PHILADELPHIA BAR ASSOCIATION

Probate and Trust Law Section Newsletter

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Report of the Chair

By KATHLEEN A. STEPHENSON
PEPPER HAMILTON LLP

Well, its been a year. I am often struck by the contrast of fast versus slow - of old versus new. In most parts of my life, this past year passed in an orderly day by day, week by week, month by month fashion; in a few other parts, hours seemed to drag into years. With respect to our Probate and Trust Law Section, the year flew by as the Section addressed new issues and reexamined some old ones. Serving as an officer of this section is, to be honest, fun! In the past four years, I was lucky enough to serve with Julia Fisher, Marilyn Sanborne and Mary Jane Barrett, my predecessors, each of whom would qualify as "a hard act to follow."

This year, I was supported by and relied upon fellow officers, Kevin Gilboy, our incoming chair, Margaret Thompson and Robert Friedman. Kevin made sure that concerns of our section were addressed by the Bar Association's Disaster Planning Committee. Margie pulled off one of the better receptions I've been to in a while and Rob made sure that Meeting Notices and Minutes got out on time so that everyone knew where and when they were to be someplace and why. Throughout the year Kevin, Margie and Rob offered thoughtful perceptive advice (and an occasional "are you out of your mind?") and I am grateful to them.

The same is true for the Section's Executive Committee, especially Lindsay C. Foster Johnson, Dorothy F. Luntey, Matthew Rosin and Elizabeth Shevlin, who have completed three year terms as Executive Committee members. Committee chairs also fill a vital role in our Section, and particular thanks are due Jill Fowler for her service as chair of

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Inside this Issue....

What is Elder Law?

By KEELIN S. BARRY, ESQUIRE

Four esteemed Philadelphia Elder Law Practitioners brought unique perspectives to this topic at the September 27, 2007 Elder Law Committee Meeting. Gordon Wase, Jerry Rothkoff, Sue Waserkrug, and Sandy Pfeffer agreed that Elder Law is defined by the population served rather than by the scope of law used in representing clients. But, as each panelist described their own unique Elder Law Practice, it was clear that Elder Law is a broad area of practice with as many permutations as practitioners.

Elder Law became an identifiable area of law in the 1980's, with the advent of Medicaid crisis planning, according to Jerry Rothkoff, whose practice uses a very interesting Life Care Planning model inspired by Timothy Takas' practice in Hendersonville, N.C. Since the 1980's, Elder Law's Life Care Model has evolved to do whatever is needed to improve the lives of the elderly and disabled. Overseeing a real estate transaction, advising on Medicaid eligibility, filling out public benefit applications, administering trusts and wills, and acting as a court-appointed guardian are all within the scope of this elder law practice. For some practitioners, much of the practice is more social work than legal work. For others, the practice is primarily about numbers and money management.

Gordon Wase, a partner in the firm of Wase & Wase, noted that all Elder Law practitioners should be familiar with four basic areas: 1. Estate Planning: Medicaid Planning is a key sub area; 2. Guardianships; 3. Estate Administration; 4. Trust Administration. Gordon's own practice initially addressed two client needs. 1. Preserving assets for loved ones when a person enters a nursing home or anticipates entering a nursing home in the future; 2. Guardian appointments for those who never planned for incapacity and need decision-makers. While some criticize Medicaid planning as wrongfully hiding assets from the tax authorities, in fact this planning can prevent a non-institutionalized spouse from falling into poverty, or allow those of moderate means to pass some wealth on to the next generation.

Sue Wasserkrug is Help Line coordinator at the Senior Law Center. Anyone over 60 years of age can call the Help Line with legal questions. Consumer questions are asked most frequently. Grandparent Custody, Health Care, Medicare, Estate Planning, pensions, housing, and other legal questions are answered by volunteer attorneys, who research answers and then call back from their own offices. Sue's office primarily trains, coordinates and supervises the volunteer attorneys, but also gets involved in researching difficult issues, monitoring frequently asked questions, and other aspects of running the Help Line.

Sandy Pfeffer, Chief Counsel for Philadelphia Corporation for Aging (PCA), doesn't represent the

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Report of the Chair, continued

the Tax Committee and Nina Stryker (our newly elected Secretary of the Section) for her service as chair of the Rules and Practice Committee. Roberta Barsotti is stepping up as the new chair of the Tax Committee and Bernice Koplin as chair of the Rules and Practice Committee, and thanks are due them for their willingness to assume these important roles.

For me, chairing our Section has been one year out of over thirty practicing in this field. I cannot imagine a practice that is as varied and challenging as what we do. To those who think "probate and trust lawyers" are a staid group where nothing new ever happens, I say look again! The focus of what we do in this field –essentially, the orderly transmission of assets from one person to another - may not change over the years or over centuries for that matter. How we do it does, however. Granted, we still look back to the 1536 enactment of the Statute of Uses, but we meld that medieval concept of property law with last week's Private Letter Rulings from the IRS. And we are just now beginning to implement and work out the ways the Pennsylvania Uniform Trust Act will impact on our practices. Kevin intends to make these issues a focus for 2008 and that is an important and necessary project. Whether a new notice requirement or a new ruling from the IRS, we as a Section continue to provide each other with pertinent and necessary information on legal issues arising in our practices. That benefits each of us, benefits our profession and benefits our clients.

I am very proud to be an attorney. I enjoy my practice and find it challenging and rewarding. My final thought as your 2007 chair is that you do as well.

Estate Appraising
An Individual or Team Effort?

By MATTHEW S. WILCOX

The Pension Protection Act of 2006 (PPA), signed by President Bush in August 2006, includes several sections relevant to the art world, specifically to appraisers. Follow-up guidance was later issued in IRS Notice 2006-96. Almost all the new regulations concerning appraisal practice have attracted sharp criticism from some practitioners, and sound praise from others. One point of contention is who can be considered a "qualified appraiser", an individual or a collective appraisal group or corporation. According to the new law, a qualified appraiser is an "individual."

The Art Dealers Association of America (ADAA), the Private Art Dealers Association (PADA), as well as many auction houses commonly provide appraisals that are inherently group efforts. Several appraisers work together to arrive at the stated opinions of value, officially stated by the company or organization. Worried that the PPA instantly disqualified this approach, some auction houses have sent the IRS recommendations to amend the legislation.

On the other hand, citing the federal government-sponsored Appraisal Foundation's own regulations, known as The Uniform Standard for Professional Appraisal Practice (USPAP), the Appraisers Association of America (AAA) supports the new legislation and the language. By USPAP definition, an "organization" simply cannot give an opinion of value.

Along with this thorny issue, other contentious points for appraisal professionals characterize the PPA legislation, such as new educational standards for appraisers, greater appraiser liability, and the increasing dependence upon USPAP. Nevertheless, in a heretofore unregulated profession, most appraisers would agree on the need for written standards to maintain high ethical and professional standards.

Elder Law, continued

elderly. His client is the PCA. PCA is the largest non-government agency Area Agency on Aging (AAA) in the United States. The Older Americans Act of 1965 set up the nation-wide system of AAA's, charged with protecting the interests of older Americans. President Kennedy said: "It is not enough for a great nation to have added new years to life. Our objective must be to add new life to those years."

In Philadelphia, PCA has 650 employees who provide a wide range of services to Philadelphia's seniors. The Office of Chief Counsel represents PCA in Public Benefits Appeals, Guardianship proceedings brought by the Older Adult Protective Services, and other matters. PCA funds three agencies to provide legal services for Philadelphia's low income seniors: Community Legal Services, The Elder Law Clinic at Temple University, and the Senior Law Center.

For additional information, see the National Academy of Elder Law Attorneys' web site: www.naela.org. See Jerry Rothkoff's web site: http://www.rothkofflaw.com/. See PCA's site: www.pcacares.org. See Senior Law Center site: www.seniorlawcenter.org.

Also, join the Elder Law Committee on the last Thursday of every month from 1-2:30 at the Philadelphia Bar Association. Each month, the Committee sponsors a program of interest to Elder Law Practitioners of all levels of experience. Contact co-chairs Rise Newman (risenewman@risenewmanlaw.com) or Keelin Barry (KeelinSBarryEsquire@hotmail.com) for more information.

Practice Tip

How to prevent a capacity challenge when a testator disinherits someone?

• Have client schedule a capacity evaluation with physician immediately.

• Add a paragraph to the will specifying that the testator acted intentionally after careful and long thought.

• Explain the testator's reasons for disinheriting the person.

• Make a videotape of the will signing.

Section 409A of the Internal Revenue Code: Compliance Issues Update Regarding Non-Qualified Deferred Compensation

By MATTHEW I. WHITEHORN
DILWORTH PAXSON LLP

Background

This article focuses on some of the major highlights of the recent guidance regarding non-qualified deferred compensation. Section 409A of the Internal Revenue Code of 1986, as amended (the "Code"), was implemented by the American Jobs Creation Act of 2004 (P.L. 108-357 and is titled "Inclusion in Gross Income of Deferred Compensation Under Non-qualified Deferred Compensation Plans." For purposes of Section 409A, non-qualified deferred compensation can be constituted in many different forms, whether in a traditional plan document, employment agreement or severance program. (*See* "Covered Arrangements," below). Generally, under these types of plans, there is no inclusion of deferred amounts in income until a "substantial risk of forfeiture" lapses, for example, requiring employment on a date certain as a condition to payment.

The genesis of Section 409A ("409A") derives from the Enron problem, where corporate insiders with non-qualified deferred compensation plans received preferential distributions of company assets to the detriment of shareholders and creditors. Final Treasury regulations underlying 409A, which were preceded by several notices as well as proposed regulations, were issued on April 10, 2007. (Treas. Reg. § 1.409A-0, *et seq*.) The final regulations are considered very complex by most practitioners. As a result, lawyers' groups and business lobbyists have successfully requested effective date delays from the Internal Revenue Service ("IRS") and Treasury Department.

