Report of the Chair

By HOWARD I. VERBOFSKY
PNC BANK

George Nofer, one of our Section’s esteemed past Chairs, sent me a very gracious email. I thought I would share it, and my reply, with you.

* * * *

Howard, I have been dilatory in not congratulating you sooner on your ascending to the Chair. Of the different organized bar activities in which I have been involved over my now 50 years of practice, the Section has been one of my most satisfying. To the extent that I was one of the organizers of the Section (from a lowly Orphans’ Court Committee), I take pride in what it has become.

* * * *

George, I very much appreciate your kind words. Your efforts as a “founding father” of the Section make your email that much more special. You say that you are proud of what the Section has become. I agree. The Section has quietly become, I think, a model of what a bar association section should be, by any measure.

If the measure is member services, the Section excels. The most obvious examples are the Section Listserve; the Philadelphia Estate Practitioner Handbook (available online and, for Section members, in hard copy); the educational programs; and this Newsletter. Less obvious is the fine work done in the committees, such as the suggested changes to continued on page 25
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<th>Committee</th>
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<th>Date of Meeting</th>
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<tbody>
<tr>
<td>Education Committee</td>
<td>Judith B. Stein</td>
<td>Usually 2nd Tuesday of the Month</td>
<td>PNC Bank 1600 Market Street 3rd Floor</td>
<td>4:00 P.M.</td>
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<td>302-651-1693</td>
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<td>Elder Law Committee</td>
<td>Debra Speyer</td>
<td>2nd Thursday of the Month</td>
<td>Philadelphia Bar Association 10th Floor 11th &amp; Market Streets</td>
<td>12:00 P.M.</td>
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<td>Legislative Committee</td>
<td>Kathleen Stephenson</td>
<td>2nd Wednesday of the Month</td>
<td>Pepper Hamilton, LLP 2 Logan Square 30th Floor</td>
<td>3:30 P.M.</td>
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<td>215-981-4311</td>
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<td>Publications Committee</td>
<td>Susan G. Collings</td>
<td>Set on an ad hoc basis; call for meeting date</td>
<td>Drinker Biddle &amp; Reath, LLP 1 Logan Square</td>
<td>12:00 P.M.</td>
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<td>Andrea Hyatt</td>
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<td>Schnader Harrison Segal &amp; Lewis, LLP 1600 Market Street</td>
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<td>Rules &amp; Practice Committee</td>
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<td>4:00 P.M.</td>
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<td>Taxation Committee</td>
<td>Andrea Lawrence</td>
<td>Usually 1st Tuesday of the Month</td>
<td>Calibre 1500 Market Street 20th Floor</td>
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**June 3, 2003**
Managing Real Estate in Fiduciary Accounts

Faculty: Reaves Lukens
Lois Murphy
Jane Laffend

Location: PBI/PBEC Education Center
Wanamaker Building
10th Floor

Time: 11:45 a.m. (registration) to 2:30 p.m.

**October 7, 2003**
New Split Dollar Requirements and Other Insurance Issues

Faculty: TBA

Location: PBI/PBEC Education Center
Wanamaker Building
10th Floor

Time: 11:45 a.m. (registration) to 2:30 p.m.
Decoupling the Pennsylvania Estate Tax from the Federal Estate Tax

By ADAM T. GUSDORFF, ESQUIRE
BALLARD SPAHR ANDREWS & INGERSOLL, LLP

If you hear cries of “Mayday!” from Harrisburg on May 1, chances are good that it won’t have anything to do with the celebration of the holiday, because May 1 is the day that the first tax returns are due under the new, “decoupled” estate tax, which has been roundly criticized as being in violation of the Uniformity Clause of the Pennsylvania constitution.

Act 89 of 2002, which is effective for estates of decedents who died after June 30, 2002, decoupled the Pennsylvania Estate Tax from the phase-out and elimination of the Federal state death tax credit by providing that all references in the Pennsylvania Inheritance and Estate Tax Act to the Internal Revenue Code of 1986 shall mean the Code as amended through June 1, 2001, which was six days before the passage of the Economic Growth and Tax Relief Reconciliation Act (“EGTRRA”). EGTRRA provided for the phase-out and elimination of the state death tax credit and also accelerated the increase of the unified credit.

The problem is that the Pennsylvania estate tax on estates exceeding $700,000 will essentially be calculated using the Code’s graduated schedule for determining the state death tax credit, and graduated taxes are unconstitutional in Pennsylvania. Although the graduated schedule had always been used in calculating the Pennsylvania estate tax (often called a “sponge” or “slack” tax), few complained under the prior scheme because the tax had to be paid regardless, and it didn’t matter whether it went to the Commonwealth or the Federal government.

Now an estate will be able to show the financial harm needed to gain standing to challenge the estate tax in court, which has the Department of Revenue concerned.

“The new law needs to come out,” said a Department of Revenue employee who asked not to be identified. “If the law stays and a court declares the estate tax unconstitutional, not only will we not collect that declining amount [of the sponge tax under the federal phase-out], but we may have to worry about giving back what we’ve collected in the last two or two-and-a-half years.”

If this worst-case scenario for the Department plays out, the Commonwealth, in addition to forgoing the amount it could have collected under the old law (i.e., taking the higher unified credit and phase-out into account), would face the prospect of being sued for refunds. The total loss could end up in the tens of millions of dollars.

Perhaps the best way to prevent a lawsuit would be for the legislature to repeal the troublesome component of Act 89 and, in essence, put things back as they were. The Commonwealth would then collect the “declining amount” until the state death tax credit is fully eliminated in 2005.

But getting the legislature’s attention is another matter.

“We’ve talked to the legislature and we’ve talked to the Attorney General, and we can’t force them to do anything,” said one source in the Department of Revenue’s Inheritance Tax Division. “We have to lobby like everybody else.”

Mark Ryan, the Executive Director of the Republican House Finance Committee, said he is not aware of any bill that is pending in either house of the General Assembly that would undo Act 89. Nor is his Democrat counterpart, Bob Kassoway, who added that any change probably would not come – at the earliest – until the annual budget tax bill is passed, which may not be until August.

One highly placed source in the Department of Revenue said efforts would continue to be made to contact legislators and/or the Attorney General’s office. The source was not permitted to elaborate, but added: “We do understand that there is a lot of concern over whether or not [Act 89] is unconstitutional. Right now, we are trying to figure out what to do.”

In the meantime, the Department is finalizing a PA-706. Until it is available, the federal Form 706 – completed in accordance with the Code as it existed on June 1, continued on page 4
The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) provides that the amount of state death tax credit that may be taken against the federal estate tax is reduced by 25% for deaths occurring in 2002, 50% for deaths in 2003, 75% for deaths in 2004, and by 100% for deaths occurring in 2005 and thereafter. Beginning in 2005, a deduction will be allowed for state death taxes paid in computing the taxable estate for federal purposes. The effect of the state death tax credit phase-out is to reduce state revenues in cases where the state death tax was tied to the federal death tax credit, unless states take legislative action.

Pennsylvania took such legislative action last spring, and enacted Act No. 89. This Act decouples the Pennsylvania Estate Tax from the provisions of EGTRRA by defining the federal estate tax as that contained in the Internal Revenue Code of 1986, as amended through June 1, 2001 (prior to the enactment of EGTRRA).

The Act also modifies the language in regards to the filing of the Pennsylvania estate tax return. For decedents dying on or before June 30, 2002, the due date for the Pennsylvania estate tax return is one month after the due date for the federal estate tax return. For decedents dying on or after July 1, 2002, however, the Act amends 72 P.S. 2145 to explicitly require that Pennsylvania estate tax returns be filed ten months after the decedent's death, without regard to the due date of the federal estate tax return, if any.

The modification of the Pennsylvania estate tax filing due date begs the question of whether the filing date for the Pennsylvania inheritance tax will also change. Paul Dibert, the Business and Trust Valuation Manager, Inheritance Tax Division, Pennsylvania Department of Revenue answers "No. The Pennsylvania inheritance tax returns will continue to be due at nine months after the decedent's death" as required in 72 P.S. 2136(d).

For the time being, the 2001 Form 706 should be used to calculate Pennsylvania estate tax due.

**Editor's Note**

The article in the December 2002 issue of the Probate and Trust Law Section Newsletter, titled "The Final Minimum Distribution Regulations: Selected Changes," inadvertently omitted the name of the author. The article was written by Robert H. Louis of Saul Ewing, LLP. We apologize for the oversight and thank Mr. Louis for his contribution to the Newsletter.
What is the Inheritance Tax Rate on the Inheritance Tax?

By DANIEL B. EVANS, ESQUIRE

It is said that hard cases make bad law, but sometimes hard cases force courts to rethink what everyone "knows." Everyone "knows" that the Pennsylvania inheritance tax is imposed on the beneficial shares of the estate before taxes. So, you figure out what the shares of the estate would be if there were no federal estate tax and no inheritance tax and then apply the appropriate inheritance tax rate to the different shares of the estate. The burden of the tax (i.e., who pays the tax) is a separate issue.

Faced with a somewhat unusual estate, the Commonwealth Court re-examined what we "know" and came up with a very different result, holding that the tax rate on the taxes paid from the residue of the estate should be the rate for the beneficiaries creating the tax, and not the beneficiaries of the residue from which the taxes are paid. In re Estate of Ray Bloom Ross, 2652 C.D. 2001, www.courts.state.pa.us/OpPosting/Cwealth/out/2652CD01_12-20-02.pdf (12/20/2002), rehearing den. (2/12/2003). Although the decision was based on unusual facts, the rationale of the decision could change the way the inheritance tax is calculated in many (if not most) estates in the future.

