Report of the Chair

By HOWARD I. VERBOFSKY
PNC BANK

In this column, I want to take time to mention the activities of some of the Section’s Committees.

First, as carryover of the “Green Book” Committee (and the hard work of many, including Daphne Goldman and Gene Gillin), the Section continues to receive very positive feedback regarding the hardcopies of the Philadelphia Estate Practitioners Handbook (“PEPH”), which were distributed to each Section member, and the Handbook’s web version (www.peph.com).

On a related web topic, Dan Ross has agreed to be the Section’s liaison with the Philadelphia Bar Association regarding the Section’s web site. If you have questions or comments about the Section’s web site, contact Dan.

The Legislative Committee has been reviewing drafts of the Pennsylvania version of the Uniform Trust Code. If you have questions or comments, contact Kathleen Stephenson, Committee Chair.

The Rules and Practice Committee has been reviewing the Orphans’ Court citation procedure. That Committee, chaired by Margie Thompson, is also revising the old “Red Book,” which will appear as the first major update to the PEPH web site.

The Committee on Public Service has a new Chair in Howard Vigdeman and several new committee members. That Committee has the listserve postings of pro bono projects up and running again.

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Summary of the Jobs and Growth Tax Relief Reconciliation Act of 2003

By STEPHEN D. D. HAMILTON
AND MARK D. GRIMM
DRINKER BIDDLE & REATH LLP

This article summarizes the provisions of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (the “2003 Tax Act”) which was signed into law by President Bush on May 28, 2003. Among other things, the 2003 Tax Act:

- reduces tax rates on capital gain and dividend income;
- accelerates certain tax reductions established by the Economic Growth and Tax Relief Reconciliation Act of 2001 (the “2001 Tax Act”); and
- provides certain business taxpayers increased depreciation and expensing deductions.

Reduction of Capital Gain and Dividend Tax Rates

Capital Gains. The 2003 Tax Act decreases the tax rates for long-term capital gains of individuals, trusts and estates from 10% and 20% to 5% (0% in 2008) and 15%, respectively. These reduced tax rates apply to long-term capital gains recognized (including long-term capital gains recognized from installment sale transactions entered into prior to May 6, 2003) on or after May 6, 2003. The new rates apply both for regular tax and alternative minimum tax (“AMT”) purposes.

Dividends. Under the 2003 Tax Act, most dividends are taxed at the new capital gains rate of 5% and 15% as described above. This new tax treatment applies to “qualifying dividends” received on or after January 1, 2003. In general, “qualifying dividends” are dividends received from domestic corporations and “qualified foreign corporations.”

“Qualified foreign corporations” generally include:

- corporations incorporated in a United States possession;
- foreign corporations, substantially all the income of which is eligible for the benefits of a United States income tax treaty that the Treasury Department determines to be satisfactory for purposes of this provision and that includes an exchange of information program; and
- foreign corporations with outstanding stock or ADRs that are readily tradable on an established securities market in the United States.

For dividends to qualify for taxation under the new capital gains rates, a taxpayer must hold the relevant shares of stock for more than 60 days out of the 120-day period beginning 60 days before the ex-dividend date. In the case of preferred stock, these periods are extended to 90 and 180 days. For this purpose any days during which the taxpayer’s risk of loss is “hedged”, as described in Internal Revenue Code §246(c)(3), are disregarded.

Dividends received from a regulated investment company (a “RIC”) or a real estate investment trust (a “REIT”) will qualify for the new reduced rates if the aggregate of the qualifying dividends received by the RIC or REIT is 95% or more of the RIC or REIT’s gross income aside from long-term capital gains. If the qualifying dividend income of a RIC or REIT does not meet this 95% threshold, then dividends from the RIC or REIT are qualifying dividends only to the extent the income of the RIC or REIT itself constitutes qualifying dividends. As a result, most dividends distributed by REITs will not qualify for the new reduced rates, nor will RIC dividends that are attributable to short-term capital gains or interest income earned by the RIC (unless the short-term capital gains and interest income amount to no more than 5% of the RIC’s gross income aside from long-term capital gains).

One technical point about the new reduced tax rates on dividends is that they apply only to actual dividends. The new rates do not apply to “in lieu of” payments that are made with respect to shares of stock that are the subject of a securities loan. So individuals whose dividend-paying stocks are lent out

continued on page 4
Summary of JGTRRA, continued

by their broker will not be eligible for the reduced tax rate. If an individual has shares in a brokerage account, generally the broker has a right to lend any shares that are held in the individual’s margin account. Accordingly, for an individual to be sure of getting dividends eligible for the reduced rates of tax, he or she must hold all dividend-paying stocks in a cash account, not a margin account.

Modification of Other Provisions. The following provisions have been affected by the new capital gain and dividend tax rates:

• the collapsible corporation rules under Internal Revenue Code §341 have been repealed;

• the accumulated earnings tax and the personal holding company tax are reduced to 15%; and

• amounts realized on the disposition of “Section 306 stock” are treated as dividends for purposes of applying the new reduced capital gain and dividend tax rates.

Sunset Provision. The new reduced tax rates for capital gain and dividend income sunsets, by its terms, in 2009.

Acceleration of Income Tax Reductions

Tax Rate Reductions. The 2001 Tax Act lowered the marginal income tax rates for individual taxpayers from 15%, 28%, 31%, 36% and 39.6% to 10%, 15%, 27% 30%, 35% and 38.6%, respectively.

In addition, the 10% income tax bracket was to have been expanded for taxable years beginning after December 31, 2007 and the four top tax rates were to have been reduced further to 25%, 28%, 33% and 35% for taxable years beginning after December 31, 2005. The 2003 Tax Act accelerates these changes. As a result, effective for 2003, the taxable income level for the 10% income tax bracket is increased to $14,000 and the four top tax rates are 25%, 28%, 33% and 35%. Because the 2003 Tax Act has an immediate effect on the income tax liability of individuals, the Treasury Department has posted revised withholding tax tables on the Internal Revenue Service website (www.irs.gov).

In addition, the 2003 Tax Act increases the AMT exemption amount to $58,000 for married taxpayers filing a joint return and to $40,250 for unmarried individuals filing a separate tax return for taxable years beginning in 2003 and 2004. This increase is designed to reduce the number of taxpayers who would otherwise be thrown into the AMT by reason of the reduction in regular income tax rates.

Increase in Child Tax Credit.
The 2001 Tax Act increased the child tax credit from $500 to $600 for the 2003 and 2004 taxable years. In addition, the child tax credit, under the 2001 Tax Act, was to have further increased in stages to a maximum of $1,000 in the 2010 taxable year. Under the 2003 Tax Act, the child tax credit increases to $1,000 for the 2003 and 2004 taxable years, but, for taxable years beginning after December 31, 2004, the child tax credit reverts to the levels provided for under the 2001 Tax Act.