Payment Events

In order to prevent abuses, the final regulations limit 409A-compliant permissible payment events to:

- death
- disability (as defined under 409A)
- separation from service
- certain changes in corporate control
- unforeseeable emergency
- a specified time or a fixed schedule that is set at the date of deferral.

Under 409A, payments cannot be triggered based on a company's financial health. In addition, acceleration of payments is generally prohibited, with limited exceptions (for certain tax payments, domestic relations orders, compliance with laws, *de minimis* account balance cashouts, etc.). Extensions or other modifications of the time or form of scheduled payment dates is also generally prohibited, except where such a date is pushed back for five years from the originally scheduled date and the extension election is made at least one year in advance of the originally scheduled date. Furthermore, payments to certain key officers who are "specified employees" of corporations with publicly-traded stock must be delayed for six months following the date of separation from service. In any event, a written plan document is required under 409A that specifies timing and payment provisions that are 409A-compliant.

Covered Arrangements

Section 409A applies not only to traditional nonqualified deferred compensation plans, such as "top hat" plans or rabbi trusts for executives, but can also apply to employment agreements, performance bonus programs, separation pay, discounted equity and stock plans (*e.g.*, discounted options and stock appreciation rights ("SARs")) and a gamut of other compensation-related programs. Deferred compensation, for 409A purposes, exists where there is a binding right to receive compensation for services performed during a given year in a later year.

Importantly, there are several exceptions from 409A coverage. The principal one is known as the "short-term" deferral rule. Basically, if deferred compensation is paid out no later than 2-1/2 months following the year during which it vests (by March 15th in the case of a calendar year employer), the payment is not treated as deferred compensation for 409A purposes.

Another crucial exception from 409A coverage is for certain separa-
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Section 409A, continued

tion pay arrangements. Generally, the "two times/two years" rule states that involuntary separation pay that does not exceed two times the compensation limit for qualified retirement plans, that is, a maximum of $450,000 for 2007 ($460,000 for 2008) and is paid out no later than the end of the second year after termination of employment, is exempt from 409A coverage. Under certain conditions, voluntary "good reason" terminations are treated as involuntary for purposes of invoking the separation pay exemption.

Timing of Deferral Elections

Under 409A, deferral elections must be effectuated no later than the last day of the year preceding the year in which covered services are to be performed. For example, an employee's election to defer compensation for services performed in 2008 must be in place by December 31, 2007. There is a special 30-day election window for newly-eligible participants.

Substantial Risk of Forfeiture

Section 409A does not recognize a covenant of non-competition as constituting a valid substantial risk of forfeiture. 409A also rejects the concept of extension of a vesting date, commonly known as a "rolling risk of forfeiture." Additionally, certain deferred compensation arrangements that were in place on October 3, 2004, are treated as "grandfathered" and are exempt from 409A, unless their terms are materially modified after that date.

Tax Implications of 409A Non-Compliance

When a deferred compensation plan violates 409A, rather onerous negative tax consequences result for the employee:

- the immediate inclusion of the deferred amount in income
- an additional 20% of penalty (*i.e.*, 20% of the amount included in income)
- the imposition of deemed interest.

Effective Date

Under the final regulations, written documents were required to be 409A-compliant by December 31, 2007. However, IRS Notice 2007-78 (issued on September 10, 2007) extended the written compliance documentation deadline date until December 31, 2007. More recently, IRS Notice 2007-86 (issued on October 22, 2007) again further extended that deadline until December 31, 2008. In addition, the transitional relief period to make changes to existing time and form of payment elections without violation of the 409A anti-acceleration and impermissible payment date extension rules is now extended until December 31, 2008. (However, new payment elections cannot be made in 2008 to defer payments otherwise payable in 2008.) In any event, operational compliance with 409A is required as of January 1, 2008. Reliance on the final regulations is treated as a reasonable, good faith interpretation of the statute.

457(f) Plans

On July 23, 2007, the IRS released Notice 2007-62, which previews the anticipated final guidance on 457(f) plans. Under an "ineligible" 457(f) plan sponsored by a tax-exempt organization, deferred compensation is includable in income, or vests, when the substantial risk of forfeiture lapses (for example, an employee who must continue to remain employed until a specific date in order to receive payment has a taxable event on the date when that condition is satisfied).[1] It appears that the IRS does not intend to recognize a rolling risk of forfeiture as a permissible extension of a vesting date, and in the view of some practitioners, may not even recognize the 5-year pushback rule under 409A for 457(f) purposes. In addition, a covenant not to compete would also not constitute a substantial risk of forfeiture under Notice 2007-62. Notice 2007-62 indicates that its guidance is meant to be prospective only, but that taxpayers may rely on its rules concerning substantial risk of forfeiture pending the release of final guidance. It would seem likely that the IRS would offer some transitional relief for existing 457(f) plans.

What to Do Now?

It would be a prudent measure to have counsel initiate the process of reviewing any existing deferred compensation agreements, employment agreements and severance programs for 409A compliance. While the urgency of such measures has been reduced by the December 31, 2008 deadline extension, this process may yet prove to be a very time-consuming task. It is noteworthy that the IRS has indicated that it anticipates the creation of a 409A correction program , apparently in recognition of the complexity of these rules.

[1] Under an "eligible" 457(b) plan, the vesting rules applicable to ineligible 457(f) plans do not apply and the participant is not taxed until receipt of a plan distribution, but contributions are capped, generally, at $15,500, whereas the amount of contributions to a 457(f) plan is unlimited.

Issues in Family Succession from Second to Third Generation

By PETER WHITE, SENIOR VICE PRESIDENT AND
GREGORY DIENNA, CFA, SENIOR VICE PRESIDENT
U.S. TRUST, BANK OF AMERICA PRIVATE WEALTH MANAGEMENT

Many of us have experience in our professional and perhaps personal lives with the old adage of "shirtsleeves to shirtsleeves in three generations." This phrase typically illustrates the failure of a family to transition a business and/or wealth over three generations. It describes the first generation (G1) as the wealth creators - hard working, frugal, and successful; the second generation (G2) shares many of the same values that made the first generation successful, typically working in the family business, but enjoying some of the fruits of that labor in the form of better education, lifestyle, etc.; and the third generation (G3) as further removed from the business and the core family values. The transition between G2 and G3 is critical to the maintaining family's legacy and wealth - but also where we see the most conflict.

At U.S. Trust, Bank of America Private Wealth Management, we work with families and their advisors to lead an ongoing dialogue between all the generations about the issues that affect multi-generational wealth transfer. Listed below are just a few of many topics we raise with families about managing the transition from the second to third generation:

1. It is important for G2 and G3 to realize that family and business are different. G1 and G2 are often unfocused on this distinction because for them the experience of family and business have been one. But when it comes to succession from G2 to G3, the distinction between family and business must be recognized by all concerned.

2. The family should think about and discuss the values that have made it successful as a family over the years and how it can preserve those values for as long as it envisions maintaining itself as a family unit. The family's financial capital is important, but its intellectual and human capital are as important to its ability to thrive in the future. Intellectual capital refers to competence in the management of family matters; human capital refers to the family's functioning as a community of interest. The family must decide what approach it will take to preserving and growing all its assets, including its intellectual and human capital.

3. The family must decide what its mission should be as a family which owns a family business. Is it realistic and desirable for the family to continue to own and manage the business? Are family members prepared to manage it in a highly competitive business environment? Should professional managers be brought in? Should the business be sold in whole or part?

4. The family must decide whether its mission as a family should include other activities. Should it diversify its holdings and set up a family office to manage its financial assets? Should it engage in family philanthropy? What activities – such as family meetings or holidays – should be pursued to preserve and enhance family unity?

5. The family must develop a strategy for accomplishing its goals, especially the goal of succession. Succession should be considered a long-term matter, not an isolated event. How will younger family members be trained to take on responsibility? Who will guide them? Who will evaluate them? How will their assuming responsibility affect professionals working in the business who are not members of the family? How can the process best accommodate the needs of all concerned?

Even this partial list sounds like much to undertake, especially for a family that is seemingly doing well and does not appear to have difficulties. At U.S. Trust, Bank of America Private Wealth Management we understand the complex technical and emotional issues that families face and believe the combination of an experienced guide, thoughtful planning, and good communication can help to successfully maintain the family's legacy into the third generation and beyond.

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Alternative Investments and the Prudent Investor Act

BY DAVID A. RUBEN, ESQUIRE

Alternative investments are investment vehicles other than stocks, bonds or mutual funds. Common examples include hedge funds and private equity. David Swenson, the Chief Investment Officer for Yale University's endowment, invests just 16% of the portfolio in domestic stocks and bonds. Swenson has opted, and very successfully so, to place most of the portfolio in alternative investments. This diversification has insulated Yale's endowment from bear markets and has resulted in an average annual return of 16.1% over the last 21 years. Alternative investment strategies can also be effectively used by Pennsylvania fiduciaries and should not be ignored.

The 1999 Prudent Investor Act changed the focus of fiduciary duty from the dated "prudent man" standard, looking at each individual investment, to a consideration of the overall portfolio. The Pennsylvania Prudent Investor Rule provides that "[a] fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust, and by pursuing an overall investment strategy reasonable suited to the trust." 20 Pa. C.S. §7203 (a). A fiduciary may invest "in every kind of property and type of investment, including, but not limited to, mutual funds and similar investments, consistent with this chapter." 20 Pa. C.S. §7203 (b).

"A fiduciary shall exercise reasonable care, skill and caution in making and implementing investment and management decisions." 20 Pa. C.S. §7212. "The rules of this chapter are standards of conduct and not of outcome or performance." 20 Pa. C.S. §7213. A fiduciary "is not liable to the extent the fiduciary acted in substantial compliance with the rules of this chapter or in reasonable reliance on the terms and provisions of the governing instrument." 20 Pa. C.S. 7213. Investment choices are "considered in the context of the trust portfolio as a whole and as part of an overall investment strategy, and not in isolation." 20 Pa. C.S. 7213.