The Facts

The problem in Ross was that the will left the bulk of the estate in specific gifts to lineal descendants and a relatively small residue to collateral heirs. Also, the will directed that all taxes were to be paid from the residue. As a result, the Pennsylvania inheritance tax and federal estate tax completely consumed the residue, leaving nothing for the collateral heirs. The Commonwealth Court was therefore confronted with an estate which was required to pay inheritance tax at 15% even though the 15% beneficiaries actually received nothing.

The estate argued that the lower tax rate for lineals (6% in this case, because the decedent died in 1999) should apply to the pre-tax residue because it was used to pay the taxes for the benefit of the lineal descendants. Both the Board of Appeals and the Orphans' Court disagreed, saying that the estate was essentially trying to deduct the taxes, which is not allowed. (See 72 P.S. § 9128.)

The Commonwealth Court reversed, holding that the taxes could not be deducted, but that the tax rate for lineals should apply to the pre-tax residue if the taxes paid out of the residue benefited the lineals and not the collaterals. The court relied on the language of section 2116(a)(1) of the Inheritance and Estate Tax Act (72 P.S. § 9116), which states that the lower rate of 6% (now 4.5%) applies to property passing "to or for the use of" lineal descendants. Because the funds of the residue were “used” to pay the inheritance tax on property passing to lineal heirs, the residue was used for the benefit of the lineal heirs and the lower tax rate of 6% should apply to the residue. (In a footnote, the court noted that, if the residue were insufficient to pay the tax then the beneficiary would be required to pay the tax directly, which the court said supported its holding that the payment of taxes from the residue benefited the 6% beneficiaries.

Applying the Holding

Some questions to ponder:

Is it critical that the entire residue was consumed by taxes? In other words, does the holding in this case only apply to estates with no residue, or does it apply to estates with enough of a residue to pay taxes and make distributions to beneficiaries? The rationale of the decision, which is that the payment of tax from the residue for pre-residuary gifts is a payment for the benefit of the pre-residuary beneficiaries, should apply whether or not the residue is sufficient to pay the tax. The court also observed that the residue “can fully satisfy the six percent taxes,” which means that there might be a small amount left for the residuary beneficiaries (in which case the 15% rate would apply). So there is nothing in the decision to indicate that the absence of any residuary distribution was critical to the holding.

Does it matter whether the taxes are paid from the residue by direction of the decedent or by operation of law? In this case, the will directed that the death taxes be paid

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Inheritance Tax Rate, continued

from the residue, and the court stated that "Decedent made the decision that any taxes due were to be paid out of the residuary estate" (p. 3) and repeated that the use of the residue to pay the taxes on the gifts to the lineal descendants was "pursuant to instructions in paragraph NINTH of her will" (p. 8). However, the court also recognized that the same payments would have been made by operation of law in the absence of instructions in the will, in accordance with 72 P.S. §9144(a). (p. 3, note 7.) In conclusion, the court stated that it was the intent of the decedent "to benefit the collateral beneficiaries only to the extent that monies remained in the residuary estate after the payment of, inter alia, all death taxes." (p. 9) However, such an intent could be inferred even without a specific direction as to the payment of taxes, because the same result would occur by operation of law. All things considered, the existence of a direction in the will to pay the taxes from the residue should not be necessary to the holding in the case. A contrary conclusion would mean that a will that restates existing law is taxed differently than a will that relies on statutory law without restating it, which makes no sense.

And does the decision only result in a decrease in taxes? Can it work the other way around, and result in an increase in inheritance tax when the residue that would otherwise pass to a lineal descendant is used to pay the inheritance tax on a gift to a collateral heir? What is sauce for the goose is sauce for the gander, and there is no reason to believe that the decision only benefits estates, and never the Department of Revenue. And that is why the decision is so worrisome (and so important), because the more usual estate will make a few specific gifts to friends, collat-
eral heirs, and other 15% beneficiaries, and leave the rest of the estate to lineal descendants, and so the application of the principal of Ross Estate will most often result in an increase in inheritance tax, and not a decrease.

For example, suppose there is a total of $100,000 given to one or more 15% beneficiaries out of a $1,000,000 net estate, with the residue to children or other descendants. Before Ross, the inheritance tax would be $15,000 on the $100,000 in collateral gifts and 4.5% on the remaining $900,000, for a total of $55,500. However, if the tax is paid from the residue and the tax on the residue should reflect the rate for the beneficiary who benefited from the payment of the tax, then there is a tax on the $15,000 paid from the residue at the rate of 15%, not 4.5%. In fact, the calculation will be circular (a tax on a tax on a tax), with a resulting effective tax rate of 17.647% on the $100,000. So $117,647 is subject to tax at 15%, resulting in a tax of $17,647, while the remaining $882,353 is subject to tax at 4.5%, resulting in a tax for the lineals of $39,706, or a total tax of $57,353. Which is $1,853 more than the tax would have been before Ross.

And not only is the tax more, but (as demonstrated above) it is also harder to calculate, because the taxes have to be applied on the shares of the estate after taxes, which automatically results in a circular calculation.

Promoting Fairness

Having said all that, it must be admitted that the result in Ross is objectively fairer, because the tax rates are based on what beneficiaries actually receive, rather than what the will says that the beneficiaries should have received. So the effect of the decision is to protect beneficiaries from poor estate planning. Take the situation faced by the court in Ross itself. The "gross estate" was $892,979, but $763,850 was payable to lineal heirs and the remainder was (supposedly) payable to collateral heirs. Ignoring any other deductions, the federal estate tax would have been $65,499 and, according to the Pennsylvania Department of Revenue, the inheritance tax should have been $65,200 (6% on $763,850 and 15% on the rest), for a total death tax liability of $130,699. That would leave $762,280 for the lineal heirs and nothing for the residuary beneficiaries. However, suppose that the lawyer doing the estate planning had done the calculations and thought through the situation in advance, and then convinced the testator to change the will to leave $10,662 to the collateral heirs and the rest of the estate to the lineal heirs. In that case, the inheritance tax would be only $54,538 (15% of $10,662 plus 6% on the rest of the estate), resulting in total death taxes of $120,037, a savings of $10,662. In that case, the lineal heirs would still get the same $762,280 (after taxes), but the collateral heirs would get the $10,662 saved in inheritance tax, a saving due entirely to changes in the will which had no effect on the distribution of the estate other than to change the rate of tax to be applied to the part of the estate paid in taxes.

Before the decision in Ross, for Pennsylvania inheritance tax purposes it was best for the death taxes to be paid out of the fund passing to the beneficiaries with the lowest inheritance tax rate. That way, the amounts paid for death taxes, and not to beneficiaries, would be taxed at the lowest possible rates. The Ross decision would eliminate this kind of gamesmanship.

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Inheritance Tax Rate, continued

As a matter of tax policy, it is desirable for similar situations to be taxed similarly, and the Ross case should allow estates with the same values and the same net distributions to beneficiaries to be subject to the same taxes, regardless of what the governing document might label as the "residue" and which beneficiaries might be labeled as the "beneficiaries" of the amounts paid in taxes.

But is the objective fairness worth the costs of more complicated tax calculations? And (most importantly of all) is this the tax system the legislature really intended?

Conclusion

The Ross case could be appealed to the Supreme Court and, regardless of how the Supreme Court rules, the issue could be reconsidered by the legislature, so it's too soon to tell whether the decision represents another hard case making bad law, or a new and improved look at an old problem.

Until there is a definitive answer from the Supreme Court or the legislature, the issue of the tax rates to be applied to the amounts paid in taxes is going to be debated and disputed and practitioners will need to be aware of the issue for the protection of their clients.

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:

Howard I. Verbofsky
PNC Bank
1600 Market Street, 28th Floor
Philadelphia, PA 19103
e-mail: howard.verbofsky@pncbank.com
(215) 585-6814

Name: ____________________________

Address: __________________________

Committee Preferences:
First: ____________________________
Second: __________________________
Third: ____________________________

Probate and Trust Section Newsletter No. 106
The Hershey Power Play

By CHRISTOPHER H. GADSDEN
GADSDEN SCHNEIDER & WOODWARD LLP

Ed. Note: This article first appeared in the November 2002 issue of TRUSTS AND ESTATES.

The Hershey School Trust recently tried to sell a controlling interest in Hershey Foods, the largest chocolate maker in the United States. The initiative ignited very vocal public protest and rapid-fire state court litigation that attracted a huge amount of national publicity. That furore finally died down in September, when the trustee backed down by deciding against the sale. But still unresolved is the case’s troubling impact on charitable trusts and fiduciary duties. The Hershey imbroglio—and the proposed state legislation it seems to have inspired—may broaden the state attorney general’s scope of review of charitable trusts, burden trustees of charitable trusts with significant new duties, and cause donors to doubt whether their charitable purposes will be served.

Hershey’s Gift

At the core of the debate is the irrevocable deed of trust that Milton S. Hershey, founder of the Hershey Chocolate Company, and his wife Catherine executed in 1909 to establish a trust that would support the Hershey Industrial School to educate poor, white, male orphans. The school, later renamed the Milton Hershey School, would be residential, and was intended to adopt a holistic approach to the education of its students. The deed of trust named the Hershey Trust Company as trustee and nine individuals as managers. These managers were empowered to exercise substantial decision-making authority over the trust, and to govern the school. Initially Hershey contributed land to the trust, but a few years later he transferred shares of common stock constituting a controlling interest in Hershey Chocolate, now known as Hershey Foods.