The 2003 Tax Act also provides that the increased amount of the child tax credit (up to $400) will be paid in advance to taxpayers who are eligible for the child tax credit in 2003 and who received the child tax credit in 2002. To determine if a taxpayer is eligible for an advance payment, the Internal Revenue Service will use the information provided on a taxpayer’s 2002 tax return. These advance payments began in July and it is intended that each taxpayer eligible for an advance payment will receive it by October 1, 2003.

Marriage Penalty Relief.
Under the 2001 Tax Act, the standard deduction for married taxpayers filing a joint return was to have increased in stages until 2009, when it would equal double the standard deduction of an unmarried individual filing a single return. The 2003 Tax Act increases the standard deduction for married taxpayers filing a joint return to an amount equal to double the standard deduction for individuals filing a single return for the 2003 and 2004 taxable years. For taxable years after 2004, however, the standard deduction for married taxpayers filing a joint return reverts to the amounts provided in the 2001 Tax Act.

Additionally, the 2001 Tax Act was to have expanded in stages the 15% income tax bracket for married taxpayers filing a joint return to an amount equal to double the size of the 15% income tax bracket for individual taxpayers filing a single return beginning after December 31, 2007. The 2003 Tax Act expands the 15% income tax bracket for married taxpayers filing a joint return to double the size of the 15% income tax bracket for continued on page 5
Summary of JGTRRA, continued

individual taxpayers filing a single return for the 2003 and 2004 taxable years. For taxable years beginning after December 31, 2004, however, the 15% income tax bracket for married taxpayers filing a joint return reverts to the amounts provided in the 2001 Tax Act.

Sunset Provision. The 2003 Tax Act does not change the ultimate sunset provisions of the 2001 Tax Act. Therefore, beginning in 2011, tax rates and brackets, the child tax credit and any marriage penalty relief will revert to their pre-2001 levels unless further tax legislation is enacted.

Depreciation Deductions, Expense Deductions and Corporate Estimated Taxes

"Bonus" Depreciation. The 2003 Tax Act provides a "bonus" first-year depreciation deduction of 50% of the purchase price for most newly acquired "qualified property." "Qualified property" includes MACRS property with a recovery period of 20 years or less, water utility property, certain computer software and certain leasehold improvements. This qualified property generally must be acquired and placed in service between May 6, 2003 and December 31, 2004, and cannot have been acquired pursuant to a binding contract in effect on or before May 5, 2003. The 2003 Tax Act also provides extra first year depreciation deductions for certain passenger vehicles.

Expense Deductions. The 2003 Tax Act increases the maximum dollar amount that may be expensed by small businesses under Internal Revenue Code §179 in lieu of claiming depreciation deductions. Under §179 a small business may expense up to $100,000 of depreciable tangible personal property that is purchased for use in the active conduct of a trade or business. The 2003 Tax Act increases the §179 limit to $100,000 for property placed in service in taxable years beginning in 2003, 2004 and 2005. In addition, the 2003 Tax Act increases the point at which the §179 deductible amount begins to phase out, from $200,000 of total property placed in service during the year to $400,000. These dollar amounts are indexed annually for inflation for taxable years beginning after 2003 and before 2006. For purposes of this provision, property qualifying for this deduction includes off-the-shelf computer software placed in service in taxable years beginning in 2003, 2004 and 2005.

Corporate Estimated Tax. The 2003 Tax Act provides that 25% of the corporate estimated tax payment due on September 15, 2003 does not need to be paid until October 1, 2003.

Endnotes

1 A taxpayer electing to treat dividends as investment income pursuant to Internal Revenue Code §163(d) cannot treat those dividends as capital gains eligible for the new reduced tax rates. There is also a rule treating loss on the sale of stock as long-term capital loss rather than short-term capital loss to the extent an extraordinary dividend, as defined by Internal Revenue Code §1059(e), eligible for the new reduced tax rates is received by an individual.

2 According to the conference committee report on the 2003 Tax Act, until the Treasury Department issues guidance identifying the satisfactory treaties, a foreign corporation shall be treated as a qualified foreign corporation if it is eligible for the benefits of a comprehensive income tax treaty that includes an exchange of information provision other than the current United States-Barbados treaty. The nations with such treaties include Canada, Mexico, the United Kingdom, Germany, France, Italy, Japan and most other developed countries.

NEWSLETTER ARTICLES

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

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Understanding Care Management

By ANDREA L. JONES
EXECUTIVE DIRECTOR
INTERVENTION ASSOCIATES

Mrs. Kaye (not her real name) is a 78 year-old woman who has lived alone since her husband died. Her grown children live in various parts of the country. So far, a familiar scenario. Her son calls to tell you that his mother has missed some bill payments, has seemed distracted and confused on the phone, and seems to be “slipping.” He wants to know whether, as Mrs. Kaye’s agent under a power of attorney or simply as her lawyer, you have noticed any changes, and if so, whether you have done all you can do.

Even if you have not often encountered this scenario in your practice, you may be experiencing it in your personal life. Many of our parents are aging and starting to face some fairly significant problems.

Case management agencies offer services that can be particularly useful in these situations. Case managers are predominantly master’s level social workers (MSWs/MSSs) and often have extensive experience in where to turn and how to help. In Mrs. Kaye’s case, a case manager would be able to meet with Mrs. Kaye in her home and fully evaluate her circumstances. Does she appear well? Is she disheveled, malnourished, weak? Confused? Demonstrating questionable judgment? Suspicious? Able to care for herself and understand complicated medication instructions? Is her house in good repair? Is her neighborhood safe? Is she still driving? Does she have involved neighbors? Does she have food in her pantry and refrigerator that is nutritious and fresh? Can she follow simple instructions to prepare a cup of tea, for example? Are there scorched pots on the stove? Has she seen a physician recently? If she is seeing a doctor, can she communicate reliably with him or her? Often the answers to these questions leave one wondering how many older adults are able to survive at all. Sometimes changes occur quickly and are undetected by those who are not in close contact. More often, the changes occur gradually and fly “under the radar.”

How does a case manager address these problems? An experienced case manager can prepare a written evaluation along with recommendations directed at implementing a plan to increase the quality of Mrs. Kaye’s life and ensure her safety. Perhaps she needs a good medical evaluation and appropriate medication, or some companion assistance in her home to help her shop, prepare meals and take her medications appropriately. Often, homes need modifications and adaptive equipment to make life easier. Many people respond well to increased activities to socialize outside the house. Depression is epidemic among lonely, isolated older adults. Setting up paratransit rides or private transportation, arranging for meals on wheels, community mental health outreach, senior day care, referrals to geriatricians and geriatric psychiatrists, advocating for our clients during hospital admissions and making sure they receive the maximum services at discharge are all standard operating procedure for a case manager.

