in decedent's gross estate and that the marital deduction was reduced by the tax payable from the property otherwise passing to the spouse. The estate did not refute that the values of the new trusts were properly includable in the gross estate.

The Tax Court concluded that the estate taxes were payable out of property in the revocable trust that would otherwise pass to the spouse, and not from property in the sixteen new trusts. The court based its decision on the fact that the revocable trust established decedent's intent and that under applicable state (Illinois) law it may be considered when the Will is silent. The court concluded that equitable apportionment of the estate taxes among the trusts was inappropriate, as the revocable trust clearly provided for payment of the taxes.

No Valuation Discount For Potential Income Tax On Distribution From Retirement Plans

In *Estate of Louis R. Smith v. United States,* (No. H-02-2046) (USDC SD Texas), decedent's estate filed an estate tax return and reported the value of two retirement accounts. The estate subsequently filed a claim for a refund, claiming that the executor should have applied a 30 percent discount to the accounts for the income taxes due on distribution. The IRS disallowed the claim, and the estate sued. The District Court, noting that Code Sec. 691(c) allows the taxpayer an offsetting income tax deduction for the estate tax attributable to an asset, concluded that the fair market value of the accounts was properly reported in the initial return and granted the government summary judgment.

Estate Includes Assets Omitted from Return; Fraud Penalty Affirmed

In *Estate of Emanuel Trompeter, et al. v. Commissioner,* (T.C. Memo. 2004-27), decedent died, survived by his wife and two children. The children, who served as co-executors of his estate, reported a $26 million gross estate on the estate tax return. The Service determined that the estate failed to properly value certain of decedent's assets, including preferred stock, and failed to report $14 million in other assets.

The Tax Court held that (i) the estate fraudulently undervalued decedent's assets, failed to report $4.5 million in additional assets, and claimed a $1.5 million erroneous deduction for the alleged settlement of a claim, and (ii) the estate was subject to a 75% penalty for fraud under Code Sec. 6663. *Estate of Emanuel Trompeter v. Commissioner,* T.C. Memo. 1998-35.

The Ninth Circuit vacated the decision and remanded, instructing the Tax Court to provide findings for omitted assets, including value, to clarify its method for its present-value calculations of stock; and to determine, after making the requisite findings, if it was appropriate to revisit the decision to impose the fraud penalty. *Estate of Emanuel Trompeter, et al. v. Commissioner,* No. 99-70905 (9th Cir. Jan. 30, 2002).

The Tax Court (i) provided specific information as to the existence and fair market value of $4.5 million of assets omitted from

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the estate, (ii) clarified the method the court used in determining the value of the omitted assets, and (iii) affirmed its imposition of the fraud penalty under Code Sec. 6663, stating that the co-executors' willful failure to disclose all assets, plus the intentional undervaluation of certain reported assets constituted clear and convincing evidence of fraud.

FLP Assets Included in Decedent's Gross Estate Without Discount

In *Estate of Abraham v. Comm'r,* TC Memo. 2004-38, the children, legal guardians, and representatives of decedent, who had been placed under a guardianship, agreed to a stipulation to establish an estate plan for decedent. The agreement provided, in part, that a family limited partnership be set up, of which decedent was the general and a limited partner, with a son receiving a 30 percent interest for settlement of his claims against the estate. Two more partnerships were set up for the daughters, who became limited partners for a payment of $160,000. For the two years from the creation of the partnerships to her death, decedent, through her guardians, made gifts of limited partnership interests to the children and their families.

The estate reported decedent's partnership interests on the estate tax return and the Service issued a deficiency notice, determining that 70 percent of the fair market value of the assets in the son's partnership and 100 percent of the assets in the daughters' partnerships were includable in decedent's taxable estate under Code Sec. 2036.

The Tax Court included that the value of the properties was includable in the decedent's gross estate under Code Sec. 2036(a), because the decedent continued to enjoy the right to support and maintenance from all the income of the partnerships. This was based on the fact that the probate court decree that authorized creation of the partnerships stated that the decedent's needs for support were contemplated first from the partnership income, and only thereafter, could the children receive their proportionate shares of income from the partnerships. The decedent's support needs were actually treated as an obligation of the partnerships.