Hershey’s philanthropy was not limited to the establishment of the school and what has become known as the school trust. He and his wife also built churches, schools, libraries, swimming pools, and a palatial public garden modeled on Versailles. The company that he founded was and remains the dominant employer in the town of Hershey. Today, it has a work force of 6,200 people. Hershey, with a population of 13,000 in south central Pennsylvania, is the quintessential company town.

Today the school is set on a campus of 2,700 acres just southeast of downtown Hershey. It has about 1,200 students (racially and ethnically diverse, male and female) who receive free tuition, room, board and healthcare and live in clusters of brick homes with full-time caregivers.

The school trust has assets with a principal value in excess of $5 billion. About 56 percent of the fair market value of trust assets consists of Hershey Foods stock. That stock represents a 77 percent voting interest in the company.

In Dec. 2001, the 17 individuals who constitute both the board of directors of the Hershey Trust Company and the managers of the school, held a meeting with a Pennsylvania deputy attorney general, who had been investigating some alleged conflicts of interest and mismanagement. The deputy reportedly encouraged them to diversify the trust assets. In March, the directors and managers voted 15-2 to explore a sale. Shortly thereafter they engaged an investment banker. By mid-July the exploratory efforts became public knowledge, sparking a huge outcry in Hershey and its environs. The public feared that any sale of a controlling interest in the company would lead to job reductions and possible plant closings in the Hershey area.

Monkey Wrench

Michael Fisher, attorney general for Pennsylvania and Republican candidate for governor of the state, publicly opposed the sale. On Aug. 12, he filed with the Orphans’ Court Division of the Court of Common Pleas of Dauphin County a Petition for Rule to Show Cause Why a Proposed Sale of Trust Assets Constituting the Controlling Interest in Hershey Foods Should Not Be Conditioned Upon Court Approval. This petition began a whirlwind tour through the Pennsylvania court system. On Aug. 23, Fisher petitioned for an ex parte injunction against the school trust and the company to prohibit them from continued on page 9
The Hershey Power Play, continued

entering into any agreement of sale before his petition had been heard. On
Sept. 3, Senior Judge Warren G. Morgan of the Orphans’ Court held a
hearing on the injunction request, at which a number of witnesses tes-
tified, including a former chief executive officer of the company and an
investment banker. The follow-
ing day, Morgan entered an order
granting the injunction. The trustee
and the managers immediately ap-
pealed. On Sept. 10, the Common-
wealth Court heard oral argument on
the appeal.

The reason that the parties
and courts moved so quickly was
that Sept. 14 was the deadline for
prospective buyers to submit bids.
Two bids were received, one from
William Wrigley Jr. Co.; the other, a
joint bid from Nestle and Cadbury-
Schweppes. Shortly before midnight
on Sept. 17, the trustee and manag-
ers announced that, by a vote of 10
to seven, they had rejected both bids,
and terminated their efforts to sell
the company. On the following day
the Commonwealth Court entered an
order upholding the grant of injunc-
tive relief, and directed the Orphans’
Court to rule on the merits of the first
petition “expeditiously.”

A week later the directors
of the trust company raised the white
flag. The board chair confirmed in
writing to the attorney general that
the school trust would not sell its
controlling interest without advance
notice to his office and approval of
the Orphans’ Court. At their Oct. 2,
meeting the directors ratified this
action, and petitioned Judge Morgan
to dismiss Fisher’s petition as moot.
In an adjudication and decree dated
Oct. 16, the judge agreed—but not
without pointedly criticizing the
boards of the trust company and
school.

“We view the resolution
adopted by the Directors/Managers on
October 2, 2002 as a proper gesture
toward that reconciliation [of commu-
nity, company and school],” said the
judge, “but it will not be enough...Reconstituting the Boards in
number and composition closer to the
model utilized by Milton S. Hershey
during his lifetime, and until recently
by all succeeding Boards, will hasten
the reconciliation.”

Morgan is urging the direc-
tors and managers to reduce their
number from the 17 to the original nine,
and increase the number, now just
four, who live in Hershey. It seems
that, “however well-intentioned,” the
board members have become “det-
ached” from Hershey’s vision, Judge
Morgan said. “Not the least significant
reasons for this being that the mem-
bership of each Board is unusually
large and the residences and daily lives
of too many members are distant and
disconnected from the charitable in-
terests they serve.”

Two Views of Trust Law

Whatever reconciliation be-
tween the Hershey Trust and the
Hershey community is possible, it will
be a lot harder to reconcile the oppos-
ing views of the attorney general’s
power over trusts, a trustee’s duty and
a donor’s right.

The attorney general never
contended that the trustee lacked the
power to sell trust assets. After all,
Section 7141 of the Pennsylvania Pro-
bate, Estates and Fiduciaries Code
provides: “Except as otherwise pro-
vided by the trust instrument, the
trustee, for any purpose of adminis-
tration or distribution, may sell, at
public or private sale, any real or
personal property of the trust.” And, un-
like many founders of companies or
controlling shareholders, Hershey
had not mandated or even expressed
any preference that the school trust
retain the company’s stock. The only
limitation Hershey placed was that
the trustee had to obtain the manag-
ers’ approval. In fact, the company’s
name was never mentioned in the
deed of trust. According to the
school trust’s answer to the first pet-
tition, the company had, during
Hershey’s tenure as chairman of the
board, executed an agreement for the
merger of the company with Kraft-
Phenix Cheese Corporation and
Colgate-Palmolive Peet Company.6

But Fisher did take the po-
tion that seems to be a startling en-
largement of a state attorney
general’s traditional parens patriae
role for charitable interests. Fisher
argued that this role authorized him
to review not only whether the sale
would protect the interests of the in-
tended beneficiaries of the school
trust (that is to say, the present and
future students of the school), but
also whether it would adversely im-
pact the interests of the public at
large, that is to say the community
of Hershey.

The trustee and managers
presented a more traditional view of
trust law. Their position was that,
since the approval of the manag-
ers, the trustee had a clear power
to sell under the governing instru-
ment and Pennsylvania statutory
law. The trustee’s objective of di-
versifying the portfolio was, they
claimed, advocated earlier by the
deputy attorney general. It certainly
represented an investment approach
that is almost universally accepted
under modern portfolio theory.7 The
trustee and managers also argued
that the statutory power of the Or-
phans’ Court to restrain the sale of a
trust asset does not apply when the
trustee has a power to sell.8

continued on page 10
The Hershey Power Play, continued

A Sympathetic Judge

How did the courts react to these two stances?

It is important to keep in mind that the hearing in the lower court was held to entertain the request for a preliminary injunction; the merits of Fisher’s argument were not being decided. Nevertheless, to justify the injunctive relief, the attorney general had to convince Judge Morgan of the following: that there would be immediate and irreparable harm; greater injury would result from refusing the injunction than granting it; the injunction would restore the parties to the status quo before the “alleged wrong;” the wrong was manifest and would be abated by the injunction; and the right to relief was clear.9

Judge Morgan’s adjudication indicates some of the factors that resonated with him in making his decision:

• Consistent with the provisions of the deed of trust, the board of directors of the trust company and the managers of the school were the same individuals. This identity of personnel governing the trustee and the trust beneficiary made it unlikely that the beneficiary would question the actions of the trustee and warranted an active role by the attorney general.

• The Pennsylvania Prudential Investor Rule, which generally requires trustees to diversify portfolios, does not apply to the school trust. The hearing judge seemed to take particular pleasure in the fact that the expert witness for the trustee did not know this legal point.

• The hearing judge was persuaded by the testimony of Richard Zimmerman, a former chief executive officer of the company, that a sale of the controlling interest would necessitate expense reduction in the form of massive job layoffs and potential closings of plant facilities in the Hershey area. Therefore, the Hershey community might be irreparably harmed even if the school trust were enriched.

• The financial needs of the school did not require a sale of the controlling interest in the company stock. Three years earlier the trustee had petitioned the same judge for permission to expend substantial funds to establish an institute to study and recommend methods for teaching needy children, documenting that the school trust was then holding in excess of $600 million of unexpended income. And in 1963, the trustee had secured court approval to expend $50 million to establish the Pennsylvania State Medical School at Hershey.

Clearly, the judge was sympathetic to the attorney general’s position. Morgan wrote, “Next, the Directors/Managers argue that the law of Pennsylvania establishes that the duty of a trustee is to administer the trust solely for the benefit of the beneficiaries of the trust, quoting in support the statement under Comment p. of §1701(1) of the Restatement Trusts which reads, ‘The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person.’ We are familiar with these rules but do not construe them to mean that as long as the act of a trustee is an exercise of a power given in the trust instrument and purports to serve the trust, the trustee can act with impunity and without regard for adverse effects on others. We know of no case that employs the rules advanced by the Directors/Managers in the context of an Attorney General asserting his duty to see that the public interest is not harmed by an act of a trustee that may otherwise be lawful and purports to be in furtherance of the trust.”

The ruling of the Orphans’ Court was appealed to the Commonwealth Court, an intermediate appellate court in Pennsylvania that hears appeals in all cases that have been commenced by the Commonwealth government or officers thereof acting in their official capacity. In Pennsylvania, most appeals involving trust and estate matters are referred instead to a different intermediate appellate court, the Superior Court. In a majority opinion the Commonwealth Court did not focus on the substantive claims in the case and limited its review to a determination “whether there were any reasonable grounds for the trial court’s action.” Noting that a consummation of a sale would terminate the entire legal proceedings prior to a resolution of the substantive issues, the President Judge wrote, “Because we cannot conclude that no reasonable grounds exist to support Judge Morgan’s order, we must affirm his grant of the preliminary injunction.”