Case managers can maintain contact with the elderly person and are prepared to step in to do what family members otherwise could, or work with local family members to “fill in the gaps.” Case managers also frequently provide informed, experienced opinions with regard to finding senior housing when that becomes necessary. Often case managers are called upon to break a tie when family members disagree concerning their parent’s care. In addition, attorneys and trust officers increasingly ask case managers to provide written documentation about a case to substantiate that everything that should be done has been done for the client.

Case management is a growth industry in southeastern Pennsylvania. As an industry, it is currently unregulated. And that is a problem, because anyone can practice case management. If you are looking for a case manager, you should look for the following:

• Educational experience - social work or nursing provide the best background for this type of work.

• Agency longevity - how big is the agency, how long has it been in operation, how many clients does it

continued on page 7
Care Management, continued

have, what geographical areas does it cover? If you are looking for an appropriate assisted living residence, it is preferable to retain a case manager with hands-on experience in the five-county area.

- Does the agency specialize? Some case management agencies work only with older adults. Some agencies also work with children who have special needs and younger adults with chronic mental and physical illnesses.

- Usually an initial phone consultation is free so that a person can get a feel for how the case manager operates and what he or she can do for your client. Does your client’s situation sound like familiar territory to the case manager?

- Fees -- A case manager should openly discuss fees. Currently, market rates range from $70 to $200 per hour. How does the case manager bill? Can he or she send you a sample bill? Bills should describe specifically and at length how your client’s money is being spent. Does the case manager require a retainer? Does he or she offer a flat fee for an uncomplicated initial evaluation? Is there some payment flexibility? Private case management is paid for exclusively by the individual. There is no third party reimbursement available yet.

- Can the case manager provide you with testimonials or references?

- Is the case manager available 24 hours a day, 7 days a week? How can you reach him or her?

- Most importantly for older adult clients, how does the case manager arrange for companion staff when a little extra support can help keep someone safe at home? An agency should, at the very least, have a good collaborative relationship with a home health agency or, even better, have home health workers on their own staff.

And by the way, Mrs. Kaye is fine and well at home. We arranged for an evaluation by a geriatrician who feels that although she probably has mild dementia, with some companion support and appropriate medication she will be able to stay at home a while longer. The family has asked us to stay involved to monitor her situation, escort her to doctors’ appointments, hire companion staff, help her with bill paying, and develop a plan to increase her care at home with an eye toward finding a more supportive living arrangement when that time comes.

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**JOIN A COMMITTEE**

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

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Name: ____________________________  
Address: ____________________________

Committee Preferences:

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Amendment to the Disclaimer Provisions
May Have Created Uncertainty

By W. STEVEN WOODWARD
GADSDEN, SCHNEIDER & WOODWARD, LLP

An amendment made last year to the disclaimer provisions of Chapter 62 of the Probate, Estates &
Fiduciaries Code, intended to correct what most estate planners had seen as
an anomalous result in the Superior Court’s decision in McCutcheon Estate, 699 A.2d 746 (Pa. Super. 1997),
may have unintentionally introduced some uncertainty on the unrelated
question whether a disclaimer, once made, can be revoked.

Before the 2002 amendment, the final sentence of §6205(a) had read:
“The disclaimer shall be binding upon the disclaimant and all persons claim-
ing through or under him.” In a decision that drew considerable criticism
at the time it was issued, the Superior Court in McCutcheon Estate relied on
that language to hold that in the case of disclaimer of an interest arising un-
der the intestate law, the rights of the disclaimer party’s descendants are
also cut off. The effect of the Superior Court decision can be illustrated by a
simple example. Suppose an intestate decedent left two children, A and B,
and that A’s children, C and D, also survived. A disclaims, and the question
is whether his share goes to C and D,
as would have been the case if A had
actually predeceased the intestate par-
ent, or whether C and D should be
viewed, for purposes of §6205(a), as
“claiming through or under” A and
therefore also barred by A’s disclaimer.
The Superior Court in McCutcheon
held that the latter view was correct:
“[Section 6205(a)] . . . requires that any
issue or heirs, direct or collateral, of
the disclaimant are likewise precluded
from sharing in the estate.” When that
decision was published, it caused some
stir in the estate planning community,
since the result was unexpected, to say
the least.

Last year’s amendment, con-
tained in 2002 Act No. 50, was expressly
designed to overrule the result in
McCutcheon. It replaced the sentence
quoted in the preceding paragraph with
the following: “The disclaimer shall not
in any way diminish the interest of any
person other than the disclaimant in such
person’s own right under the instrument
creating the disclaimer interest or un-
der the intestate laws nor diminish any
interest to which such person becomes
entitled under subsection (b) by reason
of the disclaimer.” The official com-
ment to the Advisory Committee’s draft
of the amendment reads:

This amendment is de-
signed to preserve the intent of
the original provision. That
provision was not intended to
diminish the interest of any
person other than the disclaim-
ant in the disclaimer property
which such person acquired in
his or her own right, as op-
posed to interests acquired
‘through or under the disclaim-
ant.’ The latter language ap-
ppears to have been interpreted
to bring about this unintended
result in McCutcheon Estate,
1997). This change is intended
explicitly to overrule the result
in McCutcheon to the extent it
so holds or carries any such
implication. Any such result
could seriously undermine the
usefulness and effectiveness of
disclaimers in Pennsylvania,
particularly if it were inter-
pretably to apply beyond the
narrow facts of that case.

The 2002 amendment may
unintentionally make for some
uncertainty on another, unrelated
question – namely, whether a
disclaimer, once made, can be
revoked. In Ciaffoni Estate, 787 A.2d
971 (Pa. Super. 2001), the Superior
Court had read the prior statutory
language to the effect that “[t]he
disclaimer shall be binding upon the
disclaimant” as dispositive of the
issue and refused to permit
revocation of a disclaimer: “[O]ur
legislature has intended clearly that
documents purporting to disclaim or
revoke an heir’s or beneficiary’s
interest in the decedent’s estate be
irrevocable.” Id. at 974-75. In
Ciaffoni the party seeking to revoke
the disclaimers had argued that he
should be permitted to do so on the
grounds that “no prejudice will
accrue to other interested parties
because distributions from the estate
have not been made”, but the court
concluded that prejudice or lack
thereof was not the issue in light of
the statutory language. Id. at 972,
973-74.