III. IRS REVENUE RULINGS, REVENUE PROCEDURES AND NOTICES

No Deductions For Contributions Of Trust Principal Qualifying As Qualified Conservation Contributions

In *Revenue Ruling 2003-123*, the Service, amplifying Rev. Rul. 68-667, clarified that a trust is not allowed either a charitable deduction under Code Sec. 642(c) or a distribution deduction under Code Sec. 661(a)(2) in connection with a contribution to charity of trust principal even though the contribution meets the requirements of a qualified conservation contribution under Code Sec. 170(h). Because the contribution is made from trust principal and not from the gross income of the trust, the trust is not allowed a charitable deduction under Code Sec. 642(c). Further, no deduction is allowed under Code Sec. 661(a)(2) because, under Treas. Reg. Sec. 1.663(a)-2, amounts are deductible under this section only as provided under Code Sec. 642(c).

IV. IRS PRIVATE LETTER RULINGS AND TECHNICAL ADVICE MEMORANDA

Undistributed Earnings Not Excluded Property For Alternate Valuation Purposes.

In *TAM 200343002*, decedent died the sole owner of the stock of a corporation. The estate elected on the estate tax return under Code Sec. 2032(a) to value the assets in the estate as of six months after the individual's death. The appraiser determined the stock value and adjusted the value for a premium for control and a marketability discount. At the estate's request, the appraiser then adjusted the value to reflect the election of alternate valuation under Code Sec. 2032(a) and Treas. Reg. Sec. 20.2032-1(d)(4) and treated the corporation's post-death earnings as excluded property under Reg. section 20.2032-1(d)(4).

The Service noted that for corporate earnings accumulated during the alternate valuation period to be considered excluded property, they must be declared as a dividend or distributed during the alternate valuation period; for property to be excluded property, it must have been separated from the asset generating the income. On this basis the Ser-vice found that the corporate earnings that were not declared by the corporation and distributed to the estate during the alternate valuation period were not excluded property under Reg. Sec. 20.2032-1(d).

Basis of Real Estate Determined.

In *PLR 200340019*, the Service determined that the basis of real estate an individual acquired from her mother's estate through the exercise of an option was equal to the sum of the basis of the option

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and the actual option price paid. Mother's Will gave an individual the right to purchase her home for a sum certain. The Service found that the right to purchase the home was a valuable option to purchase the home for an amount below its fair market value. Based on Rev. Rul. 67-96, the Service concluded that the option was property that acquired a basis under Code Sec. 1014(a), measured by the difference between the value of the home for federal estate tax purposes and the option price. The individual's basis in the property was therefore the sum of the basis of the option and the actual option price paid.

Proposed Merger Not Substantial Modification For Code Section 2703

In *PLR 200348006*, the Service ruled that the proposed merger of a limited partnership into a limited liability company with member units being subject to an LLC agreement did not cause loss of the effective date protection from Code Sec. 2703 for the partnership agreement transfer restrictions, because the merger would not constitute a "substantial modification of right or restriction" under Treas. Reg. Sec. 25.2703-1(c). The Service stated that the terms of the partnership agreement regarding allocations, distributions, transfers of units, and other rights and restrictions were virtually identical to those of the LLC agreement. Also, no additional rights would be conferred and no additional restrictions would be imposed as a result of the merger.

Separate IRAs Created for Beneficiaries by Trustee-to-Trustee Transfers

In *PLR 200349009*, the decedent died before reaching her required beginning date, survived by two daughters. The decedent's revocable trust was the beneficiary of her IRA and provided for distribution of one-half of the trust assets to each of the decedent's two daughters. The share for the older daughter was to be paid outright, and the share for the younger daughter was to be held in a subtrust for the younger daughter's benefit. The Service stated that after the decedent's death, the trustee could divide the IRA into two separate IRAs by a trustee-to-trustee transfer of the IRAs to create separate IRAs for each of the two daughters, provided that the transfers would not affect the timing or amount of minimum required distributions. However, because the IRA passed through a trust, for purposes of the required minimum distributions, both successor IRAs would be distributed over the life expectancy of the older daughter.

Grantor Retains Control Over Trust While Spouse's Exemption Retained Through Power of Appointment

In *PLR 200403094* a grantor created and funded a trust retaining the right to amend or revoke the trust and to withdraw income or principal. Certain assets held in the trust were subject to the grantor's spouse's testamentary general power of appointment and would therefore be included in the spouse's gross estate for federal estate tax purposes. The grantor's spouse proposed to exercise the power to appoint to her estate sufficient assets to take full advantage of her estate tax exemption, and then to use those assets to create a nonmarital family trust.