One judge dissented on the basis that the trustee had the power to sell this trust asset and that the state attorney general was exceeding his parens patriae authority.

AG’s New Power

Indeed, for trusts and estates practitioners, Fisher’s position, and the support it garnered in the Orphans’ Court, raises the pressing question: What is the proper scope of the attorney general’s review in its capacity as parens patriae for

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charitable interests? Citing the decision of the Supreme Court of Pennsylvania in Pruner's Estate, the attorney general had argued that the "ultimate beneficiary and real party in interest of all charitable trusts is the general public." From this point Fisher extrapolated the proposition that the attorney general is authorized to consider the likely effect of a charitable trust action upon all segments of the general public. In this case, of course, that meant considering the projected consequences of the sale for the general citizenry of Hershey and its environs.

But the holding in Pruner's Estate (and the basis on which it has been regularly cited) is that the attorney general as a representative of the public interest is an indispensable party in all court proceedings involving charitable interests. The court in Pruner's Estate did not address the scope of the attorney general's review. Customarily the attorney general has sought to protect charitable interests only by ensuring that charitable funds are properly managed and not subjected to unnecessary fees or other expenses; and that charitable assets are not diverted from the uses intended by the grantor.10

Fisher's expansion of this role in the Hershey case certainly goes beyond what his office seeks when reviewing the sale of nonprofit health care entities. Under Pennsylvania law, fundamental changes in non-profit corporations (such as a merger, consolidation, division, sale of major assets or dissolution) are subject to review by the Orphans' Court to confirm that property committed to charitable purposes is not being "diverted from the objects to which it was donated, granted or devised."11 The attorney general as parens patriae is a party to such proceedings. In 1997 the Office of the Attorney General had issued a review protocol that required 90 days prior notice, and the submission of a variety of information. Most of the informational requests are designed to determine whether the consideration being paid by the for-profit hospital chain or other buyer is fair and adequate and how the sale proceeds to be received are to be applied for future charitable uses. These requests fall easily within the non-diversion rubric.

The review protocol also demands information "relative to the perspective of the non-profit's beneficiary class or representatives thereof (for example, the community)" and "information...bearing on the effect of the proposed transaction on the availability or accessibility of health care in the affected community." The goal seems to be to determine what ripple effect the proposed transaction will have on the community—and what the public's reaction is to the proposed transaction. Yet even here the focus is still on the health care services that have been the primary charitable purpose of the non-profit corporation. In contrast, the proposed role of the attorney general in the Hershey case looks far beyond the educational implications of the sale to the overall welfare of the Hershey community.

Trustees' New Burden

For trustees of charitable organizations, Fisher's stance raises this nettlesome question: Do they now owe duties to the public at large? Tradition ally, trustees understood that their duty was to manage prudently the assets of the trust for the benefit of the named beneficiaries or class of beneficiaries.12

But the attorney general's position implies that the trustee of a charitable trust also must take into account the consequences of a trust action on all segments of the public at large. This duty potentially has no bounds. Should the trustee consider impact on the local community, the statewide population or the nation as a whole? If a sale of the controlling interest in the company did lead to job reductions in Hershey, would additional employment opportunities be created in some other state? Must the trustee of a charitable trust prepare a form of environmental impact statement for every major action?13

Donors' Uncertainty

For charitable donors, Fisher's stance throws a huge question mark over their right to designate beneficiaries and to have their charitable purposes respected. Is there now a new, undefined class of beneficiaries who, in some sense will be competing for the trustee's loyalty? What advice can the estate planning counsel give to a client who now is considering a charitable gift in trust? Can the scrivener of a charitable trust draft provisions that will give the donor greater assurances?

Lawmakers Response

To codify his stance and try to make it workable, Fisher proposed new legislation. The state senate passed an amendment to the Pennsylvania Prudent Investor Rule that would require a charitable trustee to take into account "an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the com-
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munity in which the beneficiary of the trust is located and the special value of the integration of the beneficiary’s activities with the community where that asset is located.”

The proposed legislation also would require the trustee to give 60 days advance notice to the attorney general of any action that might involve change in control if the trust holds “a controlling interest in a publicly traded business corporation received as an asset from the settlor.” On Oct. 22, the bill sailed through the state general assembly by a wide margin. Protecting jobs and businesses is a popular stance in an election year. The bill is expected to be signed by the governor.

To some extent the proposed legislation would bring the governance of charitable trustees more in line with that of non-profit corporation directors. The Pennsylvania Non-Profit Corporation Code states that directors of non-profit corporations may consider, inter alia, “the effects of any action upon any or all groups affected by such action, including members, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.”

But there is a huge difference between the Non-Profit Corporation Code’s “may consider” the public interest and the proposed standard for charitable trusts: “shall consider.” Thankfully, the proposed legislation seems to expand the class of beneficiaries only to the community in which the charitable institution or its primary beneficiaries are located. This may help trustees better understand their new duty. On the other hand, the trustee of a private foundation could be caught in a conflict between this state law provision, which might warrant retention of the business interest, and a federal tax law that requires private foundations to divest stock if it represents more than a 20 percent voting interest in the company.

Fisher’s solution also does little to ameliorate the concerns of charitable donors if they plan to fund their trusts with interests in a company that has a significant presence in a community. Furthermore, community groups may some day contend that other trust assets might have the sort of special value that invokes this new provision, for example, a large tract of land that is devoted to agricultural uses but has development potential as a site for a shopping mall. On the other hand, because the new law would amend the Pennsylvania Prudent Investor Act, which governs “except as otherwise provided by the governing instrument,” a savvy donor may try to stipulate in the trust instrument that the trustee is excused from compliance with this new requirement.

Round Two?

As this article goes to press, there is still much uncertainty. Even though the court proceedings have quieted down and the governor is expected to sign the new law, the conditions that first sparked the controversy remain. There still are business reasons for the company to seek a merger partner. The number and composition of the directors and managers have not changed. The school trust still owns its controlling interest in the company and its investment portfolio is still undiversified. A future disposition of part or all of the shares is still possible.

It all puts me in mind of the movie character Forrest Gump’s famous quip. “Life is like a box of chocolates,” he said. “You never know what you’re gonna get.”

POSTSCRIPT

There were several developments shortly after this article originally went to press in late October 2002. The new legislation, Act No.133 of 2002, was signed into law by the governor on November 6, 2002. One week later, as recommended by Judge Morgan, the Board of Directors of the Hershey Trust Company was dramatically reconstituted. Eleven directors left office and four new directors, all residents of Central Pennsylvania, were elected. Similar changes were made to the Board of Managers of the Milton Hershey School. Dr. William L. Lepley, the School President, left his position on December 1st and John O’Brien, an alumnus of the School, was appointed as interim president.

There have been no published reports about renewed efforts to sell the Trust’s controlling interest in Hershey Foods. In hindsight the 2002 initiatives to sell that interest brought to full boil some long-simmering opposition to the policies of the Directors/Managers on the part of the school alumni association and the community. The changes in governance and management for the Trust Company and the Milton Hershey School addressed their grievances. The other change that resulted from the furor is the new Pennsylvania statute, the provisions of which have yet to be tested.

Endnotes

1 With court approval the eligibility criteria have been revised several times, most recently in 1976. The
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...current class of eligible students consists of poor and healthy children (male and female) who have not been receiving adequate care from their natural parents.

2 Protestors reportedly collected more than 6500 signatures on a petition calling for the removal of the Director/Managers and presented it to the Attorney General. Associated Press Newswires 9/24/02.

3 The Democratic candidate, Ed Rendell, also voiced concern about the sale.

4 In Pennsylvania the Court of Common Pleas is the trial court at the county level and the Orphans’ Court Division is a division of the court that has jurisdiction over estates, trusts and non-profit corporations.

5 The jurisdiction of the Commonwealth Court will be explained below.

6 The agreement was signed on Oct.25,1929, just four days prior to the great crash of the stock market. Because of the stock market turmoil the transaction was never consummated.

7 Pennsylvania adopted the Prudent Investor Rule in 1999. PEF Code §7201 et seq. Section 7204 states the general rule that “a fiduciary shall reasonably diversify investments, unless the fiduciary reasonably determines that it is in the interests of the beneficiaries not to diversify”. Section 7205 creates an exception for assets received in kind from the grantor, even though the asset constitutes a disproportionately large share of the portfolio. These provisions, however, are not applicable to pre-existing trusts such as the school trust.

8 Section 3355 of the PEF Code.


10 The briefs of both the attorney general and the trustee cite Commonwealth v. Barnes Foundation, 398 Pa.458, 159 A.2d 500 (1960), which is an example of the traditional parens patriae role. In that case the attorney general petitioned the court to force a charitable foundation to permit public viewing and enjoyment of the foundation’s world-famous art collection.

11 15 Pa. C.S.A. §5547(b).

12 The brief of the trustee and managers cited several Pennsylvania Supreme Court decisions for the proposition that a trustee is required to act solely in the interest of the beneficiaries. In re Steele’s Estate, 377 Pa. 250, 103 A.2d 409 (1954); In re Pew Memorial Trust No. 1, 5 D.&C.3d 627 (O.C. Phila.1977).