Alternative investments, often more difficult to justify under the former "prudent man" standard, are not precluded by the Prudent Investor Act. They may, in fact, help achieve the portfolio investment strategy by reducing risk and enhancing return. Hedge funds, for example, can short stocks, which insulates the portfolio from market downturns.

Alternative investments are also a more viable option than many fiduciaries might think. Real estate, hedge fund, and private equity often require large initial investments feasible only by large institutional investors. Derivative instruments, such as Real Estate Investment Trusts (REITs), private equity portfolios and funds of hedge funds have brought these investments within the reach of a far greater number of fiduciaries.

The Prudent Investor Act will permit fiduciaries to make alternative investments that contribute to the portfolio's overall investment strategy. Many fiduciaries have not taken advantage of the flexibility provided by the Prudent Investor Act, whether from comfort with the status quo or from an uneasiness of venturing into the somewhat complicated world of alternative investments. Pennsylvania fiduciaries should not ignore the significant benefits of alternative investments. It never hurts to "hedge" your bet.

Family Succession Issues, continued

Messrs. White and Dienna for U.S. Trust, Bank of America Private Wealth Management reflect the views of Bank of America as represented in this article. U.S. Trust, Bank of America Private Wealth Management operates through Bank of America, N.A. and United States Trust Company, N.A., which are wholly owned subsidiaries of Bank of America Corporation. Bank of America, N.A. and United States Trust Company, N.A., Members FDIC.

Mr. White consults on family advisory matters exclusively for the Multi-Family Office of U.S. Trust, Bank of America Private Wealth Management. Mr. Dienna, is Senior Vice President, Private Client Consultant, U.S. Trust, Bank of America Private Wealth Management - Philadelphia.

Taxation Committee Meeting – October 2007

By JILL FOWLER

October's meeting of the Taxation Committee featured J. Paul Dibert, Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue, and James Millar, Assistant Counsel in the Office of Chief Counsel. Paul and Jim confirmed for the Committee that, following John Murphy's retirement in January, no new Chief had been appointed. They also informed the Committee that a number of other experienced personnel had retired earlier in the year. Paul said that the loss of experienced revenue agents would likely result in some slowing in the issuance of inheritance tax appraisements, although the Department continues to respond to inheritance tax returns significantly sooner than most other taxing authorities respond to such returns. Jim gave some details about enforcement efforts. In particular the Department is focusing on bringing before the court attorneys who have failed to arrange for the filing of inheritance tax returns in multiple estates that they have handled. Finally, Paul gave the Committee some insight into how the imaging of inheritance tax returns would impact the review of these returns by Department personnel. The Committee is grateful to Paul and Jim for taking time from their busy schedules to speak with us, and to Gene Gillin of Harkins and Harkins, who arranged for their visit.

Re: Willing Seller

By FREDERICK C. "CHUCK" BERTSCH III, MBA, ASA
F.C. BERTSCH & CO., INC.

Not long ago we were asked to value a CEO's controlling interest in a fair sized contracting company. The CEO's advisors were anxious to secure a low value and, toward this end, pointed out that most of the company's key customer relationships existed with the CEO. Their thought was that a buyer of the company would pay less for it, given the risk attached to maintaining continuity of customer relationships. The CEO was in good health, so this was not the issue; it was, in their view, a question of whether the CEO would be expected by the buyer to stay with the company and whether he would work as diligently as he had in the past.

We found this argument unpersuasive for two reasons. The less important reason is that, in our opinion, people tend to exaggerate the importance of one person, particularly in larger companies. There is, we think, a good deal of inertia in business relationships and customers will keep on doing business with a company unless given a persuasive reason to change. The more important reason is that we thought the CEO's advisors were focusing unduly on the "willing buyer" of Revenue Ruling 59-60 and not considering the "willing seller."

The seller of a business interest, whether controlling or not, must be presumed to want the best price he can get. The holder of a controlling interest (and sometimes a non-controlling interest) often is in a position to do things to reduce buyer risk perceptions and thereby obtain a better price. In the case at hand, the CEO could have entered into non-compete and employment agreements with the buyer and might have been willing to make a portion of the purchase price contingent on maintaining customer continuity. Note that a controlling interest owned by a non-executive also often is in a position to secure commitments from key managers by some form of payment and, clearly, can negotiate whatever transaction terms best serve his interests. Any buyer of a business is concerned about continuity and, knowing this, a willing seller should be expected, in pursuit of self-interest, to do what he can to alleviate this concern.

Education Committee

By KAREN M. STOCKMAL, CHAIR

In the past year, the Education Committee has continued its mission to plan quality legal education programs of interest to members of our Section. Programs were presented at the first three quarterly meetings of the year.

Estate Planning for Multinationals

This well received course which was planned and presented by Committee member Paula M. Jones of McCarter and English LLP, focused on the pitfalls and opportunities related to estate planning for clients who own property outside the United States and/or are citizens of other countries. Committee member Pedro Rivera served as a co-course planner.

Attorney Malpractice: When the Practice of Law Isn't Perfect

This program, planned by Committee members Paula Jones and Olivia Stoner, provided Section members an opportunity to receive 2 ethics CLE credits. Speakers included Barbara Rosenberg of the Disciplinary Board of the Supreme Court of Pennsylvania; Hope Comisky, Professional Responsibility Counsel at Pepper Hamilton LLP; Richard Myers, of Paul, Reich and Myers, P.C.; and Jack Fleming of Minnesota Mutual Insurance Company.

The Estate Planner as a Jack of All Trades

This program, planned by Committee member Christina Alt represented a new format for our programs. The program addressed what a practitioner needs to know about four areas of the law often encountered in estate planning. Vincent Carrisimi of Pepper Hamilton LLP, spoke about Intellectual Property; Paul Burnett of Wachovia Bank, N.A., spoke about Real Estate; Meredith Brennan of Schnader, Harrison, Segal and Lewis LLP, addressed Family Law; and Jim Matour of Hangley, Aronchick, Segal and Pudlin, P.C. spoke about Bankruptcy.

Members of the Section are always welcome to attend our meetings. Our meetings are generally held on the second Tuesday of January, February, March, May, June, September, October and November and members are welcome to participate by teleconference or in person. We seek to have our committee reflect the diversity of our Section members in terms of practice specialties, client base and firm size.

Elder Law Committee

By KEELIN S. BARRY &
RISE P. NEWMAN, CO-CHAIRS

"The mission of the Elder Law Committee is to further the knowledge and practices of members of the legal community having an interest in elder law by developing cutting edge educational programs and the information necessary to stay abreast in this growing and ever changing area of law. Our goal is also to study, review and make recommendations concerning legislation affecting the elder community. We further wish to serve the public generally by developing literature that will provide information about legal issues faced by the elder community and their caregivers." (Proposed Mission Statement)

What is Elder Law?

Elder Law is among those few areas of law defined by the population served instead of the subject matter content. Elder Law practitioners develop expertise and contacts to help older clients and their families with legal planning and problems related to aging. Medicaid planning for those needing nursing home care, Advance Healthcare Directives, Estate Planning and Administration, Guardianships, and Public Benefits are among the staples of this area of practice. However, the Elder Law practitioner also must be able to steer clients through problems relating to deeds, financial scams, and grand-

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Elder Law Committee Report, continued

parent visitation and custody rights. It truly is an ever-changing area of practice.

Committee-sponsored Programs

During 2007, the Elder Law Committee has offered programs to educate the legal community about the following cutting-edge issues:

January 25, 2007: "Making Special Needs Trusts Work for your Clients," presented by the McAndrews Law Group.

February 22, 2007: "Helping Your Clients Chose a Long-Term Residential Care Facility," with Shari VanderGast, Executive Director, Intervention Associates.

March 29, 2007: "Understanding Pensions: ERISA Rights and Remedies," with Doris J Dabrowski.

April 26, 2007: "Veteran's Benefits: Income, Burial, and Medical," with Veterans Administration Representatives.

May 31, 2007: "Pennsylvania Legislative Update:What Elder Law Practitioners Need to Know," with Albert J. Foster, Jr., Pelino & Lentz, Legislative Liaison for the Philadelphia Bar Association's Probate and Trust Law Section.

Sept. 27, 2007: "What is Elder Law: Four Different Views," with Sandy Pfeffer, Chief Counsel, Philadelphia Corporation for Aging; Jerry Rothkoff, Principal, Rothkoff Law; Gordon Wase, Partner, Wase & Wase; and Sue Wasserkrug, Director, SeniorLAW Helpline, SeniorLAW Center.

October 25, 2007 "Torts for Those Abused in Nursing Homes and other Custodial Care," with Ron Lebovits, Zarwin, Baum, DeVito, Schaer, & Toddy, P.C.

Nov. 29, 2007: "Powers of Attorney: From Basic to Complex," with Rise Newman, Rise P. Newman, LLC.

Speakers Available for Your Group

If your group is interested in Elder Law topics, we can send an experienced speaker to address your group. Call us at the Philadelphia Bar Association.

What will the Elder Law Committee do in 2008?

During 2008, the Elder Law Committee will continue to offer monthly educational programs for attorneys on cutting-edge legal topics and provide community education. Upcoming topics scheduled are Guardianships; Wills and Trusts: From the Simple to the Complex; Medicaid Planning, and Annual Legislative Update. We meet on the last Thursday of the month from 1:00- 2:30 at the Philadelphia Bar Association. We do not meet in December, June, July, or August. Please join us!

Publications Committee

By ROBERT H. LOUIS, CHAIR

During 2007, the Publications Committee has continued with its mission of producing the Section newsletter three times each year, as well as issuing e-alerts on subjects of immediate interest.

We are pleased to have had a number of members of the Section write for us this year, in addition to experts from the fields of investment planning, elder care and art management. We have also benefited from contributions from newer members of the bar.

We are pleased to have had entertaining and informative articles on the Uniform Trust Act, Delaware asset protection laws, ethical guidelines, and art law, among numerous others.