The amendment designed
to cure the McCutcheon problem
removed the “shall be binding upon
the disclaimant” language from the
statute, undercutting the rationale of
Ciaffoni and reducing its usefulness
as precedent in any case that arises
under the current version of the stat-
ute, so that the question whether a
continued on page 9
Deductibility of Investment Advisory Fees by Trusts

By JULIUS J. CIESIELKA, JR.

The question of whether investment advisory fees incurred by a trust are subject to the 2% limitation applicable to miscellaneous itemized deductions under Section 67(a) of the Internal Revenue Code has been addressed in three different circuit courts. The decisions in the three circuits differ significantly.

The question was first raised in O'Neil v. Commissioner, 98 TC 227 (1992). The trustees of the O'Neil trust, none of whom had expert knowledge of investing large sums of money, were unwilling to serve as co-trustees without the employment of an investment advisor. An investment advisor was employed and the investment advisory fee was deducted in full on the trust's Form 1041, U.S. Fiduciary Income Tax Return. The return was audited and the Internal Revenue Service determined that the investment advisory fees were subject to the 2% limitation under Section 67(a) and a deficiency was determined.

The trustees disputed the deficiency and argued in the Tax Court that the investment advisory fees were allowable under the exception of Section 67(e)(1). This section provides that "costs incurred in connection with the administration of an estate or trust and which would not have been incurred if the property were not held in such trust or estate should be treated as allowable in arriving at adjusted gross income."

The Tax Court agreed that the investment advisory fees were incurred in connection with the administration of the trust, but interpreted the second prong of the exception to require that the fees be unique to the administration of a trust. Recognizing that many individual investors employ investment advisors, the court concluded that such a cost is not unique to a trust and ruled in favor of the Internal Revenue Service.

The trustees appealed the decision and in 1993 in O'Neil v. Commissioner, 994 F.2d 302 (6th Cir. 1993), the Sixth Circuit reversed the Tax Court opinion. The Sixth Circuit ruled that the investment advisory fees were incurred because the property was held in trust and were deductible because the requirements of Section 67(e)(1) were satisfied. The Circuit Court pointed out that individuals are not required to consult advisors, but fiduciaries have an obligation to beneficiaries to exercise "proper care and skill" in the management of trust assets. The trustees had to invest and manage the assets of the trust as a "prudent investor" (although under Ohio law there was a list of pre-approved investments). The court stated that since the trustees lacked investment expertise, employment of professional assistance was warranted due to the unique position that the trustees occupied as to the beneficiaries.

The question was raised again, this time by Mellon Bank in Mellon Bank v. U.S., 47 Fed. Cl. 186 (Fed. Cl. 2000). Mellon Bank had employed outside advisors for two types of trust services. An investment advisor was employed to pro-
Investment Advisory Fees, continued

vide investment strategy advice and a second organization was hired to provide accounting, tax preparation and management services. Claims for refund were filed for thirteen trusts based upon the rationale in the O'Neill decision. The claims were denied by the Internal Revenue Service, and Mellon brought suit in the Court of Federal Claims.

The Court of Claims reviewed Section 67(e)(1) and applied the section's two tests. The court and all parties agreed that the expenses in question were paid in connection with the trusts. As to the second prong of the test, the court determined that the trustee's obligations under Pennsylvania law required the trustee to use the "prudent man" rule in managing assets and that the expenses at issue would be incurred by a "prudent man". However, because a prudent individual investor would employ an investment adviser and hire professionals for tax preparation, accounting and management services, the court ruled that the expenses at issue were not unique to the trusts and ruled in favor of the Internal Revenue Service.

The decision was appealed to the Federal Circuit, Mellon Bank v. U.S., 265 F.3d 1275 (Fed. Cir. 2001). The Federal Circuit articulated the second requirement for deductibility as requiring that the expense be "unique to the administration of a trust and not customarily incurred outside trusts." The court found that these expenses were not unique and ruled that they were subject to the 2% limitation.

The most recent decision concerning the deductibility of investment advisory fees is Scott v. U.S., 328 F.3d 132 (4th Cir. 5/1/03). In Scott, three trustees, who claimed that they did not possess investment expertise, employed an investment advisor, as permitted in the trust agreement. The trust paid investment advisory fees, custodian fees, trustee fees and fees for the preparation of income tax returns and accountings. The expenses were claimed in full on the trust's Form 1041, U.S. Fiduciary Income Tax Return. On audit, the Internal Revenue Service subjected the investment advisory fees to the 2% limitation. The tax was paid and a refund claimed. The district court denied the deduction in Scott v. U.S., 186 F. Supp. 2d 664 (E.D. Va. 2002).

On appeal, the Fourth Circuit agreed with the Federal Circuit's Mellon Bank decision, and disagreed with the Sixth Circuit's O'Neill decision. The Fourth Circuit found that "trust-related administrative expenses are subject to the 2% floor if they constitute expenses commonly incurred by individual taxpayers." The court found that individuals often incur investment advisory fees in the management of their income-producing property and, therefore, such advisory fees do not meet the exception of Section 67(e)(1). In contrast, the court stated that "fees paid to trustees, expenses associated with judicial accountings, and the costs of preparing and filing fiduciary income tax returns[ ] are not ordinarily incurred by individual taxpayers, and they would be fully deductible under the exception created by Section 67(e)."

The treatment of investment advisory fees and other miscellaneous itemized deductions on federal fiduciary income tax returns appears to vary depending upon the jurisdiction in which the trust is located. With two circuit courts now taking the position that investment advisory fees are subject to the 2% miscellaneous itemized deduction limitation, more aggressive
Online Resources for Estate Planning Practitioners

By PETER J. JOHNSON
HECKSCHER, TEILLON, TERRIL & SAGER, P.C.

As computer technology has become pervasive and as court systems have found new ways to utilize the Internet, estate planning practitioners in southeastern Pennsylvania can benefit from a number of useful online tools and resources. At the outset, it is important to establish that the use of these resources requires a computer, a connection to the Internet, current Internet browser software such as Microsoft Internet Explorer (see http://www.microsoft.com/windows/ie/downloads/critical/ie6sp1/default.asp), and current form-browsing software such as Adobe Acrobat Reader (see http://www.adobe.com/products/acrobat/readstep2.html), a program which works in conjunction with browser software and allows the user to view and, in some cases, complete forms electronically.

One of the most comprehensive online resources is the electronic version of the Philadelphia Estate Practitioner Handbook, which is published by the Probate and Trust Law Section of the Philadelphia Bar Association and is located at http://www.peph.com. This website contains the complete text of the "Blue Book," also known as the "Register of Wills of Philadelphia County Manual," and the "Green Book," also known as "Forms for Use Before the Register of Wills and Orphans' Court Division."