13 This rule of law would create the sort of “stray duties” that in a different context the Supreme Court of California had warned against. Goldberg v. Frye, 266 Cal. Rptr. 483 (Cal.App. 1990).


15 Internal Revenue Code §4943.
Enforcing Charitable Trusts: Who Has Standing?

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Current litigation in the Montgomery County Orphans’ Court over the future of the Barnes Foundation provides a fresh opportunity to review the interesting question of who may maintain a suit to enforce a charitable trust. In a February 12, 2003 Opinion (issued as this article is being written), Judge Stanley R. Ott ruled on the efforts of several persons and entities to intervene in a matter begun when the Board of Trustees of the Barnes Foundation filed a petition in the Orphans’ Court to amend its charter and by-laws. The Court granted standing to one party petitioning to intervene (the Board of Trustees of Lincoln University), and denied standing to the other three (an individual taxpayer, a group of Barnes Foundation art students, and the Violette deMazia Trust). The question of who should be permitted to participate as a party in litigation concerning a charitable trust is answered, in the Barnes Foundation matter as in all cases, by applying certain well-established principles of Pennsylvania law.

The rule, found with minor variations in Pennsylvania Supreme Court opinions and the RESTATEMENT (SECOND) OF TRUSTS, §391. A discussion of the leading Pennsylvania cases often begins with Wiegand v. The Barnes Foundation, 374 Pa. 149, 97 A.2d 81 (1953). There, a concerned private citizen, with the consent (but nothing more) of the Attorney General, sued the Barnes Foundation and its officers and trustees for alleged breach of their duties. Although the Supreme Court upheld the dismissal of the plaintiffs’ claims by the court below, it declared that the proper reason to have dismissed the claims was that the plaintiff was not shown to be a member of the Barnes Foundation or to have any interest in it beyond that of other members of the general public. Absent a special interest, a private party cannot “compel the performance of a duty owed by the corporation to the public.” Wiegand, 374 Pa. at 153, 97 A.2d at 82. The action should have been brought by the Attorney General.

This rule can be traced to centuries-old English common law, under which the king, as pares patræae, was the ultimate enforcer of charitable trusts. The purpose of the rule is to avoid endless litigation brought by individuals or organizations whose interests as members of the general public are exclusively enforced by the Attorney General. See Nevil Estate, 414 Pa. 122, 129, 199 A.2d 419, 423 (1964) (in cy pres proceeding, possible claimant of fund not entitled to notice); Pruner Estate, 390 Pa. 529, 136 A.2d 107 (1957) (general public is the beneficiary of charitable trust, and its interests in enforcing trust are exclusive responsibility of Attorney General).

In a more recent case, the Supreme Court evaluated several factors in affirming that the petitioner did in fact have a “special interest” in the charitable trust, which conferred standing and entitled the petitioner to seek (and obtain) injunctive relief. Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123 (1981). The Court’s analysis suggests that practitioners seeking or opposing a finding of standing in a matter concerning a charitable trust, regardless of the involvement or position of the Attorney General, should emphasize, in particular, the relationship between the charity and the party seeking standing. Other factors include the intent or purpose of the charity and the party seeking

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A Tutorial for the Special Needs Trustee

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The past decade has witnessed the widespread emergence of a category of trusts which are broadly defined by their purpose of preserving entitlement to public benefits on behalf of the beneficiary, while enhancing the quality of life of the beneficiary. The origins of the common law version of this trust, the third party supplemental needs trust, have been in the making since the early 1980’s, when the decisions in Lang1 and Stout2 helped delineate the how-to and how-not-to aspects of third party trusts. The passage of OBRA ‘93,1 ten years ago, provided the blueprint for the current treatment of first party trusts, involving the transfers of the beneficiaries’ own assets to trusts, subject to the payback of Medicaid benefits to the state at death.

A considerable body of legal and lay literature on the successful creation of special or supplemental needs trusts exists, which will not be repeated here. However, drafting the trust is only half of the challenge. The most perfectly crafted document will not be effective if the trust is not properly administered. Thus, the selection, education and need to carefully monitor the trustee are discussed in this article.

I. Defining the Special Needs Trust

“Special” or “supplemental needs” trusts (SNTs) are trusts designed to supplement benefits from government programs. The most common programs are Supplemental Security Income (“SSI”) and Medical Assistance (“Medicaid”), both of which are means-tested programs, allowing for countable resources of about $2,000, and with low income caps as well. SSI provides for cash assistance up to a maximum of approximately $552 per month, which is to be used only for food, shelter and clothing, but does not provide for numerous other quasi-essentials and comforts, such as over-the-counter medications, toiletries, reading and other entertainment materials, or travel-related items such as airline tickets. In Pennsylvania, SSI eligibility automatically qualifies the beneficiary for Medicaid, which provides a wide array of medical services, including hospitalization, doctors’ visits, therapies and medications, as well as a range of home and community based services and residential facilities. Thus, the SNT provides a mechanism through which supplemental items or services are provided to the disabled person.

The degree of scrutiny for self-settled trusts will be higher, since the state is a creditor with the equivalent of a lien on the principal of the trust equal to the value of the benefits, even though pay-back is deferred until the death of the beneficiary.

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standing, and any contributions of money made to the charity by the party seeking standing. 493 Pa. at 499, 426 A.2d at 1127.

Returning to the February 12, 2003 Orphans’ Court Opinion in the Barnes Foundation matter, it appears that the relationship between the Barnes Foundation and the Board of Trustees of Lincoln University was so significant that at least “limited” standing was conceded by the Barnes Foundation. The Court granted “full” standing, declined to limit the procedural rights of the successful intervenor, and rejected the concept of “limited” standing, which finds little support in the law. As in the Valley Forge case, the party’s strong relationship with the charity was the key that established the required “special interest” and unlocked the courthouse door.

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II. The Trustee’s Duties

An SNT trustee, like any other trustee, is a fiduciary, who must be educated as to the basic elements of fiduciary duties, including (1) the duty to carry out the terms of the trust agreement; (2) the duty of loyalty to the beneficiary; (3) the duty to act and invest prudently; (4) the duty not to delegate trustee duties; and (5) the duty to maintain records of transactions, prepare tax returns and account to the beneficiary for the trustee’s actions in the administration of the trust.

It is necessary to obtain a tax identification number for a testamentary SNT; for first party SNT’s the Code allows either the grantor’s social security number or a new tax identification number to be used.

In some instruments, provision may be made for an advisory committee, to consist of one or more family members, a caregiver, social worker or other individual with special insight into the beneficiary. Whether or not a formal committee is designated, the trustee should plan to meet periodically with those close to the beneficiary to monitor the needs of the beneficiary. If particular restrictions, whether as to investments or expenditures, are imposed by the instrument, they must be noted. In addition to the public benefit preservation issues, the trustee must also balance the size of the fund, the age and life expectancy of the beneficiary, so as to best utilize the funds over the lifetime of the beneficiary.

In many situations, the SNT trustee is a family member, not a professional trustee or even a business person. The SNT trustee must be carefully instructed as to the duty to act solely in the best interests of the beneficiary, without regard to the trustee’s own advantage and the welfare of any other person. It is not uncommon for the trustee to want to expend funds which may benefit the entire family out of the trust of the disabled beneficiary. In trusts which are subject to court approval for withdrawals, there is less danger of improper distributions. The Court will often require contribution from other family members before approval is given to install an inground swimming pool, for example, despite its usefulness in providing therapy to the beneficiary. Each case must be individually assessed.

The trustee should also be advised of the duty to account, and make periodic reports to the public agencies providing benefits if required. The trustee must understand that personal liability for breach of duty will follow. A supervising court may require periodic accountings or reports. Social Security will request reports annually of the use of SSI distributions, and the Department of Public Welfare may also request periodic information.

If the trustee is also the guardian of the estate or the representative payee for Social Security purposes, the trustee must keep separate accounts and refrain from commingling the funds. Separate bank accounts with separate registrations are needed for these different funds. It is implicit that the trustee’s own funds be segregated and not commingled.

III. SSI Requirements

Beyond the more or less standard fiduciary responsibilities which accompany the job of trustee, there is an even more difficult level of balancing the beneficiary’s special needs for distributions with the eligibility criteria for the public benefits at risk. Then, constantly comparing the needs of the beneficiary against the rules of the program, the trustee must determine what can properly be paid for from the trust. Since the most restrictive and one of the most common programs involving SNTs is SSI, a review of the program’s general provisions follows.

A. SSI — Resource Limits

SSI permits an applicant to have “countable resources” which do not exceed $2,000 in value. If resources exceed $2,000 during any calendar month, the beneficiary’s SSI benefits and, as a result, his or her eligibility for Medicaid, may be terminated. Income that is received during the month is considered “income” throughout the calendar month of receipt, even if deposited as savings. If the funds are still there at the beginning of the next month, the funds are then considered to be “resources” and are subject to the resource limits.

Certain assets are excluded when determining a person’s eligibility for SSI benefits and may freely be purchased for the beneficiary. Payments should always be made directly to the vendor or service provider, however, because funds given to the beneficiary directly are considered income, which will reduce dollar for dollar the cash benefit being paid, and can result in excess resources if the $2,000 total is exceeded. Common examples of excluded resources for SSI purposes are (1) a primary residence, if the

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beneficiary lives in it or intends to return to it; (2) household goods, including furniture, household equipment and supplies and personal effects; (3) one vehicle of unlimited value if needed for regular medical treatments, modified for handicapped use, or if needed for essential daily activities, otherwise, value must be $4,500 or less; (4) life insurance with a cash value of $1,500 or less, and all term insurance; (5) a burial plot, or other burial space, regardless of value; (6) a revocable burial fund, worth up to $1,500, if the funds are clearly designated as being set aside for the individual’s burial expenses (reduced by the face value of any insurance policies excluded above); (7) an irrevocable burial trust or other irrevocable burial arrangement, if the fund is of a reasonable amount, and if such funds are held in an irrevocable burial contract, an irrevocable burial trust, or are an amount in an irrevocable trust which is specifically identified as being available for burial expenses.