On the basis of these facts, the Service ruled (i) if the spouse dies during the grantor's lifetime and exercises the power of appointment, the grantor will be treated as making a gift to the spouse that qualifies for the federal gift tax marital deduction, to the extent of the assets appointed by the spouse, (ii) if the surviving spouse predeceases the grantor, the trust assets to which the power of appointment relates will be included in the surviving spouse's gross estate for estate tax purposes, (iii) any assets that originated in the trust and that pass to or from the family trust established under the surviving spouse's Will do not constitute a transfer from the grantor to the other beneficiaries of that trust, and (iv) the family trust assets that originated in the trust will not be included in the grantor's gross estate.

Disclaimer Of LLC Interest Qualified

In *PLR 200406038*, The Service ruled that the proposed disclaimer by an individual of an interest in an LLC, if timely, together with her resignation as co-manager of the LLC, will be a qualified disclaimer under section 2518, even though she previously voted on an amendment to the LLC agreement. Decedent died intestate and her entire estate, including her interest in an LLC, passed to her mother under state intestacy laws. The mother proposed to disclaim the entire interest in the LLC passing to her. The Service concluded that mother's execution of the amendment to the agreement in her capacity as co-manager of the LLC and co-personal representative of daughter's estate would not be considered the acceptance of benefits of the disclaimed interest.

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Life Insurance Held by Irrevocable Trust Not Included in Trustee's Estate

In *PLR 200404013*, the Service ruled that the proceeds of a second-to-die life insurance policy were not included in the gross estate of an insured trustee, because the trustee held no incidents of ownership over the policy. The grantor's spouse was a co-trustee with a corporate trustee, and the trustees together had absolute discretion to distribute income and corpus to the grantor's descendants for care, health, education, maintenance, support, purchase or improvement of a home, establishment of a professional practice, or acquisition of a business. The trust bought a joint and survivor life insurance policy on the lives of the grantor and his spouse. The spouse, as a trustee, renounced her right, as trustee, to change the beneficiary of the policy, revoke any change of beneficiary, assign the policy, or revoke a assignment of the policy. She also renounced the right to make contributions to the trust and to appoint a successor adviser. On the basis of these fact, the Service ruled that the spouse, as trustee, had no incidents of ownership in the policy and that the purchase of the insurance policy was not a gift by the grantor or his spouse and that no portion of the proceeds of the policy would be included in either of their gross estates.

Voting And Nonvoting Stock Not Treated As Different Classes Of Stock In Recapitalization

In *PLR 200407006*, the Service ruled that the creation of both voting and nonvoting stock in a corporate recapitalization did not create senior stock under Code Sec. 2701 because the two classes of stock differed only in voting rights, which prevented viewing either class as senior to the other for purposes of the anti-estate freeze rules of Code Sec. 2701, nor did it create a second class of stock for S Corporation purposes under section 1361(b)(1)(D). In addition, the Service ruled that the merger of two corporations and the resulting survival of one of two identical buy-sell agreements made only a *de minimis* change in the effective agreements and thus did not eliminate the effective date protection afforded the buy-sell agreements under Code Sec. 2703.

Duty of Consistency Requires Inclusion Of Asset In Wife's Estate

In *TAM 200407018*, a husband died, survived by his wife and two sons. Under Section IV of the husband's will, the wife was bequeathed a life estate in certain property including "all oil paintings". Under Section V of the Will, the husband also gave his wife a life estate and a general power of appointment in his other tangible personal property. A painting was listed as a pastel and not an oil painting and the executors determined that it passed under Section V and a marital deduction was claimed for it. Before the wife's death, it was determined to be an oil painting. The wife's estate claimed that she never had a general power of appointment over it and therefore the marital deduction was incorrect, and the painting wasn't includable in her estate.

Following the reasoning in *Estate of Letts v. Commissioner, 109 T.C. 290 (1997)*, the Service ruled that the duty of consistency binds the wife's estate to the representation made by the husband's estate about the qualification of the painting for the marital deduction as there is sufficient privity between the two estates. The Service concluded that the painting was includable in the wife's estate. The Service noted that for the duty of consistency to apply there must be a representation by the taxpayer, reliance on the representation by the Service and an attempt by the taxpayer after the statute of limitations on assessment has expired to change the representation.

NEWSLETTER ARTICLES

What would you like to see in future issues of the Probate and Trust Law Section Newsletter? The Publications Committee is looking for articles and ideas of interest to the probate bar. Please send any articles or ideas to:

Susan G. Collings, Esquire
Drinker Biddle & Reath, LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA
19103-6996
215-988-2618
e-mail: susan.collings@dbr.com