The website for The Philadelphia Courts, First Judicial District of Pennsylvania, located at http://courts.phila.gov, contains a number of useful resources, including an online version of the Pennsylvania Supreme Court Orphans' Court Rules, located at http://courts.phila.gov/pdf/rules/strules2.pdf, and the Philadelphia County Orphans' Court Rules, located at http://www.courts.state.pa.us/judicial-council/localrules/philadelphia/philadel_09orphan.pdf. Drop-down links from the home page provide access to Philadelphia Orphans' Court hearing schedules (searchable by list type, date and judge name) and dockets (searchable by name and docket number). Numerous Philadelphia County Orphans' Court forms are available at http://courts.phila.gov/forms.html, including forms for use in Estate, Incapacitated Person, Minor, and Trust proceedings.

The Chester County Register of Wills / Clerk of the Orphans' Court website is available at http://www.chesco.org/wills/index.html. Although docket information is not available, a number of forms are located at http://www.chesco.org/wills/forms.html, including Petition for Grant of Letters, Account Checklists, and Estate Information Form. Chester County Orphans' Court Rules are located at http://www.courts.state.pa.us/judicial-council/localrules/chester/chester_05orphan.pdf.

The Delaware County Courthouse and Government Center has a number of estates-related resources available at http://www.co.delaware.pa.us/registerofwills/index.html, and some of the information is particularly useful to the layperson, such as articles entitled "Why a Will Can't Wait," located at http://www.co.delaware.pa.us/registerofwills/will.html, and "What Should I Know about Handling an Estate," located at http://www.co.delaware.pa.us/registerofwills/estate.html.

Delaware County practitioner information is available elsewhere on the Delaware County website at http://www2.co.delaware.pa.us/pa/welcome.asp, where real property records and docketing information can be found. Finally, probate records can be submitted and viewed online at https://www2.co.delaware.pa.us/probateweb (note the "s" after "http"). Registration is required to use the probate system, however; contact the Delaware County Register of Wills at 610-891-4000 in order to get at password and personal identification number which will be keyed to your Supreme Court Identification Number. Delaware County Orphans' Court Rules are located at http://www.courts.state.pa.us/judicial-council/local-rules/delaware/delaware_03orphan.pdf.

There is not a lot of information at either the Bucks County Government Register of Wills website, located at http://www.buckscounty.org/departments/registerofwills/index.html, or the County of Montgomery, Pennsylvania website, located at http://www.montcopa.org. However, Bucks County Orphans' Court Rules continued on page 12
HIPAA Privacy Rule Adds Hurdles to Administration of Estates

By RENÉE C. VIDAL

If you have obtained birth or death records from the Pennsylvania Department of Health’s Bureau of Vital Statistics within the last few months, you have undoubtedly learned that it has become more difficult. The increase in “security” of birth and death records is a result of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, which mandated the adoption of national standards for electronic health transactions, as well as Federal privacy protections for individually identifiable health information, referred to as protected health information.

In response to the HIPAA mandate, the U.S. Department of Health and Human Services enacted regulations in the form of the Privacy Rule, which became effective on April 14, 2001 and required compliance by April 14, 2003 for most entities covered by the rule. The Privacy Rule applies to health plans, health care clearinghouses, and health care providers who conduct certain health care transactions electronically. These covered entities are required to implement standards to protect against the misuse of protected health information. Protected health information is information that is generally individually identifiable health information that is transmitted by, or maintained in, electronic media or any other form or medium that relates to 1) past, present or future physical or mental health or condition of an individual; 2) provision of health care to an individual; 3) payment for the provision of health care to an individual; or 4) the information identifies or provides a reasonable basis to believe it can be used to identify an individual.¹

The requirements of the Privacy Rule apply to a state health agency, such as the Pennsylvania Department of Health, if the agency provides health benefits, operates clinics, or transmits health information electronically in connection with a transaction covered by HIPAA that causes it to be a covered entity.² Because the HIPAA regulations require covered entities to evaluate practices and implement safeguards to limit unnecessary or inappropriate access to and disclosure of protected health information, obtaining death or birth certificates has become increasingly difficult for practitioners who assist clients in administering estates. A visit to the Department of Health’s website³ reveals several hurdles to obtaining birth or death records for clients. To obtain birth records, the person making the request must be the person named on the record, a legal representative of that person or an immediate family member. Persons eligible to obtain death records include the legal representative of the decedent’s estate, an immediate family member or an extended family member who is able to show a direct relationship to the decedent. It does not include the attorney for the estate.

These restrictions are intended to comply with the HIPAA regulations. Although there are certain circumstances under which protected health information may be dis-

¹ 45 CFR 164.501.

² 45 CFR 160.103.

³ www.health.state.pa.us.

Online Resources, continued


Although each county takes a different approach to making content available, one constant is the fact that Internet content evolves continuously, with new information being added to websites with little or no fanfare on a daily basis. In a practice which, by definition, is county-specific, it is encouraging to note that many Pennsylvania Orphans’ Courts and Registers of Wills have embraced Internet technology and are making content and information available to estate planning practitioners and the general public.

continued on page 13
HIPAA, continued

closed, such information is generally protected and only disclosed when authorized by the individual who is the subject of the information or that person’s personal representative. The HIPAA regulations require that a personal representative with legal authority to act be treated the same as the individual for purposes of the Privacy Rule. A personal representative is a person legally authorized to make health care decisions on another person’s behalf or legally authorized to act on behalf of a deceased individual or the individual’s estate. Thus, personal representatives include executors, administrators, persons with health care powers of attorney and parents, guardians and persons acting in loco parentis for emancipated minors.

To ease procedures in administering estates, preparation of an authorization form to be executed by executors or administrators of estates will save time and hassle if death or birth records are needed. The authorization for disclosure should specifically:

1. state that it authorizes disclosure of necessary birth and death records of the decedent or direct relatives of the decedent,

2. state the names of the persons or organizations who will receive the information,

3. state that the purpose of the request is for the administration of the decedent’s estate,

4. notify the executor/administrator of his/her right to refuse to sign the authorization,

5. be signed and dated by the executor/administrator,

6. be written in plain language,

7. include an expiration date or event (such as upon approval of the accounting or execution of a family settlement agreement),

8. notify the executor/administrator of the right to revoke the authorization at any time in writing and how to exercise that right and any applicable exceptions to that right under the Privacy Rule, and

9. explain the potential for the information to be re-disclosed by the recipient and no longer protected by the Privacy Rule.

Report of the Chair, continued

The Education Committee, chaired by Judy Stein, continues to put on interesting programs. The Section’s next Quarterly Meeting will be on October 7, and the CLE topic will address the split dollar rules. And, although not formally a committee, I want to again publicly thank Kevin Gilboy for the “Tax Tips” that he shares with us at each Quarterly Section Meeting. While on the topic of CLE programs, please save the date of December 10, when the Section’s Annual Meeting, with its CLE program, will be held.