B. SSI - Income Rules

It is the SSI income rules which can be the most difficult to comprehend for the trustee. In addition to the $2,000 resource limitation, an SSI recipient may not have income in excess of $552 per month in order to qualify for benefits. “Income” is defined by the SSI regulations as “anything you receive in cash or in kind that you can use to meet your needs for food, clothing and shelter.” Certain disbursements from the trust may be deemed “income” to the beneficiary for SSI purposes, regardless of their characterization for trust accounting and income tax purposes.

Any cash payment that is received by the beneficiary during the month as a distribution from the trust is considered income throughout the calendar month of receipt, whether it is spent or retained. If the payment is deposited into an account either by or on behalf of the beneficiary, it becomes a “resource” in the following month, which must be below the “resource” limits described above.

For SSI purposes, all distributions from the trust will be classified under one of the following four categories. As explained below, distributions that SSI will classify as either “direct income” or “in-kind support and maintenance” should be made only in very infrequent circumstances and only after full consideration of the consequences. Form is elevated over substance in the review of the distributions, so painstaking care is needed. In general, the first two categories of distributions should be avoided; the second two should be liberally used.

1. “Direct Income” to the Beneficiary

Any cash, money or other item equivalent to or convertible to cash which is given to the beneficiary will immediately be considered as direct income to him, and will reduce his SSI benefits on a dollar-for-dollar basis. As a result, the trustee should avoid making cash payments to the beneficiary since there is no advantage to doing so. In fact, if a cash distribution results in the loss of SSI benefits, both SSI and Medicaid benefits will be lost. Examples of items which can be converted to cash are postage stamps and a refundable airline ticket.

2. “In-kind Support and Maintenance” (“ISM”)

If the trust beneficiary receives food, clothing or shelter as a result of payments made from the trust to other persons, then the beneficiary will have income in the form of “in-kind support and maintenance.” The beneficiary’s SSI benefits will be reduced if he receives ISM because SSI benefits are specifically intended to pay for food, clothing and shelter. Therefore, if the beneficiary receives those goods or services from another source, then he is considered as requiring less SSI. Examples of ISM would be payment from the trust for the beneficiary’s rent, grocery bills, or winter coat.

Generally, while it is desirable to avoid ISM payments, it is not always prohibited. The consequence of ISM distributions is a reduction of the beneficiary’s SSI benefits, based upon the presumed or actual value of the benefits. The reduction is not on a dollar-for-dollar basis, but is generally capped at one-third of the SSI payment; thus, though the payment is reduced, there is no loss of Medicaid benefits. Since the cash benefit is reduced but not eliminated, as is the case with distributions of cash, in certain circumstances, the value of a distribution of ISM to the beneficiary could be greater than the SSI dollars lost as a result of the distribution. Careful scrutiny must be given to any proposed distribution of ISM.

3. Items Not Considered to be “Income” to the Beneficiary

Distributions made to a third party which result in the beneficiary receiving items that are not food, clothing or shelter are generally not considered to be income to

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the beneficiary and will not affect eligibility for SSI. Some examples of distributions which are not considered income for SSI purposes include cash payments made to providers of medical or social services for care rendered to the beneficiary.

In addition, bills which are paid for the beneficiary to receive services are not counted as income to him. However, if the beneficiary receives any asset as a result of payment of the bill, the value of the asset received is counted as “in-kind income,” which is discussed in the next section.

4. “In-kind Income”

In general, “in-kind income” exists whenever the beneficiary receives a non-cash item which is not food, clothing or shelter. In most cases, it is safe to provide such income to the beneficiary. This is so because the value of the non-cash item, other than food, shelter or clothing, is not counted as income to the beneficiary in the month in which it is received if the item will be deemed to be an excluded asset if retained in the following month. For example, if the trustee purchases a computer for the beneficiary, it will not be counted as income because it will be considered an excluded household item if retained by the beneficiary in the following month.

Therefore, exempt assets may be purchased for the beneficiary without causing a loss of eligibility for SSI. The trustee may also pay for certain medications and alternative health treatments if they are not covered by Medicaid or other benefit programs.

Although an SNT may provide substantial discretion in making distributions from the trust funds, that discretion must be exercised so as to avoid distributions which increase the countable resources or income to a level which exceeds the maximum allowed. Thus, in general, the trustee should limit distributions to payment for services for the beneficiary or for in-kind income.

IV. Beneficiary’s Needs

The trustee should be empowered to employ professionals to assist in the administration of the trust, including hiring a care manager or other qualified person to prepare an annual assessment of the beneficiary’s needs. In determining how to make decisions about purchasing goods or services for the beneficiary, ideally in consultation with the beneficiary, his immediate household members and possibly a care manager, the trustee should compile a list of items and services which would enhance the beneficiary’s life.

The list of desirable expenditures is as varied as the personal situation and environmental factors relating to a beneficiary. Purposes for distributions may include: recreational equipment, games and crafts; books and magazines; telephone, answering machine; television, radio and cable service; computer equipment, musical instruments, stereo, CD player; education and educational travel; home maintenance items such as tools, appliances, furnishings; medical, psychiatric or dental services that are not covered by Medicaid or are from providers who are not Medicaid-participating; special medical equipment; social worker or case management services; companion and nursing aide services; and direct payment of medical insurance premiums.

More latitude exists in making distributions from third party special needs trusts for entertainment, travel and expenses of third persons. Although the Social Security Act does not restrict the expenditures from first party trusts to those which are medical, therapeutic or otherwise related to the disability of the beneficiary, the Department of Public Welfare objects to expenditures outside that general category.

V. Record Keeping and Reporting

If distributions from the trust are ever called into question by SSA, the Internal Revenue Service or the Department of Public Welfare, the trustee will need to prove that they fell into the proper category. It is necessary to maintain very accurate records. Records should be updated regularly, with a yearly review in preparation for the filing of the annual report and income tax returns.

The SSI program requires periodic reports for all SSI recipients. These reports must be completed for eligibility to continue. The beneficiary must report the existence of the Special Needs Trust to SSA, and provide a copy of it if requested. In addition, the Trustee or the beneficiary must inform SSA at any time there is a change in the beneficiary’s address, employment status, living arrangements, amount of income, marital status, changes in health, admission to a health facility or nursing home, departure from the U.S., or entitlement to additional public benefits.

Any report made to SSA should be in writing and should include the beneficiary’s name and social security number, the trustee’s name, and a description of the event that triggered the report and the date it occurred. The report is due within ten (10) days of the end of the month.
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in which the event happened and copies should be retained by the trustee.

The failure to make a timely report will allow the SSI program to claim reimbursement of all incorrectly paid benefits and to impose a fine of $100.

The trustee should err on the side of disclosure to SSA in the event of a questionable event or distribution. If the issue is discovered by the Income and Eligibility Verification System, skepticism will prevail in the determination of the trustee’s good faith. Information is shared by the IRS and Department of Public Welfare and Social Security Administration, so it is not unlikely that the questionable expenditure or distribution will be discovered. If the trust is a “pay-back” trust under OBRA ‘93, the law requires that it be for the sole use of the beneficiary, and verification will be requested to establish that distributions did not benefit third parties.

VI. Appeals from Adverse Decisions

The trustee must be attentive to notices regarding SSI or Medicaid benefits. If notice is given of the intent to reduce or eliminate benefits, a prompt written appeal should be filed within 10 days. Although the notice states that an appeal can be filed within 60 days, benefits may be suspended unless the appeal is filed within 10 days, and the beneficiary may thus be without benefits for an extended period, even if the decision is reversed on appeal.

SNT Checklist

The Trustee should consider expenditures for the following:

1. Funeral planning
   • Pre-need irrevocable funeral and burial trust and burial plot

2. Furnishings and personal items
   • Durable medical equipment such as wheelchairs, walkers, geri-chairs
   • Specialty clothing items such as orthopedic shoes, arch supports, elastic hosiery, hearing aids, supplies for incontinence or to prevent pressure sores
   • Electronic items such as television with remote control, VCR, radio, telephone with enhancements if appropriate, and accessories and furniture to accommodate the beneficiary’s disability
   • Cable or satellite services
   • Books, magazines, audio books, music on CDs or tapes
   • Memberships in clubs and magazine subscriptions
   • Furnishings and accessories for room in facility

3. Services
   • Medical and dental care not otherwise covered by benefits or private insurance, including skilled care that Medicare will not cover
   • Companions and home care aides
   • Speech, occupational, physical, and massage therapy
   • Psychological counseling
   • Education
   • Care managers

4. Quality of Life Enhancement for Third Party SNT
   • Birthday party
   • Fresh flowers
   • Holiday gifts
   • Entertainment and cultural activities
   • Travel and vacation expenses for beneficiary and family member
Ethics Column

By PAUL C. HEINTZ
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Question: May a lawyer accept a case if his or her own testimony will be needed in a hearing in which that lawyer’s client is involved?