We are always looking for timely and interesting articles of various lengths, and we welcome contributions from any Section member and from others engaged in related areas of work.

Our articles generally fall into a number of categories: federal estate and gift tax issues, PA estate and trust law, investment issues, elder law, art and tangible property issues, issues involving the law of other states, such as NJ and DE, recent cases on fiduciary law, retirement plans and distributions, and asset protection planning, to name many examples of our far-flung practices.

We have added several new members to our Committee this year, and we extend an invitation to other Section members to join us, and to suggest ways in which the Publications Committee may better serve the needs of the Section members.

Legislative Committee

By THOMAS O. HISCOTT, CHAIR

During the spring of 2007 the primary activity of the Legislative Committee was to offer two rounds of comments to draft legislation that would amend Chapter 55 of the PEF Code (incapacitated persons). Several of our suggestions were taken by the Guardianship Study Group of the Joint State Government Commission.

We are currently working on possible legislative approaches to the treatment of children born after the parent's death using assisted reproductive methods, and have several other interesting projects waiting in the wings.

Active members of the Committee during 2007 included Jay Foster, Rebecca Smolen, Michael Stein, Bernice Koplin, and Jeb Bell.

Orphans' Court Litigation and Dispute Resolution Committee

By TIMOTHY J. HOLMAN, CHAIR

The Orphans' Court Litigation and Dispute Resolution Committee was formed in 2005, went on a brief hiatus in 2007, and now resumes its activities. The Committee's members include a number of leading Orphans' Court practitioners as well as lawyers who are developing an Orphans' Court practice or whose practice sometimes places them in the Orphans' Court in contested matters.

The mission of the Committee is to improve the quality of practice before the Orphans' Court through:

* the exchange of knowledge, ideas, and information, and

* the consideration and possible endorsement of changes to court rules and of new or alternative methods of resolving Orphans' Court disputes.

The Committee meets on the second Tuesday of every other month at 8:30 a.m. at the offices of Heckscher, Teillon, Terrill & Sager, P.C., Center Square East, 12th Floor, 1500 Market Street, Philadelphia. The next meeting will be on December 11, 2007.

Probate Section members with an interest in Orphans' Court litigation and dispute resolution are welcome to join. Contact Timothy J. Holman, Esquire at Heckscher, Teillon, Terrill & Sager, P.C. for further information. He can be reached at (610) 940-4196 or tholman@htts.com.

Rules and Practice Committee

By NINA B. STRYKER, CHAIR

The Rules and Practice Committee continued its work on a variety of projects this year. We continued to provide assistance with the e-filing systems both in the Orphans' Court Division and the Office of the Register of Wills.

Since the introduction of e-filing in the Register of Wills Office in late September 2006, we have been working with the Register of Wills' technical team, including Michael McLaughlin, Alan Yandziak and Lou DiRenzo, in monitoring and providing feedback for this state of the art e-filing program. We are currently working with this group to address issues that have arisen concerning the e-filing manual. Our committee stands ready to consider new rules for adoption that will incorporate new developments in our practice as a result of the e-filing capability.

We have continued our consideration of Joint Court Regulation 97-1, the Procedure for Approval of Compromises involving Minors, Incapacitated Persons, Wrongful Death and Survival Actions, and have had a very productive meeting with the Judges' law clerks. We are forming a subcommittee to recommend changes to the procedures for the Court's consideration.

Our Committee's work would be impossible to accomplish without the hard word of our dedicated committee members, and our secretary, Sue Lomas. My personal thanks to all of the Committee members for their time, thoughtful consideration and dedication to the work of the Section.

New members are always welcome. We meet on the second Tuesday of the month at 4:00 P.M. in the offices of Obermayer Rebmann Maxwell & Hippel LLP, 19th Floor.

Taxation Committee

By JILL R. FOWLER, CHAIR

The Taxation Committee once again hosted a number of excellent speakers who spoke on selected topics of interest to members of the Probate and Trust Law Section. The focus was on topics that were timely and that had a practical application to our practices. We were fortunate enough to enlist a number of well-respected volunteers to address our meetings.

Our March meeting featured Roberta Barsotti, the Secretary and Chair-Elect of the Taxation Committee, and Vice President and Managing Director of Wealth and Financial Planning (Pennsylvania and New Jersey) of Wilmington Trust. Roberta gave a well-received report on items of interest from the Heckerling Institute, including new developments and the latest thinking on the future of the federal estate tax.

April's meeting featured Ann L. Stallman, Vice President of J.P. Morgan Trust Company of Delaware. Anne gave an interesting presentation on "HEET" Trusts as a gifting alternative for wealthy clients who have already used their entire lifetime gift tax exemption. The term "HEET" is an acronym for a "Health Education Exclusion Trust." The terms of these trusts limit distributions for beneficiaries to the types that are specifically <u>excluded</u> from the definition of taxable gifts --- direct payments for health and for tuition -- the transfer to such a trust is not a "gift" for the purposes of the gift tax.

In May, Donald P. DiCarlo, Senior Fiduciary Counsel and Wealth Planner for Vanguard National Trust Company, updated the Taxation Committee on the status of state death taxes in all fifty states. Don broke down the approaches that various states have taken to state estate and inheritance tax into broad categories and also discussed several planning approaches to use when confronted with death tax schemes from other states.

Our June meeting featured Mary Jo Baum of Brian R. Price and Associates. Mary Jo gave a wonderful presentation on remainder inheritance tax. The presentation was designed to alert practitioners to situations in which the remainder tax issue arises and, by including sample returns, walked the Committee through the mechanics of calculating and reporting remainder inheritance tax.

October's meeting featured J. Paul Dibert, Business and Trust Valuation Manager of the Inheritance Tax Division of the Pennsylvania Department of Revenue, and James Millar (Assistant Counsel in the Office of Chief Counsel). Paul and Jim updated the Committee on the status of the Department's appointment of a new Chief and also explained to the Committee how the imaging system at the Department would be implemented. They also reported on collection efforts as well as expected time frames for receipt of inheritance tax appraisements from the Commonwealth.

November's meeting will feature a roundtable discussion of the new Qualified Severance regulations which I plan to lead, and in December we are hopeful that John A. Darazsdi, an Estate and Gift Tax Attorney from the Internal Revenue Service will be able to join the Committee again to speak on developments at the federal level.

Special thanks are due to Wilmington Trust, which has graciously agreed to host the Taxation Committee meetings and has faithfully supplied us with a beautiful conference room, snacks and beverages. I would also like to thank Roberta Barsotti, Secretary and Chair-Elect, for all her hard work and her assistance in planning this year's programs.

Finally, a personal thanks to all the members and non-members who attended our meetings this year. Our speakers, who have volunteered their time and talents, are always rewarded by an "audience" that is appreciative, interested and responsive. I look forward to attending future meetings as "past Chair" and thank the Section for the opportunity to have served as Chair.

NEWSLETTER ARTICLES

Would you like to see something in future issues of the Probate and Trust Law Section Newsletter? Then, why don't you write it? If you are interested, please contact the Editor:

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ETHICS COLUMN

By PAUL C. HEINTZ
OBERMAYER, REBMANN, MAXWELL & HIPPEL LLP

What are the ethical obligations of a lawyer who retains a client's Power of Attorney?

The Power of Attorney has become an increasingly important part of the estate planning process. As our clients live longer, the probability also increases that the use of the Power will become necessary. Mindful of the powerful nature of the document, clients frequently ask how they can safeguard against the premature use, and even abuse, of the power by the attorney-in-fact or agent. Because the majority of Powers are drafted to be effective immediately rather than subject to "springing powers" (contingent upon a finding by medical doctors of the need for its use), the client's concern is certainly reasonable. Often, that concern leads to the request that the scrivener keep the Power with the Will whenever the scrivener provides a Will retention service. Of course, there is the unspoken, and usually undocumented, understanding that the Power will be released only when necessary. As a result, the attorney becomes a de facto "gate keeper."

The attorney's recognition of his or her significant ethical and legal obligations usually occurs when contacted by the child of the client who demands the Power. By then the client may well have become a widow or widower and is no longer living with someone able to help. The child simply says his parent is "losing it" or "has become senile" and insists that he or she must "take over" the parent's affairs.

Of course, the attorney knows his or her focus must continue to be on the best interests of the client and not that of a non-client child. Rule 1.3 requires that the attorney act with reasonable diligence in representing the client. The attorney also has a duty to communicate with the client, pursuant to Rule 1.4, to make certain the client is informed about the request and to explain the situation, if possible, to enable the client to make an informed decision. The attorney certainly must consult with the client about the means by which the client's objectives are to be accomplished. If the attorney is not already aware of the client's condition and circumstances, he or she must verify the need to release the document and to permit the child, as the child has requested, to act on behalf of the client. Even if the attorney determines that the client suffers from some mental impairment, the attorney is obligated, pursuant to Rule 1.14, to maintain a normal client-lawyer relationship with the client to the extent reasonably possible.

The "gatekeeper's" duties would include limiting the use and circulation of the broad power. Perhaps the only immediate need for the child's help is the payment of bills. If a Limited Power of Attorney is not already on file with the client's banking institutions, always a wise step even when the General Power of Attorney exists, the first step is to help the agent arrange that with the institution. Often, there is no need to release the power. It may be delivered or mailed to the institution or institutions to permit them to review and copy it and set up the documentation that will enable the attorney-in-fact to act in that limited fashion.

The attorney should explain to the agent the nature of his or her fiduciary duties and offer to assist him or her in meeting those duties. The attorney may also be asked or expected to act as an independent observer of the agent's activities. In some circumstances, usually at the insistence of other family members, that is exactly what the client wants the attorney to do. One technique that works well and is not expensive, and even welcomed by the well-meaning agent, is the dissemination on a monthly or quarterly basis of copies of statements and cancelled checks, or informal cash activity accounts, to the attorney and appropriate family members, typically siblings, of the agent.