And, as you can read for yourself, the Publications Committee, chaired by Susan Collins, puts out a top-drawer Newsletter. I know I speak for the entire Section when I thank Susan, her Committee members, and especially the authors who write such high quality and timely pieces.

So, I have said it before, and I will say it again: The bulk of services you receive as a Section member is provided by the Committees. I have mentioned many of them in this column. There are many other services that are being provided by these Committees, by the other standing Committees (like Elder Law and Taxation) and by other Section members who serve as liaisons or members of ad hoc committees and task forces. Thanks to all who serve the Section.

For example, disclosures of protected health information may be made without authorization from the individual or personal representative to a coroner or medical examiner for the purpose of identifying a deceased person, determining the cause of death or other duties authorized by law and to a funeral director as necessary to carry out their duties with respect to a decedent as is consistent with applicable law. 45 CFR 164.512(g)(1)-(2).

45 CFR 164.502(b); 164.514(d).

45 CFR 164.502(g); see 45 CFR 164.510(b) for situations where a person is involved in an individual’s health care, but is not expressly authorized to act on the individual’s behalf.

45 CFR 164.502(g)(2)-(4).

45 CFR 164.502(g).

9 45 CFR 164.508(c).
TAX UPDATE

By JOAN AGRAN
PEPPER HAMILTON, LLP

I. COURT DECISIONS

Trust Can Deduct Passive Losses Based on Material Participation by Fiduciaries

In Mattie K. Carter Trust v. United States, 91 AFTR 2d 2003-733 (ND Tex. April 11, 2003), the district court held that passive losses realized by a trust were deductible by the trust if the trustee and the trustee’s employees and agents together materially participated in the business generating the losses. The trust had operated a large cattle ranch that also held working oil and gas interests, but a manager employed by the trustee had been in charge of day-to-day operations. The court held that the trust had materially participated in the operations of the ranch, rejecting the IRS argument that only the actions of the trustee should be considered in determining whether there has been material participation.

Disclaimer Does Not Protect Interest in Annuity Proceeds Subject to Tax Lien

In Choate v. Tubbs, 91 AFTR 2d 2003-1881 (WD Tn.), the district court held that tax liens attached to a named beneficiary’s interest in escrowed annuity proceeds, and were not defeated by his valid disclaimer of his interest in the proceeds. The court stated that the beneficiary had complete control at the time of the annuitant’s death, which clearly constituted a right to property to which pre-existing liens could attach. His subsequent disclaimer demonstrated his right to dispose of the proceeds in any manner he chose.

Nonresident Alien’s Estate Tax Charitable Deduction Limited

In Estate of Avrom A. Silver v. Commissioner, 120 T.C. No. 14 (No. 10125-01 2003), decedent, who was a citizen and resident of Canada when he died, provided in his Will for charitable bequests to Canadian charities that are organizations described in the income tax treaty of Sept. 26, 1980. The bequests were paid from property outside the United States. The estate filed a nonresident alien estate tax return, claiming a $312,840 charitable contribution deduction. The Service disallowed all but $1,615 of the deduction on the basis that the Will did not direct payment of the charitable bequests exclusively from U.S. assets and therefore the deduction was limited to the proportionate part of the U.S. assets that passed to the charitable legatees. Code section 2106 allows a nonresident alien estate a charitable deduction for transfers to charities created in the United States and to trustees for use within the United States.

The Tax Court, dismissing the estate’s reliance on a 1995 protocol to the treaty that the estate claimed overrode the statute, noted that the explanation accompanying the protocol stated it does not allow a deduction for U.S. estate tax purposes for a transfer of property that is not subject to U.S. estate tax. As the parties stipulated that the bequests were paid from property outside the United States and were not subject to U.S. estate tax, the court sustained the Service’s determination that the amended convention does not change the result under section 2106.

Couple’s Deduction Limited on Gift of Interests in Partnership to Charity

In Charles T. McCord Jr. v. Commissioner, 120 T.C. No. 13 (No. 7048-00 2003), taxpayers, in 1996, gifted a total of 82% of their limited partnership interests in a family limited partnership (in which their children were the general partners) to their children, a family trust and two charities. The parties agreed to allocate the interests under a formula that provided that the children, the trust, and Charity A were to receive interests with a set dollar amount and Charity B was to receive any remaining portion of the interests. On the basis of an appraisal made shortly after the gift, the gift of their 82% interest was valued at $7,339,410 and allocated $6.9 million, or 77% to the children and family trust, 3.6% to Charity A and 1.4% to Charity B. The partnership later exercised call rights for the charities’ interests. The Service issued a deficiency notice finding that the taxpayers understated the value of the interests and improperly reduced the value by the actuarial value of the children’s obligation to pay additional estate taxes.

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Tax Update, continued

potentially attributable to the transaction.

The Tax Court increased the aggregate fair market value of the interests assigned by the taxpayers to $9.88 million, allowing a total discount for minority and marketability of 32.45%. The court concluded that (i) the taxpayers’ aggregate charitable deduction should be determined on the basis of the fair market value of the percentage interest actually allocated to the charities, because the agreement did not explicitly state that fair market value meant fair market value as finally determined for federal gift tax purposes, and (ii) taxpayers were not entitled to reduce the value of their net gifts of limited partnership interests by the amount of the children’s contingent obligation to pay any additional estate tax that might occur under Section 2035(c), stating that such obligations were too speculative to allow for a reduction in gift value.

Estate Must Include Value of Assets Transferred to FLP Under 2036

In Estate of Albert Strang v. Commissioner, T.C. Memo. 2003-145 (No. 4102-99), the Tax Court, on remand from the Court of Appeals for the Fifth Circuit, held that an estate must include the value of assets transferred by the decedent to a family limited partnership under section 2036(a).

In its original opinion the Tax Court found that the family limited partnership was a valid partnership under state law and was valid for tax purposes, holding that the disparity between the value of the assets and the partnership interest reflected a discount rather than a gift.

Fifty two days before the trial, the Service had filed a motion to add a claim under section 2036 whereby the estate would include the value of limited partnership assets transferred from the decedent. The court denied the Service’s request for leave to amend to add the 2036 claim. Estate of Albert Strang v. Commissioner, 115 T.C. No. 35 (2000).

The Fifth Circuit reversed the Tax Court’s denial of leave to amend (finding no obvious reason for the denial) and remanded the IRS’s Section 2036 claim for consideration by the Tax Court, in addition noting that the Service could revisit the valuation of the interest in the partnership. The court affirmed the Tax Court’s holdings that the partnership had a business purpose and economic substance and should not be disregarded for estate tax purposes, that Section 2703 did not apply to the agreement and that the transfer to the partnership did not constitute a gift. Rosalie Gulig v. Commissioner, No. 01-60538 (5th Cir. 2002).