It is not difficult to envision estate and trust matters in which we lawyers may become material witnesses: Will contests, tax refund claims, guardianship proceedings and hearings involving the interpretation of Wills and trusts where extrinsic evidence may be permitted. A common law doctrine known as the "Lawyer-Witness Rule" has long prohibited a lawyer who is likely to be a necessary witness from "acting as an advocate at trial." Today that rule is found in the Rules of Professional Conduct as Rule 3.7.

The rule is based on concerns that a lawyer's credibility may be enhanced once he or she is sworn in as a witness or, if that lawyer's credibility is effectively questioned during cross-examination, the lawyer's persuasiveness as an advocate may be diminished. Furthermore, combining the roles of lawyers and witnesses may diminish the effectiveness of our system of justice and may raise the appearance of impropriety. Because the lawyer-witness rule protects the administration of justice rather than only the interest of the clients, the Rules of Professional Conduct do not permit the client to waive the disqualification.

Rule 3.7 provides three exceptions to the general rule: A lawyer is permitted to act as the advocate at trial (1) when his or her testimony relates to an uncontested issue or (2) relates to the nature and value of legal services rendered in a case, or (3) in situations where disqualification of the lawyer would work substantial hardship on the client.


The Rule also provides a means of softening the blow of the lawyer's own disqualification: It specifically states that the principle of imputed disqualification, Rule 1.10, does not apply in these situations. Accordingly, the disqualified lawyer may simply call upon another lawyer in the firm to handle the proceedings.

In general, then, a law firm may usually accept a case even if one of its lawyers will be required to testify, unless the firm's position or the testimony would otherwise place it in conflict with an existing or former client pursuant to Rules 1.7 or 1.9.

WHAT WOULD YOU LIKE TO SEE IN FUTURE ETHICS COLUMNS?

Send your questions and ideas to:

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Probate and Trust Law Section Newsletter No. 106 20
I. COURT DECISIONS

Gift Taxes Paid Within Three Years Of Death Included In Estate

In Estate of Armstrong, 119 TC No. 13 (2002), decedent made gifts in 1991 and 1992 of his stock in a privately held corporation to his four children, his grandchildren, and two trusts, which he valued for gift tax purposes at $100 per share. The children entered into a transferee liability agreement providing that they would pay additional gift taxes arising from any proposed adjustment to the amount of the gifts.

After decedent’s death in 1993, the IRS determined that the stock should have been valued at $109 per share and assessed additional gift taxes for 1991 and 1992. Total gift taxes paid were $4,682,840, of which the children paid none.

The estate sought a refund of the gift tax, arguing that the possibility that the IRS might revalue the stock and trigger additional gift taxes reduced the gift’s value and the resulting gift taxes as well. In a prior case involving the same parties, the Fourth Circuit affirmed a district court decision that the obligations to pay the additional gift taxes were speculative and didn’t reduce the value of the gifts. (See Estate of Frank Armstrong Jr., et al. v. United States, No. 01-1305 (4th Cir. Jan. 15, 2002).

Decedent’s estate tax return excluded the $4,680,284 of gift taxes paid on the 1991-1992 gifts. In 1997 the IRS issued a deficiency notice, increasing decedent’s taxable estate by the gift taxes paid within three years of death, and also reflecting the increased value of the stock.

The Tax Court granted the IRS’s request for partial summary judgment that the 1991-1992 gift taxes be included in the estate. The court rejected the estate’s argument that the gift taxes includable in the estate should be reduced by consideration received in connection with the payment of the gift taxes, noting that section 2035(c) requires inclusion of gift taxes paid by the decedent or his estate within three years of death with no provision for netting for consideration. The court also rejected the argument that decedent received consideration in connection with the transferee liability agreement. The estate failed to show that decedent or the estate received or was entitled to receive consideration for payment of the taxes.

Estate Awarded Limited Litigation Costs

In Estate of Elma Middleton Dailey, et al. v. Commissioner, T.C. Memo. 2002-301 (No. 6251-00; No. 6262-00), the Tax Court, concluding that the IRS’s position was substantially reasonable on the valuation issue, granted an estate litigation costs only on the issue of whether a family limited partnership should be recognized for tax purposes.

Decedent, during her lifetime, created a family limited partnership, taking a 1 percent general and a 98 percent limited partnership interest with her son receiving a 1 percent limited partnership interest. She subsequently transferred a 45% and 15% limited partnership interest respectively to her son and daughter-in-law. A gift tax return filed after her death, claimed a 40 percent discount, which discount was allowed by the Tax Court, in a prior case (Estate of Elma M. Dailey, et al. v. Commissioner, T.C. Memo. 2001-263). The estate then sought litigation and administrative costs for the costs of the litigation.

The Tax Court noted that the Service conceded that it wasn’t substantially justified in maintaining a position that the partnership should be disregarded for tax purposes. However, the court concluded that the Service was substantially justified in relying on its expert in challenging the valuation of the FLP. The court, after determining the appropriate allocation of costs, did not award any costs for the valuation issue but only on the entity issue.

Tax Court Valuation Of Estate’s Deduction Upheld

In Estate of Algerine A. Smith, et al. v. Commissioner) 90 AFTR 2d 2002-7443 (CA 5, 11/7/2002), the Fifth Circuit has held that the Tax Court properly limited an

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estate’s deduction for the value of a claim against it to the amount asserted by the Service’s expert witness.

Prior to her death, decedent was one of several defendants in a lawsuit by Exxon seeking reimbursement of excessive royalty payments. After her death, a court found the defendants liable to Exxon for restitution of overcharges they received. Decedent’s estate claimed a $2.5 million deduction under section 2053, the entire amount being sought by Exxon. The Tax Court, upholding the Service’s position, held that the estate’s deduction was limited to $681,840, the amount the estate eventually paid to settle the claim. The Fifth Circuit reversed, ruling that the claim should have been determined as of the date of decedent’s death. (Estate of Algerine A. Smith v. Commissioner, No. 98-60241, No. 98-60313 (CA 5. 12/15/1999), The case was remanded to the Tax Court to determine the value of Exxon’s claim.

On remand, the Tax Court held that the Service’s evidence supported a valuation of the claim as of the date of decedent’s death at the $681,840 the Service had previously allowed. The court noted that the estate failed to offer any evidence of predeath facts to support its assertion of the value of Exxon’s claim and concluded that the estate failed to show that it was entitled to a section 2053 deduction beyond $681,840.

The Fifth Circuit affirmed, finding that the Tax Court had not abused its discretion and had complied with instructions for valuing the claim on remand and agreeing with the Tax Court that the estate failed to present evidence that it was entitled to deduct the full amount claimed by Exxon.

Estate Required To Include Full Value of Partnership Assets

In Kimbell v. U.S., 91 AFTR 2d 2003-585 (DCTX 1/14/2003), prior to her death, decedent owned interests in a revocable living trust, an LLC and a partnership. The LLC was owned 50 percent by the living trust and 50 percent by decedent’s son and his wife. The LLC contributed 1 percent of the capital to the partnership and was its general partner and the trust contributed 99 percent of the capital to the partnership and was the sole limited partner. The Service determined that the value of decedent’s 99 percent interest in the partnership was the full value of the assets transferred by the trust to the partnership and not the discounted value as stated in the estate tax return. The estate paid the taxes and sought a refund.

The issue for the court was the application of Section 2036 to decedent’s transfer of assets to the partnership. The court noted that there are exceptions to the inclusion of property in an estate under 2036 for (1) transfers that are bona fide sales for an adequate and full consideration or (2) transfers after which the decedent retains neither the possession or enjoyment of, or the right to income from the property, nor the right, either alone or in conjunction with any other person, to designate the persons who shall benefit or enjoy the property.

The court first concluded that the transfer of assets to the partnership was not a bona fide sale for an adequate and full consideration because (i) the executor produced no credible evidence that the formation of the partnership was a product of an arms length transaction, (ii) decedent’s ownership interest in the trust and the LLC showed that she was on both sides of the transaction, and (iii) the executor failed to show that decedent received adequate and full consideration for the sale.

The court then concluded that decedent had retained the enjoyment of the property because the partnership agreement provided that limited partners with 70 percent interest had the right to remove the general partner. As a limited partner with a 99 percent interest, decedent had the right to remove the general partner and appoint herself as the general partner and as such she had the discretion to decide on distributions of income, thereby retaining a power proscribed under Section 2036.

Two-Life Annuity Interest In GRAT Is Qualified Interest

In Schott V. Comm., 91 AFTR 2d 2003-915, (CA9 2/18/2003), a husband and wife created separate GRATs, each of which provided for fixed annual annuity payments of 11.54 percent of the initial fair market value of the assets to be paid to the grantor for 15 years. If the grantor predeceased the term, the remaining payments would be made to the surviving spouse.

The Tax Court held that because the spousal interest in the GRATs wasn’t fixed and ascertainable at the inception of the GRAT, the spousal interest was contingent on the spouse’s surviving the grantor. The court further held that each spousal interest was not a qualified interest because they were

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subject to revocation by the grantor, and therefore the interest must be treated as having a value of zero.

The Ninth Circuit, found that the statute and regulations don't exclude contingent interests and reversed the Tax Court, holding that the trusts fit within Reg. Section 25.2702-2(d)(1), Example 7 and that the two-life annuity interests were qualified under section 2702 and should be subtracted from the value of the gift. The Circuit Court rejected the Service's argument that the date that the spouse's interest begins isn't fixed because it depends on the grantor's death, noting that the date and duration of the spousal annuity can be ascertained with acceptable probability by an annuity table.