The attorney also has a duty to maintain the client's confidences pursuant to Rule 1.6. The attorney is permitted to reveal such information about the client as the attorney believes reasonably necessary to carry out what the attorney perceives to be the client's wishes and best interests to be. However, that does not include the obligation to relinquish to the agent the client's estate planning file or even estate planning documents or copies of them.

On occasion, attorneys are faced with the agent's demand that a Will be released. While there may be times when compliance with such requests would be reasonable, those times are rare. If the client possesses testamentary capacity, and the at-

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:

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Ethics Column, continued

torney-client relationship still exists, there is usually no reason to release a Will. If the client lacks testamentary capacity, the Will cannot be changed and only the executor or Register of Wills office – after the client's death – would be the appropriate recipient.

If the client's condition deteriorates to the point that a client-attorney relationship can no longer be maintained, the agent will become the sole contact and decision-maker. Thereafter, only if the attorney perceives the actions of the agent or others puts the client at the risk of substantial physical, financial or other harm, can or should the attorney intervene. Under those circumstances, according to Rule 1.14(b), the attorney is permitted to take "… reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

One of the best protections against misuse or abuse of the power is to be certain that the client's document remains up to date. Experienced estate planning attorneys know the value of updating Powers of Attorney and devoting sufficient time to discuss them with their clients. Careful selection of the agent(s), placing limitations on powers, particularly gift-giving powers, and the use of the Power of Attorney format in conformity with the 1999 statutory changes, minimize the possibility of both abuses of the power and undue burdens on and involvement of the attorney at a later date.

Opinion 2002-52, issued by the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility, provides additional insight into the attorney's duties with respect to the release of a Power of Attorney.

WHAT WOULD YOU LIKE TO SEE IN FUTURE ETHICS COLUMNS?

Send your questions and ideas to:

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TAX UPDATE

By JOAN AGRAN, ESQUIRE
MCCAUSLAND KEEN & BUCKMAN

I. COURT DECISIONS

No Reasonable Cause for Late Filing of Estate Tax Return

In *Estate of Zlotowski v. Comm'r, TC Memo. 2007-203 (July 24, 2007)*, when the executors filed the federal estate tax return nine months after the due date, they were assessed an addition to tax for failing to timely file the return. The executors claimed that they relied on the estate's attorney who related that the delay was due to a claim that there was a German Will that revoked the US Will and that the administrators under the German Will were proceeding to administer the estate. Preparation of the return was not begun for several months when the attorney determined that the German administrators were not acting. The executors stated that the attorney told them the return would be filed late but not of the consequences of a late filing.

On the basis of these facts, the Tax Court held that the executors were liable for the penalty for late filing of the estate tax return because they had failed to demonstrate that they had reasonable cause to file a late return. Although reliance on the advice of an attorney concerning matters of law can establish reasonable cause, the estate failed to show that the attorney had advised the executors that, as a matter of law, it was unnecessary to timely file the return. It was the executors' obligation to timely file the return and therefore the estate was liable for the late filing penalty under Code Sec. 6651.

Tax Court Not Bound by Estate's Valuation

In *Estate of Josephine T. Thompson, (CA2 2007) 100 AFTR 2d 2007-5208*, the Tax Court valued 20% of a closely held company at $13.5 million, higher than the $1.75 million valuation claimed by the estate but below the $32 million valuation claimed by the Service. The Tax Court found that the estate's valuation method exaggerated the risks associated with technological change, while the Service's methodology was generally deficient.

The estate argued that because the parties agreed that the estate introduced credible evidence on the valuation issue, under Code Sec. 7491 the burden of proof shifted to the Service and the Tax Court was obligated to adopt the estate's valuation once it rejected that of the Service.

Although the Second Circuit agreed that under Code Sec. 7491 the burden of proof on a particular factual issue shifts to the Service if the taxpayer introduces "credible evidence" and meets requirements relating to substantiation, recordkeeping, and cooperation with reasonable requests by the Service for information, this does not require the Tax Court to adopt the taxpayer's valuation whenever it rejects the Service's proposed value. The burden of disproving the taxpayer's valuation can be satisfied by evidence in the record that impeaches, undermines, or indicates error in the taxpayer's valuation.

In this case, the Service cited evidence on the record to rebut the estate's valuation, including the facts that the estate: (i) was overly pessimistic in its profit projections; (ii) failed to properly account for non-operating assets; and (iii) made assumptions that were inconsistent with the company's investments. The Second Circuit concluded that, notwithstanding Code Sec. 7491, the Tax Court is not bound by formulas or opinions of expert witnesses but may reach a determination of value based upon its own analysis of all the evidence in the record. The court affirmed the Tax Court's valuation, with the exception, agreed to by the parties, that the Tax Court made an error in calculation, which the Second Circuit directed it to correct in further proceedings.

Court Upholds Pro Rata Allocation of Estate Taxes Between Trusts

In *Eisenbach v. Schneider, No. 58047-7-1 (Wash. App.9/10/07)*, husband and wife created a revocable trust, naming their two sons, plus one son's wife and children, as beneficiaries upon the death of the last surviving settlor. Upon husband's death in 1997, the trust was divided into two parts, the first part consisting of wife's share of the community property, which remained in the revocable trust, and the second part consisting of husband's share of community property, which was divided into two subshares, an exemption trust and a QTIP trust.

Wife amended certain provisions of the trust following her husband's death, effectively disinheriting one

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son from taking any portion of her separate assets. Wife died in 2002, at which time her other son became trustee of all three trusts. Under the terms of wife's Will, her estate poured over to her separate trust. Both sons were named co-executors of her estate; as such they liquidated the exemption trust without conflict but disputed the allocation of the estate tax between wife's estate, now held in her trust, and the taxable portion of husband's estate comprised of the QTIP trust.

The trust document stated that "The Trustee shall pay out of principal, to the extent that this trust shall be included in the gross estate of either Settlor for the purposes of determining federal estate taxes or Washington estate taxes, a ratable share of such taxes determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the Settlor (after exemptions and deductions are taken) as determined for estate tax purposes by the authority assessing the tax."

On the basis of these facts, the trial court concluded that the settlors clearly expressed their joint intent that federal and state estate taxes be apportioned pro rata between the two trusts. The trial court also concluded that they had effectively waived under Code Sec. 2207A (a)(2) the application of the recovery provisions of Code Sec. 2207A.

The appellate court agreed. Noting that in the state of Washington testamentary intent controls the construction of a will or trust, the court found that the trust language clearly expressed the intent of the settlors that estate taxes were to be paid "ratably" among the taxable portions of the trust, regardless of the fact that they did not specifically refer to Code Sec. 2207A. The court further noted that the Service is not concerned with how estate taxes are apportioned, only that the total amount of tax paid is correct; the apportionment of federal estate taxes is a matter of state law.

Partnership Asset Included in Deceased Partner's Gross Estate

In *Estate of Virginia A. Bigelow, (2007) 2007 WL 2684526, 100 AFTR 2d 5271*, in 1991 decedent gave a 1/175 undivided interest in her home (then valued at $1.75 million) to each of her three children and transferred her remaining interest to her revocable trust, of which she and her son were trustees. Son was also executor of her estate and her agent under her power of attorney.

In 1992 decedent moved to an assisted living facility; in that same year she transferred a 1.5% interest in her home from her revocable trust in equal shares to her daughters. In January 1993, the trustees and the children exchanged the home property for another residential property and $125,000 in cash. The trust then obtained (i) a bank loan secured by the new property and (ii) a $100,000 line of credit from a bank also secured by the new property. The trust drew down the full $100,000 and the funds were given as gifts to decedent's children and grandchildren.

In December 1994, the trustees and the children formed a California limited partnership to engage in the business of owning and operating residential real property. The trust was both the sole general partner and a limited partner; the children were limited partners. The trust transferred the property to the partnership but not the debt secured by it; decedent, in her capacity as grantor and beneficiary of the trust, agreed to hold the partnership harmless for the bank loan and line of credit.

After the property was transferred to the partnership, decedent's monthly expenses exceeded her monthly income. The partnership paid her excess expenses but made no distributions to the other partners. Under decedent's power of attorney, son made gifts of partnership units to himself, his siblings, and decedent's grandchildren. At decedent's death, the trust owned a 1% general partnership interest and a 45% limited partnership interest.

The Service, auditing the estate tax return, determined an estate tax deficiency after concluding that the real property transferred to the partnership was includible in decedent's gross estate under Code Sec. 2036(a)(1).

The Tax Court agreed, finding that the use of partnership income to replace the income lost after the transfer of the property to the partnership showed an implied agreement between decedent and her children that she would retain the right to the income from the property. In addition, the Court concluded that because after the transfer the property continued to secure decedent's legal obligation to pay the bank loan and line of credit, there was an implied agreement between decedent and her children that she would retain for her life the present economic benefit of the property.

The Ninth Circuit affirmed, inferring an agreement to retain economic benefit of the partnership property under Code Sec. 2036(a)(1) from the following: (i) the partnership payments of a debt on which the decedent was personally liable, (ii) the transfers left the decedent with insufficient income to meet her living expenses, (iii) frequent partnership "loans" to the decedent, (iv) the payment of

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decedent's funeral expenses from the partnership, and (v) the failure to follow the partnership formalities, including inconsistent partnership capital account debiting. The court rejected the estate's argument that the transfer of property to the partnership in exchange for partnership interests was a "bona fide sale for an adequate and full consideration," noting that there was no legitimate and significant nontax reasons for creating and operating the partnership.

Marital Trust Assets Included in Gross Estate

In *Estate of Gore, TC Memo 2007-169, 93 CCH TCM 1436*, decedent executed an assignment which exercised her right to withdraw the assets from a marital trust established for her benefit by her late husband and then transferred the assets to trusts created for each of her two children and to a family limited partnership formed by the children under state (Oklahoma) law. Following the transfer and until her death, decedent continued to collect dividends and interest on the marital trust assets and she received the proceeds from the sale or liquidation of these assets. Income from these assets was deposited into her personal bank account and used for her expenses.