The Tax Court concluded that, following the transfer of assets to the partnership, decedent retained, by implied agreement, possession, enjoyment, or the right to income. Dismissing the estate’s explanation that funds expended to meet decedent’s personal needs were accounted for as advances to partners, the court found that decedent maintained the same relationship to his assets as existed before formation of the partnership and everyone intended the partnership to continue to provide decedent with sources of liquidity. Although the court determined that the full amount of the transferred assets is includable in the decedent’s gross estate under Section 2036(a), it limited its holding to the amounts determined in the deficiency notice, less costs, because the Service never asserted an increased deficiency.

II. IRS REVENUE RULINGS AND REVENUE PROCEDURES

IRS Rules on Deductibility of Patent Contribution to University

In Rev. Rul. 2003-28, 2003-11 IRB 1 (02/26/2003), the Service issued guidance on when the contribution of a patent to a qualified charity is deductible under section 170(a). The revenue ruling presented three situations: (i) a taxpayer contributes a license to use a patent to a university which is a section 170(c) qualified charity, but the taxpayer retains the right to license the patent to others; (ii) a taxpayer contributes a patent to the university on condition that a faculty member continues employment at the university during the life of the patent, which expires in 15 years, and if the faculty member ceases employment before the patent expires, the patent will revert to the taxpayer, and (iii) a taxpayer contributes its interest in a patent to the university, but the university cannot sell or license the patent for three years after the transfer (the restriction does not benefit the taxpayer and, under no circumstance can the patent revert to the taxpayer).

The Service disallowed the deduction in the first situation because the contribution was a transfer of only a partial interest. Taxpayer had retained a substantial right in the patent; the license granted to the university was neither the taxpayer’s entire interest in the patent nor a fraction or percentage of each
Tax Update, continued

and every substantial interest or right that the taxpayer owned in the patent.

In the second situation, the IRS also disallowed the deduction because the possibility that the faculty member would leave before expiration of the patent was “not so remote as to be negligible” under Reg. Section 1.170A-7(a)(3).

The Service allowed the deduction under the third situation (assuming all other applicable requirements of the deduction were satisfied and subject to the percentage limitations of section 170). Unlike the conditional reversion in the second situation, the restrictions imposed could not defeat the transfer. However, under Reg. Section 1.170A-1(c), the restriction reduced the fair market value of the patent and, therefore, the amount of the taxpayer’s charitable contribution.

Executors May Continue and Initiate Innocent Spouse Claims

In Rev Rul 2003-36, 2003-18 IRB 849, the Service has clarified that a decedent’s executor can continue an innocent spouse claim begun while the decedent was alive. In addition, the executor can initiate one after the spouse’s death, provided the decedent met applicable innocent spouse requirements while alive. Because an executor assumes the rights of a decedent’s estate pursuant to the broad grant of authority in Code Sec. 6903 and has specific authority to make and disaffirm joint returns under Code Sec. 6013(a)(3), an executor is authorized to seek any form of relief from joint and several liability under Code Sec. 6015 on behalf of a decedent. It follows that an executor may pursue an existing request for relief from joint and several liability that was made while the spouse was alive. Note that the requirement under Code Sec. 6015(c) that the joint filers no longer be married, legally separated, or members of the same household, cannot be satisfied by the death of a requesting spouse.

IRS Issues Sample Provisions for QPRTs

In Rev. Proc. 2003-42, 2003-23 IRB (05/09/2003), the Service issued a sample declaration of trust and alternate provisions that meet the requirements of section 2702(a)(3)(A) and Reg. section 25.2702-5(c) for a qualified personal residence trust with one-term holder. The Service generally will not issue a letter ruling on whether a trust with one term holder qualifies as a QPRT. The Service, however, will generally issue a letter ruling on the effect of substantive trust provisions, other than those contained in sections 4 and 6 of the Rev. Proc., on the qualification of a trust as a QPRT.

III. IRS PRIVATE LETTER RULINGS AND TECHNICAL ADVICE MEMORANDA

GST Exemption Not Lost by Trust Modification

In PLR 200308045, a trust, which became irrevocable on decedent’s death, divided into equal shares for his two children. The trust provided that the net income of each share be paid to the child for whom the share was set aside, for life, with principal distributions in the trustee’s discretion based on a standard. On the death of a child, the trust would be divided into shares for such child’s then living issue and if there are none, for the living issue of the other child, with the share of a grandchild held in trust for his or her life. On the death of the children and grandchild, the principal would be paid to the great-grandchild. Decedent was survived by his two children, a grandchild, and a great-grandchild. The trustee, with the consent of the beneficiaries, proposed to modify the trust so that it would continue until the great-grandchild’s death, under the same terms as the other trusts. In addition, the great-grandchild would have a general power to appoint the trust corpus to anyone, including her estate. A state court approved the modification contingent on receipt of a favorable IRS ruling.

The Service ruled on these facts that (i) the assets of the trust will be included in the great-grandchild’s gross estate under section 2041(a)(2) because she has a general power of appointment over the trust corpus, (ii) the great-grandchild would be treated as the transferor of the trust corpus for GST purposes under section 2652(a)(1), and (iii) the trust would not lose its exempt status for GST purposes because the proposed modification complies with Reg. section 26.2601-1(b)(4)(D)(1) and would not cause the trust to be subject to GST tax.

Sale of Interest in Trust to Charity Will Not Terminate Trust’s Status

In PLR 200310024, the grantor/beneficiary of a charitable remainder unitrust had irrevocably designated a public charity the remainder beneficiary of a percentage of the trust’s assets. The beneficiary also made a gift to the charity of the same percentage of his unitrust interest in the trust. These actions effected a merger of the trust and the charitable organization.

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charity’s income and remainder interests and led to a partial termination of the trust in favor of the charity. The assets, distributed in kind, were fairly representative of the adjusted bases of the assets of the trust. There was no arrangement with the charity regarding the use of the trust assets nor did the grantor/beneficiary have the authority to direct how the funds would be spent by the charity.

The grantor/beneficiary then proposed to irrevocably designate the charity as the remainder beneficiary of an additional percentage of the trust assets and sell to the charity the same percentage of the beneficiary’s unitrust interest in the trust. The purchase price of the unitrust interest was to be based on the present value of the beneficiary’s right to receive, for the rest of his life, quarter-annual unitrust payments from the trust on that percentage of the trust assets. Taken together, the assignment and sale would effect a merger of the charity’s income and remainder interest, leading to an additional partial termination of the trust in favor of the charity.