Self-Canceling Installment Notes Valid

In Estate of Duilio Costanza, et al. v. Commissioner, 91 AFTR 2d 2003-987 (CA6 2/19/2003), decedent sold property to his son in exchange for a SCIN which provided that the son would make monthly payments, terminating on decedent's death. Following decedent's untimely death just five months later, an estate tax return was filed valuing the SCIN at zero and showing no tax due. The Service issued a deficiency notice because either (i) the SCIN was not a bona fide transaction or (ii) the transaction was a bargain sale that would increase the estate's adjusted taxable gifts.

The Tax Court held that the property conveyance was a gift, not a bona fide transaction for full and adequate consideration. The Sixth Circuit reversed, finding that the estate affirmatively showed there was a real expectation of repayment at the time the transaction was entered into, rebutting the presumption against the enforceability of intrafamily SCINs. There was no evidence that the decedent or his son presumed the decedent would die shortly after signing the SCIN. However, the case was remanded to the Tax Court to resolve the Service's alternative argument that the SCIN was a bargain sale subject to gift tax under Code Sec. 2512.

II. IRS REVENUE RULING

IRS Issues Guidance On Change To Pension Distribution Amounts

In Rev. Rul. 2002-62, 2002-42 IRB 710 (10/03/2002), the Service has issued guidance to help taxpayers preserve their retirement savings when there is an unexpected market downturn. The Ruling applies to taxpayers who have begun taking withdrawals from their qualified plans or IRAs prior to reaching age 59 1/2.

Generally, taxpayers are subject to a 10% penalty tax under section 72(t)(1) (in addition to income tax) on amounts withdrawn from IRAs or qualified plans prior to reaching 59 1/2. One exception to the penalty tax is for distributions taken as part of a series of substantially equal periodic payments over the taxpayer's life expectancy or the joint life expectancies of taxpayer and beneficiary. The IRS issued guidance in Notice 89-25 providing three methods to satisfy the "substantially equal periodic payment" exception. The taxpayer must continue the selected method until the later of 5 years or attaining age 59 1/2 or otherwise be subject to the 10% penalty tax on earlier distributions.

Two of the safe-harbor methods described in Notice 89-25, the fixed amortization method and the fixed annuitization method, require a fixed amount be distributed and could result in the premature depletion of the taxpayer's account in the event there is a downturn in the market. This ruling, which replaces the guidance under Notice 89-25, permits taxpayers who selected one of these two methods a one time change to the third method under the safe-harbor, the required minimum distribution method, where the amount changes from year to year based on the value in the account from which the distributions are being made. In addition, the ruling clarifies how this method works in light of the final regulations on required minimum distributions and provides a choice of mortality tables that can be used in satisfying the permitted methods.

III. IRS PRIVATE LETTER RULINGS AND TECHNICAL ADVICE MEMORANDA

Value Of Trust's Assets Includible In Gross Estate

In PLR 200240018, at the time of a decedent's death, he was a resident in a long-term care facility, the expenses for which were paid by the Department of Social Services. Some years prior to his death, decedent had been permanently disabled as the result of an accident. Under the terms of a negotiated settlement, a lump sum was paid to the decedent's sister, as the trustee of

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an irrevocable supplemental needs trust established for the decedent’s benefit, the terms of which permitted the decedent to qualify for government assistance. On decedent’s death, the trustee was required to reimburse the state for the costs of public assistance provided to decedent. At decedent’s death, trustee intended to sell the appreciated assets in the trust and use the proceeds to reimburse the Department of Social Services.

Under these facts, the IRS ruled (i) under section 2036, decedent was the transfersor of the funds transferred to the trust and that the value of the assets held in the trust on the date of decedent’s death was includible in his gross estate, (ii) the amount paid to the Department of Social Services for reimbursement was deductible under section 2053(a)(2), and (iii) under 1014(b)(9), the basis of the assets held in the trust is the fair market value of those assets at decedent’s death.

Stock Redemption From Revocable Trust Isn’t Disposition Of QFOBI

In PLR 200242025, decedent’s revocable trust held more than half the voting and nonvoting preferred stock in a family-owned company, while the remaining preferred stock and all of the common stock was held by, or for the benefit of, decedent’s children and grandchildren. The revocable trust provided for the distribution of the stock to separate trusts created for decedent’s daughter and son. The executor of decedent’s estate made a QFOBI election under section 2057.

Solely in order to enable the estate to pay death taxes, the company proposed to redeem shares of voting and nonvoting preferred stock from the revocable trust prior to distribution. The Service ruled under these facts that the stock redemption wouldn’t be treated as a disposition of a qualified family-owned business interest under Section 2057 and wouldn’t trigger the imposition of additional estate tax. However, a recapture tax could be imposed if the company reissued the redeemed shares or issued any new shares to a nonrelative.

Donor May Serve as Sole Trustee of Charitable Remainder Trust

In PLR 200245058, the donor created a two-life charitable remainder unitrust with a 7% payout, appointing himself as the sole trustee. The trust provided that a 7 percent unitrust payment be paid to donor on a quarterly basis during his lifetime, and after his death, the unitrust payment would be paid to his wife, subject to donor’s power to revoke his wife’s interest. At the death of the survivor recipient, trust assets would be distributed to a qualified charity.

The Service concluded, among other things that (i) the fact that the grantor was the sole trustee of the trust would not disqualify the trust as a charitable remainder unitrust under section 664 where the terms of the trust required him to use a current qualified appraisal (as defined in reg section 1.170A-13(c)) for valuation purposes for any unmarketable assets, and (ii) neither the settlor’s nor any successor trustee’s receipt of commissions as trustee pursuant to state law (so long as no commissions are charged against the unitrust amount) nor the settlor’s testamentary power to revoke his wife’s lifetime interest in the trust would disqualify the trust under section 664.

Policy Transfers Between Couple’s Trusts Are Disregarded

In PLR 200247006, taxpayer had two grantor trusts, the first of which held life insurance policies on his life. He and his wife had two additional grantor trusts, the first of which held policies on their lives. Taxpayer proposed to transfer, for valuable consideration, the policies on his life to the trustees of his second trust while he and his wife proposed to transfer, for valuable consideration, the joint policies in the first joint trust to the second joint trust.

The Service ruled on the facts presented that because the trusts were wholly owned grantor trusts, both proposed transfers would be disregarded for federal income tax purposes and would not be treated as transfers for value under section 101(a)(1). The Service also concluded that the transfers would not affect the application of section 101(a)(1) to the insurance policy proceeds paid on the couple’s deaths.

Stock Redemption Triggers Additional Estate Tax

In PLR 200252084, decedent and her four sons owned all the common and preferred stock of a corporation. On her death, her common stock passed to her sons and her preferred stock passed to her daughters. The executor of her estate

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made a QFOBI election under section 2057 on the estate tax return, deducting the value of her interest in the corporation. One of the sons proposed to have the corporation redeem all of his common stock in the corporation in return for cash and a promissory note. The redeemed shares would then be retired.

The Service, noting that the proposed redemption would result in the son disposing of his entire interest to the corporation, ruled that because the corporation isn’t a qualified heir under sections 2057(f)(1) and 2032A(e)(1) and because a redemption isn’t treated as a purchase or acquisition of any assets of the corporation by the unredeemed shareholders, the transaction would be considered a disposition causing the imposition of additional estate tax under section 2057(f)(2).

Disclaimer and Trust Reformation
Valid Permitting Estate Tax Charitable Deduction

In PLR 200302029, under the terms of decedent’s Will, a trust was created for the benefit of decedent’s brother and his brother’s wife. The income was payable to the brother and his wife for life with principal distributions to be made in the trustee’s discretion based on an ascertainable standard. Following their life interest, the corpus would pass to a designated charity. The brother predeceased decedent, but brother’s wife survived decedent. Following decedent’s death, the wife proposed to disclaim the right to receive principal payments under the Will. In addition the trustees petitioned to reform the trust under section 664(d).

The Service ruled that (i) under Section 2518, as the wife’s interest in the corpus is a separate interest from her right to receive income, if the other requirements of section 2518(b) are satisfied, the proposed disclaimer would be a qualified disclaimer under section 2518; (ii) because, due to the disclaimer, wife’s right to receive income was the only noncharitable interest in the trust, the proposed reformation of the trust would be a qualified reformation for purposes of section 2055(e)(3) if timely commenced and the trust satisfies the requirements of section 664(d)(2); and (iii) if the reformed charitable remainder trust meet the requirements of a charitable remainder unitrust under section 664, the present value of the remainder interest in the trust, as reformed, would be allowed as an estate tax charitable deduction under section 2055(a).

Report of the Chair, continued from Page 1

Orphans’ Court Rules and the monitoring of legislation.

If the measure is community service, our Section is one of the pioneers in using the internet to make it easy for Section members to find pro bono opportunities.

If the measure is cordial relationships with our Bench, I am not aware of a section that has a better relationship than our Section has with the Orphans’ Court, thanks to Judge O’Keefe, his colleagues and their clerks.

If the measure is financial management, the Section’s effective, but tasteful, use of corporate sponsors for the Newsletter, speakers and the Annual Meeting has allowed Section members to receive a great deal of value for their still modest dues.

And, if the measure is a party, well, I do not know how any group could top the wonderful Annual Meeting and reception at the Kimmel Center that Marilyn Sanborne put together.

So, George, over the years, through the hard and smart work of many dedicated Section Chairs, Committee Chairs and members, and Section members, the Section that you and others organized really has become something of which we can all be proud.