After her death, the estate filed a federal gift tax return reporting the decedent's gifts to her children's trusts of cash as well as general and limited partnership interests. The estate tax return reported a 1/3 ownership interest in the partnership to which was applied a minority discount.

On the basis of these facts, the Tax Court found that, although under state law the assignment agreement together with the decedent's exercise of control over the marital trust assets effectively withdrew them from the trust, the assignment did not result in a complete transfer of those assets to the partnership, because decedent did not relinquish all incidents of ownership over the assets. As of the date of the decedent's death, decedent's name or her husband's name appeared on most of the marital trust assets; the partnership did not hold legal title to any of the marital trust assets under state law.

The court concluded that the value of the withdrawn marital trust assets was includable in the decedent's gross estate under Code Sec. 2033 because she had retained dominion and control over those assets. In addition, even if the transfer was complete, the marital trust assets would still be includable in the decedent's estate under Code Sec. 2036 because the decedent retained the right of possession or enjoyment of those assets, evidenced by an implied agreement between the decedent and her children that she would have continued access to the assets.

Bequest Under Self-Prepared Will Qualifies for Marital Deduction

In *Sowder v. U.S., (CA9 2007) 100 AFTR 2d 2007-5377*, decedent died in 1995. Under his self-prepared Will, he gave $200,000 to each of his three children, with the remainder of his estate passing to his wife if she survived him; if she did not survive him, or were to die before his estate was distributed to her, the remainder of his estate passed to his surviving issue, per stirpes.

Wife, as executrix, timely filed the estate tax return showing no tax due, in part because of the marital deduction. On audit, the Service disallowed the marital deduction and assessed deficiencies, which the estate paid and then filed a claim for refund. After the refund was denied, the estate sued in district court, which granted summary judgment for the estate. The Ninth Circuit reversed, directing the district court to permit the Service to conduct discovery in order for the court to make a factual finding on decedent's intent regarding the marital share.

The district court made various factual findings including the following: (i) the total bequests of $600,000 to his children was the amount that could be passed tax-free to beneficiaries other than a spouse at the time he prepared the Will, (ii) decedent's handwritten notes regarding the Will did not contain the requirement that his wife survive until his estate was distributed to her, (iii) decedent was a tax-wise businessman who likely would not want to pay more tax than necessary, (iv) the 1981 change in the tax law, which created the unlimited marital deduction and the QTIP exception to the terminable interest rule, was well publicized, (v) a magazine article which addressed the change to the marital deduction was found in decedent's papers after his death, (vi) the evidence demonstrated that decedent understood the concept of deferring taxes until the second spouse's death, (vii) in 1991 'last to die' insurance, insuring decedent and his wife, was purchased by the an irrevocable trust created by decedent and his wife, (viii) decedent did not make any changes to his 1983 will after the insurance was purchased in 1991, (ix) wife understood from her discussions with decedent that estate taxes would be due only upon the last of her or decedent to die, and (x) the evidence indicated that decedent intended his gift to wife to qualify for the marital deduction when he drafted his 1983 will.

The district court noted that under Code Sec. 2056(b)(3) where a bequest is conditioned upon survival of the spouse, the terminable interest

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rule does not apply where the period is limited to not more than six months and the spouse in fact survives such period. Even though in this case there was no limitation on the period of survival, the district court found that the bequest qualified for the deduction after applying state (Washington) law, which provides that if it is determined that the testator intended a marital deduction gift, "the governing instrument shall be construed to comply with the marital deduction provisions of the Internal Revenue Code in every respect." The court said that Washington law allowed it to disregard the negative, inconsistent disqualification and on this basis and from an examination of all of the facts as noted above, the district court concluded that decedent's estate qualified for the marital deduction under Code Sec. 2056(a).

The Ninth Circuit upheld the decision of the district court, stating that its remand in the prior appeal signified that extrinsic evidence of decedent's testamentary intent was dispositive. Noting that if intent were not dispositive, a remand to review extrinsic evidence to determine intent would have been inappropriate, the court further concluded that the prior panel's remand necessarily decided that decedent's intent was dispositive and that it was proper to look to extrinsic evidence to determine that intent.

No Deduction for Attorney's Donation Of Client's File Documents

In *Jones v. Comr., 129 T.C. No. 16 (11/1/06)*, an Oklahoma attorney who was counsel for Timothy McVeigh (convicted of the Oklahoma City Bombing) received numerous copies of documents and materials from the government, including witness interviews and photographs, none of which represented the attorney's work product. The attorney had the materials appraised at $294,877 and donated them to the University of Texas, claiming a charitable deduction. The Service disallowed the deduction on the basis that the attorney did not personally own the materials.

On the basis of these facts, the Tax Court held that Code Sec. 170(c) precludes the charitable contribution deduction because the attorney did not own the client's case file under Oklahoma state law and was thus incapable of making a valid gift under state law. The Tax Court explained that in order to make a valid gift for federal tax purposes, a transfer must at least effect a valid gift under the applicable state law. The court found that the materials were for McVeigh's benefit and were delivered to the attorney within the scope of his representation. Note that most jurisdictions that have considered the issue have held that clients are the legal owners of their case files, including the attorney's work product for which the client paid; a minority hold the attorney's work product remain the attorney's property. In this case, the court determined nothing was the attorney's work product.

Decedent's Stock Receives 100% Reduction for Built-In Capital Gains Tax Liability

In *Jelke Est. v. Comr., No. 05-15549 (CA 11, 11/15/07)*, when decedent died in 1999, his revocable trust owned a 6.44% stock interest in a closely held investment holding company. At the time of his death, the company owned appreciated marketable securities worth $178 million with a built-in contingent capital gains tax liability of $51 million and other assets worth $10 million.

Decedent's estate valued the stock at $4,588,155 on the estate tax return by reducing the company's $188 million net asset value by 100% of the $51 million built-in capital gains tax liability and then applying a 20% lack of control discount and a 35% lack of marketability discount. The Service issued a notice of deficiency, valuing decedent's stock at $9,111,000 using a zero discount for the built-in capital gains tax liability and reduced discounts for lack of control and marketability. At trial, the Tax Court rejected the estate's position that the stock must be reduced by 100% of the built-in capital gains tax liability, holding that a discount of only $21 million was appropriate.

On appeal, the Eleventh Circuit vacated and remanded the Tax Court's decision, instructing the Tax Court to recalculate the date-of-death net asset value of the company and the value of decedent's interest in the company using a dollar-for-dollar reduction for the built-in capital gains tax liability under the assumption that the company is liquidated on the date of death and all assets are sold. In determining the discount for the company's capital gains tax liability, the court followed the Fifth Circuit's approach in *Dunn Est. v. Comr., 301 F.3d 339 (5th Cir. 2002)*, which allowed a 100% dollar-for-dollar reduction, calculating the estate tax after taking into account only those facts known on the date of death. The court stated that this approach "has the virtue of simplicity and its methodology provides a practical and theoretically sound foundation as to how to address the discount issue." Note that there was a strong dissent which followed the view of the Tax Court; the Tax Court had agreed with the Service that the built-in capital gain tax liability should be discounted to its present value to reflect the period of time

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over which the liability is reasonably expected to be incurred.

II. IRS REVENUE RULINGS, REVENUE PROCEDURES & NOTICES

'Transactions of Interest' Identified under Code Sec. 6011 Regs

In *Notice 2007-72, 2007-36 IRB* and *Notice 2007-73, 2007-36 IRB*, the Service has identified the first two "transactions of interest" subject to tax shelter disclosure requirements under the Code Sec. 6011 regulations, which requires that taxpayers must disclose their participation in reportable, tax-shelter-type transactions by attaching an information statement to their income tax returns. In recently issued final regs, the Service added a new category of reportable transactions consisting of "transactions of interest," which the Service believes have potential for tax avoidance or evasion, but for which it lacks enough information to determine whether they should be identified specifically as tax avoidance transactions.

Notice 2007-72 identifies the first "transaction of interest." which relates to charitable contributions of successor member interests. In this arrangement, generally the taxpayer (i) acquires certain rights in real property or in an entity that holds real property, (ii) transfers the rights more than one year after the acquisition to a charity, and (iii) claims a charitable contribution deduction substantially higher than the amount that the taxpayer paid to acquire the rights.

Notice 2007-73 identifies a grantor trust transaction, in which the grantor "toggles" on and off the grantor trust status of a trust, in order to avoid recognizing gain, or to claim a tax loss greater than actual economic loss. One variation involves a trust funded with gain and loss options; another variation involves a trust funded with marketable securities.

Transactions that are the same as, or substantially similar to, the transactions described in the notices are identified as transactions of interest for purposes of Reg. §1.6011-4(b)(6), Code Sec. 6111 , and Code Sec. 6112, effective August 14, 2007. Persons entering into these transactions on or after November 2, 2006, must disclose the transaction under the rules in Reg. §1.6011-4. Material advisors who make a tax statement on or after November 2, 2006, with respect to transactions entered into on or after that date have disclosure and list maintenance obligations under Code Sec. 6111 and Code Sec. 6112.

Service Will Determine Code Sec. 6166 Security Needs on a Case-by-Case Basis

In *Notice 2007-90, 2007-46 IRB*, the Service announced that it will determine on a case-by-case basis whether security will be required when an estate qualifies under Code Sec. 6166 to pay all or part of the federal estate tax in up to 10 annual installments.

Under Code Sec. 6324(a), a general federal estate tax lien attaches to most estate assets for 10 years following decedent's death; however, because the installment payments need not begin until 5 years after the due date of the estate tax return (generally 9 months after decedent's date of death), the government's interest is not necessarily secured for the last 4 years and 9 months. Utilizing Code Secs. 6166(k) and 6165, which allow the Service to require a surety bond or an extended estate tax lien from an estate to ensure payment of the deferred estate tax, the Service instituted a policy of requiring a surety bond or special lien as a prerequisite to making the Code Sec. 6166 election. In *Roski Est. v. Comr., 128 T.C. 113 (2007)*, the Tax Court held that the Service abused its discretion by requiring all estates making the Code Sec. 6166 election to provide a bond or special lien.