The Service ruled on the basis of these facts that (i) the sale of the beneficiary’s percentage of his unitrust interest to the charity would not cause the trust to cease to be a trust described in section 664(d)(2), and (ii) the sale would not be an act of self-dealing within the meaning of section 4941. Note that for purposes of the sale, the beneficiary is deemed to have a zero basis in his unitrust interest and he will recognize gain equal to the entire amount he realizes from the sale.

Trust Reformation to Correct Scrivener’s Error Won’t Result in Inclusion in Estate.

In PLR 200311020, a couple established a revocable trust for their lifetime benefit with the remainder at the second death to be distributed to their children. Following the husband’s death, the trust was divided into two separate trusts with one trust intended to use the decedent’s unified credit. Ambiguities were discovered in the trust that could defeat this purpose. The surviving spouse, as trustee, petitioned the local court for reformation of the trust and included affidavits from the drafting attorney that the ambiguous trust provision was the result of a scrivener’s error. The court authorized the reformation.

Finding that the court order was consistent with state law, the Service ruled that (i) the spouse did not have a general power of appointment over the assets in the decedent’s trust, and that on her death, the assets of the decedent’s trust would not be includable in her gross estate under section 2041 except for 5 percent of the principal of the decedent’s trust because of a 5 and 5 power, (ii) the assets of the decedent’s trust would not be includable in her estate under section 2036 and that the reformation was not the release of a general power of appointment by the spouse resulting in a gift under section 2514, and (iii) the reformation would not result in the spouse being treated as having made a gift of her interest in the decedent’s trust to her children.

Adding Power of Appointment to Trust Won’t Cause Loss of GST Exempt Status

In PLR 200314003, prior to September 25, 1985, a couple created an irrevocable trust for the benefit of their children and grandchildren. After the husband’s death, his residuary estate passed to the trust, which was divided into a GST exempt and a GST nonexempt trust under a formula utilizing his maximum GST exemption. To resolve family conflicts, the trustees sought a court order to modify the trust by granting income beneficiaries who die with no descendants a testamentary limited power of appointment over the net income to which the beneficiary’s descendants otherwise would have been entitled.

Noting that the proposed modification would grant each income beneficiary a testamentary limited power of appointment only over the share of income of the exempt trust that the beneficiary’s descendants would have been entitled to receive, the Service ruled that the modification of the trust would not operate to shift a beneficial interest in the trust to any beneficiary who occupies a generation lower than the person holding the beneficial interest before the reformation and would not extend the time for vesting of any beneficial interest in the trust. Therefore, modification of the distribution provisions would not affect the exempt status of the trust for GST purposes.

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Reformation of Life Insurance Trust Will Not Trigger New 3 Year Period

In PLR 200314009, grantor created an irrevocable life insurance trust for the benefit of her children, reserving the power to name successor trustees in case of a vacancy. The grantor intended to include a provision that would have prohibited her from appointing herself or any party related or subordinate to her as trustee, but due to a scrivener’s error, the prohibition was omitted from the trust. The trustee proposed, under applicable state law (California), to petition a local court to issue an order reforming the trust to include such a prohibition.

On the basis of these facts, the Service concluded that the grantor intended that the trust corpus would not be subject to inclusion in her gross estate and that the omission was a scrivener’s error. Therefore, the Service held that (i) the reformation would not be considered a release or transfer of any retained interest or power that would trigger a new three year period under section 2035, and (ii) the grantor had not retained any incidents of ownership under section 2042 and that the insurance policies held in the trust would not be includable in the grantor’s estate.

Early Termination of Charitable Remainder Unitrust Taxed as a Sale

In PLR 200314021, a private foundation which was the sole remainder beneficiary of a CRUT and the individual who was the sole income beneficiary of the CRUT proposed to petition a local court to terminate the CRUT and distribute the assets to each party based on the present value of their respective interests on the date of termination. The values would be determined using Code section 7520 rates on the date of termination and the methodology under Reg. section 1.664-4. The individual and his wife were trustees of the foundation.

Based on these facts, the Service concluded that (i) the individual would be treated for income tax purposes as selling his interest in the trust to the charity for the amount of money and the fair market value of the property the individual receives, (ii) under section 1001(c)(1), the portion of the adjusted uniform basis assigned to the individual’s interest in the trust would be disregarded and accordingly, the individual would be treated as though he had no basis in his interest in the trust and would realize gain under section 1001(c) in the amount received from the disposition of his interest in the trust, (iii) the amounts received by the individual would be subject to tax as long-term capital gain, and (iv) the termination of the trust and the distribution of assets of the trust to the individual and foundation will not result in self-dealing under section 4941.

IRD in Partial Satisfaction of Surviving Spouse’s Elective Share

In PLR 200316008, the surviving spouse of decedent exercised her state right to receive one-third of decedent’s estate. Under an agreement approved by the probate court, the elective share was funded partially from two IRAs owned by the decedent (payable to two trusts as designated beneficiaries) and from other assets that were not IRD under section 691(a). As partial payment of her share, one of the IRAs paid funds to one of the trusts, and the trust made a payment to the wife, who later died.

The Service ruled that in determining the hypothetical estate tax, the marital deduction must be recomputed because the wife was entitled to one-third of the hypothetical estate. Because neither IRA was a specific bequest to the wife, the IRAs were items of IRD under section 691(a) and, therefore, the part of the wife’s elective share comprised of the IRAs was IRD. Because the wife received IRD and her estate and its beneficiaries would receive IRD, the wife, the wife’s estate and its beneficiaries are entitled to a section 691(c) deduction, based on the wife’s interest in the IRAs, for the estate tax attributable to the inclusion of the IRD items in the decedent’s gross estate and also in the wife’s gross estate.
# Probate and Trust Law Section
## 2003 Schedule of Standing Committees

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<thead>
<tr>
<th>Committee</th>
<th>Committee Chair</th>
<th>Date of Meeting</th>
<th>Place of Meeting</th>
<th>Time of Meeting</th>
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<tr>
<td>Education Committee</td>
<td>Judith B. Stein</td>
<td>Usually 2nd Tuesday of the Month</td>
<td>*See note below</td>
<td>4:00 P.M.</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>215-988-2618</td>
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<td>Public Service Committee</td>
<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>
<td>Margaret G. Thompson</td>
<td>2nd Tuesday of the Month</td>
<td>Cozen O'Connor The Atrium 1900 Market Street</td>
<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>
<td>4:00 P.M.</td>
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<td>215-973-3157</td>
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*The Education Committee generally meets the second Tuesday of the month at 4 p.m. at Wilmington Trust, 1 Liberty Place, 31st Floor (except in July, August and December)*

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

Faculty: Beverly R. Budin, Esq.  
Peter S. Miller  
Rosemary S. Cataldi, Esq.

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

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