In response to *Roski*, the Service is establishing standards to be applied on a case-by-case basis in the future to identify those estates making an election under Code Sec. 6166 in which the government's interest in the deferred estate tax and the interest thereon is deemed to be sufficiently at risk to justify the requirement of a bond or special lien. In the interim, the Service will consider any relevant information in making its determinations including the duration and stability of the business, the ability to pay the installments of tax and interest timely, and the compliance history. Failure to respond to a request for additional information may terminate an estate's Code Sec. 6166 election. If the Service determines that an estate represents a credit risk, it will notify the estate that it must provide a bond or special lien or else terminate its Code Sec. 6166 election.

Appraisers Subject to Penalty for Appraisal Misstatements on Transfer Tax Returns

In a Memorandum from the Office of Chief Counsel, *TAM 2007-0017*, the Service has stated that (i) it may assess a Code Sec. 6695A penalty against an appraiser for appraisals prepared after May 25, 2007 that are used in connection with an estate or gift tax return or claim for refund or credit that results in a gross valuation misstatement, and (ii) there is no period of limitations that applies to the assessment of such a penalty.

The Pension Protection Act of 2006 added a penalty that provided that if the claimed value of property

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based on an appraisal results in a substantial or gross valuation misstatement under Code Sec. 6662, a penalty is imposed under new Code Sec. 6695A on any person who prepared the appraisal and who knew, or reasonably should have known, the appraisal would be used in connection with a return or claim for refund. Code Sec. 6695A(b) states that the penalty is the greater of $1,000 or 10% of the amount of the underpayment attributable to the misstatement (but in no event more than 125% of the gross income received by the appraiser for preparing the appraisal). Code Sec. 6695A(c) provides that the penalty doesn't apply if the appraiser establishes to the satisfaction of the Service that the appraised value was more likely than not the proper value.

The 2007 Small Business Act extended the income tax return preparer penalties to all tax return preparers. As a result, under current law, the Code Sec. 6695A penalty applies to an appraiser who prepares an appraisal used in connection with an estate or gift tax return or claim for refund or credit that results in a gross valuation misstatement. This change is effective for returns prepared after May 25, 2007.

The general legal advice further concludes that there is no period of limitations that applies to the assessment of a penalty under Code Sec. 6695A because, although Code Secs. 6696(d)(1), 6696(d)(2) and 6501(a) provide statute of limitations on the assessment of tax or penalties, none of these sections apply to Code Sec 6695A.

Code Sec. 6166 Estate Tax Deferral May Be Secured by Closely Held Stock

In *Internal Legal Memorandum 200747019*, the Service has set forth the circumstances under which it will accept closely held stock as collateral for the Code Sec. 6324A estate tax lien securing tax deferred under Code Sec. 6166. As noted in the discussion of *Notice 2007-90* above, under Code Sec. 6324(a), a general federal estate tax lien attaches to most estate assets only for 10 years following decedent's death. Because the installment payments need not begin until 5 years after the due date of the estate tax return, the government's interest is generally not secured for the last 4 years and 9 months of the deferral. Code Secs. 6166(k) and 6165 which allow the Service to require a surety bond or an extended estate tax lien from an estate to ensure payment of the deferred estate tax.

The memorandum addresses a number of issues. The first issue addressed is whether, and under what circumstances, stock in a closely held corporation meets the requirements of Code Sec. 6324A as property which may be pledged in support of the Code Sec. 6166 election. The memorandum states that the Service must accept such stock as collateral when the following three statutory requirements in Code Sec. 6324A(b) are met: (i) the stock (i.e. the corporation) must be expected to survive the deferral period and retain value, (ii) the executor must file a written agreement showing that all of the persons having an interest in the collateral agree to the creation of the special lien, and (iii) the value of the stock as of the agreement date must be sufficient to pay the deferred taxes plus the required interest.

Among other issues addressed by the memorandum are the following: (i) the requirements the Service may impose (pursuant to its statutory rights under Code Sec. 6324A) on an estate which has pledged stock as collateral to determine whether there has been a disposition of interest or withdrawal of funds from the business that would trigger acceleration of payment under Code Sec. 6166(g)(1), (ii) how the Service should secure its interest in the stock pledged as collateral, (iii) the procedure for denying or terminating estate tax deferral, and (iv) the continuing sufficiency of the collateral.

While the memorandum addresses stock in a closely held corporation, it states that its principles are equally applicable to interests in limited liability companies and partnerships.

III. IRS PRIVATE LETTER RULINGS AND TECHNICAL ADVICE MEMORANDA

NOLs Not Deductible by ESBT

In *CCA 200734019*, prior to his death, decedent held stock of an S corporation. Following his death, pursuant to the terms of his Will, a residuary trust was funded with various assets including the S stock. During the administration of the estate, the estate did not have sufficient income to absorb losses attributable to the S stock which gave rise to a Code Sec. 172 NOL. Upon the termination of the estate administration, the residuary trust under decedent's Will succeeded to the NOL carryover under Code Sec. 642(h)(1). The trust qualified as a permissible S corporation shareholder under Code Sec. 1361(c)(2)(A)(iii) during the two-year period following the decedent's death; however, in order to remain an eligible trust following the two-year period, the trustee made an ESBT election under Code Sec. 1361(c)(3).

On the basis of these facts, the Chief Counsel's Office advised that the trust is not entitled to deduct any amount attributable to the NOL, to

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which it succeeded pursuant to Code Sec. 642(h)(1), from the S portion of the trust following its ESBT election. Based on Code Sec. 641(c)(2)(C) which provides a complete list of the items of income, loss, deduction, or credit that the S portion of an ESBT may take into account and which further provides that "no deduction or credit shall be allowed for any amount not described in this paragraph," the Chief Counsel held that the NOLs that the trust succeeded to under Code Sec. 642(h)(1) are not described in Code Sec. 641(c)(2)(C); therefore, the S portion of the trust is precluded from taking deductions attributable to those NOLs. However, the Chief Counsel advised that the NOLs should be available as a deduction to the non-S portion of the trust following the trust's ESBT election.

Termination of Charitable Remainder Unitrust not Self-Dealing

In *PLR 200733014*, grantors, a married couple, created a net income charitable remainder unitrust which provides that the trustee will pay to the grantors in equal shares, during their lifetimes and until the death of the survivor, a untitrust amount equal to the lesser of: (i) the trust income for the taxable year, as defined in Code Sec. 643(b) and the regulations thereunder; or (ii) a determined percentage of the net fair market value of the assets of the trust valued as of the first day of each taxable year of the trust.

The payment of the unitrust amount also includes a make-up amount of trust income for the year to the extent the aggregate of the amounts paid in prior years was less than the aggregate of the amounts computed at the set percentage of the net fair market value of the trust assets. Upon the death of the survivor grantor, the trustee is to distribute all of the principal and income of the trust (other than any amount due either of grantors or their respective estates) to a certain public charity.

The trustee proposes to terminate the trust early by obtaining an order from a state court, contingent on the issuance of a favorable private letter ruling; under the proposed termination the grantors will assign their interests in the trust to the charity, in exchange for which the trustee will make a lump sum distribution equal to the present value of their right to receive unitrust or income payments for life. Any assets distributed in-kind will be distributed on a pro-rata basis between the grantors and the charity.

The grantors' personal physicians confirmed the grantors' position that that they were aware of no physical condition that would decrease either of the grantor's normal life expectancy or that either of their life expectancy was less than would otherwise be expected for a person of each of their ages.

On the basis of these facts the Service ruled that: (i) the early termination of the trust pursuant to a court order will not disqualify the trust as a charitable remainder unitrust under Code Sec. 664, (ii) neither the distribution to the grantors of the unitrust termination amount, the final distribution of trust assets to the charity, nor all of the parties' consent to trust termination constitute acts of direct or indirect self-dealing under Code Secs. 4941 and 4947, (iii) the court-approved termination of the trust, and distribution to the grantors of the unitrust termination amount and final distribution of remaining trust assets to the charity, will not constitute a taxable termination under Code Secs. 507 and 4947, and (iv) citing *Rev. Rul. 72-243, 1972-1 C.B. 233*, the amount received by the grantors as a result of the termination of the trust is an amount realized from the sale or exchange of a capital asset and, because the grantors' holding period in the life interest exceeds one year, under Code Sec. 1222(3), the gain recognized by grantors results in long-term capital gain.

Service Looks at Trustee's Material Participation in Business Venture

In *PLR 200733023*, a testamentary trust with multiple trustees acquired an interest in an LLC which actively engages in business. The trustees provided services to the LLC, including a range of administrative and operational activities relating to the LLC's business. The trustees also appointed special trustees under an agreement stating that the special trustees would be involved in the business in a manner that would satisfy the material participation rule of Code Sec. 469(h)(1); however the agreement specified that the special trustees could not "legally bind or commit the trust to any transaction or activity" and that the regular trustees retained "all decision making responsibilities related to the trust's financial, tax, or business matters."

The special trustees spent most of their work hours reviewing operating budgets, analyzing a tax dispute that arose among the LLC members, preparing and analyzing other financial documents, and negotiating the sale of the trust's interests in the LLC to a newly-admitted partner. The regular trustees asserted that they relied heavily upon the recommendations of the special trustees, even though they retained the ultimate decision-making authority.

On examination of the trust's claimed losses with respect to the LLC's business, the Service stated that the trust was required to materially participate in the actions

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of the LLC in order to avoid the passive activity limitation. Although regulations addressing the material participation requirement for trusts and estates have not yet been issued, the Service noted that the legislative history states in part that "an estate or trust is treated as materially participating in an activity . . . if an executor or fiduciary, in his capacity as such, is so participating."

The Service rejected the trust's reliance on the holding in *Mattie K. Carter Trust v. United States, 256 F.Supp.2d 536 (ND Tex. 2003)*, which held that material participation by trusts is determined from the combined activities of the trustees and the employees of the trust. The Service noted that, generally, the owner of a business may not look to the activities of the employees to satisfy the material participation requirement. In this case, the Service concluded that the activities of the regular trustees did not rise to the level of material participation. Citing the hours spent by the special trustees negotiating the sale of the trust's interests in the LLC and the hours spent resolving a tax dispute with another partner, neither of which related to the operating business, the Service further concluded that even if the special trustees were fiduciaries, their activities would not rise to the level of material participation.

CRUT's Investment in University Endowment Fund is a Capital Asset

In *PLR 200735019*, a university, qualified under Code Secs. 501(c)(3), 509(a)(1) and 170(b)(1)(A)(ii), is the trustee of, and holds the remainder interest in a charitable remainder trust intended to qualify under Code Sec. 664(d). The trust is required to annually pay a set percentage of the net fair market value of its assets to a certain income beneficiary.

The university owns an endowment consisting of a wide variety of assets, including public equities, bonds, private equity, and real estate. The university proposes to invest trust assets in the endowment; the contract between the university (not in its capacity as trustee) and the trust will provide that ownership of endowment units entitles the trust to quarterly "income payouts" based on the number of units owned on the payout date. The payout rate, set by the university to avoid the impact of market fluctuations, is not directly tied to investment performance in order to provide a predictable disbursement to unit holders. Any endowment investment return over and above the annual payout rate is credited to the principal amount of the endowment and is reflected in an increase in the value of each unit outstanding; if the annual payout rate exceeds the earnings on the endowment, the value of each unit outstanding will decrease in value.

The contract provides that the trust may invest any or all of its income payout in additional units; units may also be redeemed by the trust; if this occurs the trust will receive in return for the redeemed units the amount of cash equal to the number of units transferred multiplied by unit value as of the date of the redemption. The contract provides that the trust has no ownership interest in the underlying assets of the endowment, and the university is neither a partner nor an agent of the trust. The trust and the university will treat income payouts as ordinary income, and the holding period of a particular unit as beginning on the date the unit is issued to the trust.

A private letter ruling was previously issued to the trust concluding that the issuance of units, the making or receipt of payments with respect to the units, and the holding or redemption of units, will not generate unrelated business taxable income under Code Sec. 512(a)(1) to the trust.

On the basis of these facts, the Service concluded that the bundle of contract rights represented by each unit is property, and should be treated as a capital asset under Code Sec. 1221. The ruling emphasized that each unit represents a substantial investment by the trust for which there is an opportunity for appreciation as well as a risk of loss, each unit has an ascertainable basis, and the benefits and burdens associated with each unit are similar to those generally associated with property held to be capital assets. Although the trust will receive ordinary income in the form of the quarterly payouts, the unit is a capital asset under Code Sec. 1221 and under Code Sec. 1234A the redemption of the unit by the trust, depending on the holding period, will generate short-term or long-term capital gain or loss to the trust,.

Loan From IRA to Church for Purchase of Life Insurance not Prohibited Transaction

In *PLR 200741046*, taxpayer proposed making a loan from his self-directed IRA to a church exempt from tax under Code Sec. 501(c)(3) to enable the church to purchase an insurance policy on taxpayer's life. The church will own be the beneficiary of the policy. Taxpayer is neither a board member nor an employee of the church and has no control, ownership or financial interest in the church. No charitable deduction is contemplated in conjunction with the loan.

In exchange for the loan, the IRA will receive a 20-year promissory

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note carrying a 5% interest rate payable annually, with a balloon payment of principal due at the end of the term or, if earlier, within a reasonable period after taxpayer's death. The church will grant to the IRA a continuing security interest in the amount of the loan in a collateral-assignment of the insurance policy. The intent of the security agreement is to provide certainty for taxpayer that the ownership of the insurance policy continues to qualify as an insurable interest under state law.

It is projected that the annual interest payments will be utilized in part to satisfy minimum distributions required from the IRA. The IRA will not be entitled to any proceeds from the insurance policy and will only receive amounts due under the promissory note.

On the basis of these facts, the Service ruled that (i) the church is not related to the IRA in a manner that would come within the definition of a disqualified person under Code Sec. 4975(e)(2)(A)-(I), (ii) as taxpayer is not a board member or an employee of the church, nor does taxpayer control, own or have a financial interest in the church, the described transaction is not a prohibited transaction within the meaning of Code Sec. 4975 such that the IRA would cease to be an IRA under Code Sec. 408(e)(2), and (iii) because the IRA will not be the contract owner or the beneficiary of the policy, and in the event of taxpayer's death, only the promissory note will be repaid to the IRA, and the IRA will not receive or benefit from any death benefit that may be generated from the life insurance policy, the Service further ruled that the described transaction was not a prohibited investment in insurance within the meaning of Code Sec. 408(a)(3) such that the IRA would cease to be an IRA under Code Sec. 408(a)(3).

Relief Granted to make Revised Code Sec. 2057 Election

In *PLR 200743031*, husband and wife died simultaneously in an airplane crash before 2004. At their deaths, husband and wife were employees and shareholders of a closely held C corporation. Husband's estate passed by intestacy to his children from a prior marriage. Wife's estate passed by Will to her brother, who plans to continue to operate the company.

As a result of professional tax advice, both husband's administrators and wife's executor elected to treat each spouse's interest in the company stock and another asset as Code Sec. 2057 qualified family-owned business interests on their respective estate tax returns. The tax professionals did not include in the elections husband's and wife's interests in the building that served as the company's location because each spouse's interest in the company and other business interest was worth more than 50% of each spouse's adjusted gross estate, as required for the Code Sec. 2057 deduction.

On audit, the Service revalued the building because the mortgage was incorrectly reported, increasing the value of each adjusted gross estate. As a result, the value of each spouse's interest in the company and other business asset no longer exceeded 50% of their respective adjusted gross estates and the Code Sec. 2057 elections were disallowed. The estates requested extensions of time for making revised Code Sec. 2057 elections and filed amended estate tax returns including each spouse's interest in the building as a qualified family-owned business interest.

The Service noted that Code Sec. 2057(i) cross references the Code Sec. 2032A rules for making elections and that Code Sec. 2032A(d) states that the election is made in the manner prescribed by regulations. Regs. §301.9100-3 provides the standards used in granting extensions for making an election if the time for making the election is prescribed by regulation. The Service will grant relief if the taxpayer acted reasonably and in good faith and the grant of relief will not prejudice the government's interests; a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional and the professional failed to make, or advise the taxpayer to make, the election. In this case, the Service concluded that husband's administrators and wife's executor acted reasonably and in good faith and that the granting of relief would not prejudice the government's interest.

CRUT Division Pursuant to Divorce Does not Disqualify Resulting Trusts

In *PLR 200744019*, husband created a charitable remainder unitrust that annually pays him 9% of the net fair market value of the trust assets, valued at the beginning of the taxable year; following his death, the unitrust amount is to be paid to his wife until her death, when the remaining principal is to be paid to a designated charity. Husband retained the right to change the charity.

Husband and wife are divorcing and their separation agreement provides that the trust will be divided into two equal trusts, known as Trust A and Trust B. The terms of the two trusts will be identical to the original trust, except that: (i) husband will be the unitrust beneficiary of Trust A and wife the unitrust beneficiary of Trust B, (ii) each spouse will have a survivorship interest in the other's trust, (iii) each spouse will have

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the right to designate the charitable remaindermen of his or her trust, (iv) each spouse will be trustee of his or her trust, and (v) each spouse may make additional contributions only to his or her trust.

On the basis of these facts, the Service ruled that the proposed division (i) will not cause the original trust or either of the new trusts to fail to qualify as a charitable remainder unitrust under Code Sec. 664(d)(2), (ii) no gain or loss will be recognized by husband or wife on the transfer of one-half of husband's unitrust interest to wife and wife will acquire husband's basis in one-half of his unitrust interest, (iii) none of the trusts will recognize gain or loss on the division of the trust assets, and the new trusts will retain the asset bases and holding periods of the original trust, (iv) pursuant to Code Sec. 2516, no gift tax will be imposed on any transfers between husband and wife, (v) the transfers will not result in a Code Sec. 507 termination of the original trust as a private foundation, and (vi) the transfer will not result in Code Sec. 4941 self-dealing or Code Sec. 4945 taxable expenditures.

Sale of Real Property by Estate not IRD

In *PLR 200744001*, decedent's revocable trust entered into a contract to sell real property. Before the parties resolved outstanding issues regarding an easement for a gas pipeline which was discovered underneath the property and restitution for any damage to the property, the decedent died. The sale later closed.

The Service cited *Rev. Rul. 78-32, 1978-1 C.B. 198*, for the proposition that gain realized from the sale of real estate completed by an executor is income in respect of a decedent under Code Sec. 691(a) when the decedent had entered into a binding contract and was unconditionally entitled to the proceeds of the sale at the time of death. In this case important issues remained to be addressed at the time of decedent's death, and therefore the Service ruled that any gain realized from the sale of the property after decedent's death does not constitute income in respect of a decedent within the meaning of Code Sec. 691 and the basis of the property before the sale should be determined under Code Sec. 1014(a).

Court of Common Pleas of Philadelphia County Orphans' Court Division 2008 Calendar

Last Day to File Accounts (Due by 3:00 p.m.)	Audit Date
December 5, 2007	January 7, 2008
January 2, 2008	February 4, 2008
January 30, 2008	March 3, 2008
March 5, 2008	April 7, 2008
April 2, 2008	May 5, 2008
April 30, 2008	June 2, 2008
June 4, 2008	July 7, 2008
July 2, 2008	August 4, 2008
August 6, 2008	September 8, 2008
September 3, 2008	October 6, 2008
October 1, 2008	November 3, 2008
October 29, 2008	December 1, 2008