Report of the Chair

By ROBERT I. FRIEDMAN
COZEN O’CONNOR

It is an honor to lead off the first Section Newsletter of the year with this report from the Chair.

Under the leadership of my partner Margie Thompson, last year was a busy and productive year for our Section, and I cannot let this chance pass without thanking her again for her efforts and also for the ongoing guidance she has provided to me and the other officers. Thank you Margie.

At the Section-wide level we have now kicked off the new year with our first Quarterly meeting, held in March, on “The State of the Estate Tax.” Congratulations to the Education Committee, and course planner Karen Stockmal, for arranging such a timely program with relatively little lead time; and special thanks to our members Jerry August and Jack Terrill for such a high quality presentation on new and challenging material. The strong attendance and rave reviews are a testament to the quality of our home-grown presenters.

Our March luncheon was also a wonderful opportunity to be introduced to Judge Matthew Carafielo, the newest member of the Philadelphia Orphans’ Court Division, who was kind to take the opportunity to attend the luncheon and speak to us.

As to the estate tax “mess,” others in the Section are also at work considering how to address the uncertain tax landscape. As we learned at our Quarterly luncheon,

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What Estate Planners Need to Know about the Step Transaction Doctrine

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I. Introduction

Several recent cases should be a wake-up call to estate planners about the willingness of courts to consider IRS challenges to gift tax planning strategies by application of ‘common law’ tax doctrines, specifically the step transaction doctrine. In two factually similar cases, decided within a month of each other, Linton v. U.S.1 and Heckerman v. U.S2, a federal district court in Washington State applied the step transaction doctrine and held that taxpayers who had transferred assets to Limited Liability Companies (LLCs) and then transferred interests in the LLCs had made indirect gifts of the underlying assets rather than direct gifts of the LLC’s interests. In a third case, Pierre v Commissioner,3 while on its face a taxpayer victory, the tax Court made a special point to reserve judgment in its written opinion on the application of the step transaction doctrine to the facts at hand.

This issue should be extremely important for planners. If the funding of LLCs (or FLPs) and the subsequent gifting of interests in such entities are viewed by courts as a single integrated transaction, then valuation discounts will disappear. This will occur regardless of whether the proper timing and sequence of events is followed (so as to avoid ‘gift on formation’ challenge) and regardless of whether the instruments contain proper terms and the parties respect the business formalities.

With its recent victories, it is this author’s prediction that the step transaction doctrine will become the weapon of choice for the IRS in defeating valuation discount techniques. Practitioners will want to structure transactions involving gifts of FLPs or LLC interests under circumstances best suited to avoid application of the doctrine. Recent case law indicates that it is the existence or non-existence of “real economic risk of a change” in asset value during the time period between steps that is determinative of whether the step transaction doctrine will apply.

This article will introduce (or reacquaint as the case may be) estate planners to the basic theory of the step transaction doctrine and its development and application in estate planning techniques. It will also examine more recent case law in hope of identifying methods which can be used to avoid “stepping” on the issue with the IRS, particularly in regard to the use of family limited partnerships (FLPs) or LLCs as wealth transfer vehicles.

II. The Step Transaction Doctrine

In addition to statutory provisions and their implementing regulations, courts have developed several “anti-avoidance” doctrines that can be applied to deny the tax benefits of a tax-motivated transaction, notwithstanding that the transaction may satisfy the literal requirements of a specific tax provision.4 These doctrines become applicable as a judicial remedy whenever a taxpayer claims tax benefits, unintended by Congress, by means of structuring transactions that serve no economic purpose other than tax savings.5 Since these judicial doctrines are case law specific, they are often interchangeable and avoid neat or consistent classification. Four generally recognized ‘anti-avoidance’ doctrines, however, include the business purpose doctrine, the substance over form doctrine, the sham transaction doctrine, and the economic substance doctrine. The step transaction doctrine can be understood as a variation or sub-category of the broader substance over form doctrine6. In Smith v Commissioner,7 the Tax Court succinctly stated the underlying policy behind the application of the step transaction doctrine:

The step transaction doctrine generally applies in cases where a taxpayer seeks to get from point A to point D and does so stopping in between at points B and C. The whole purpose of the unnecessary stops is to achieve tax consequences differing from those which the direct path from A to D would have produced. In such a situation, courts are not bound by the twisted path taken by the taxpayer, and the intervening stops may be disregarded or rearranged.

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Step Transaction Doctrine, continued

Application of the step transaction doctrine will result in a court either ignoring one or more of the various separate steps in the structure of a transaction or collapsing all steps into a single transaction. In determining whether the step transaction doctrine is applicable to the facts at hand, the courts will apply all or any one of three alternative tests: the binding commitment test; the end result test; or the mutual interdependence test. Binding Commitment Test

Binding commitment requires a finding that the parties committed at the outset to honor a specific result, and is the least frequently invoked. It is the narrowest alternative. It collapses a series of transactions into one “if, at the time the first step is entered into, there was a binding commitment to undertake the later step.”

End Result Test

End result analysis looks at the result and determines whether the steps would have permitted any other result. It is the broadest and most flexible standard. This test examines whether “the series of formally separate steps are really pre-arranged parts of a single transaction intended from the outset to reach the ultimate result.”

Mutual Interdependence Test

Mutual interdependence considers whether the steps are so interdependent that they would be meaningless unless all occur. This test seeks to determine whether, “on a reasonable interpretation of facts,” the steps were “so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series” of transactions. The focus of this test is the relationship between the steps, not necessarily their result. Similar to the End Result test, this test requires an examination of the economic substance of the steps when viewed together.

III. Estate Planning Applications

The step transaction doctrine is most often raised by the IRS in transactions involving the corporate income tax. This makes sense in that many corporate transactions are complex and often take place in numerous steps over long periods of time. The doctrine, however, has also been extended to numerous estate planning transaction cases and has been called “well-established” and “expressly sanctioned” in the area of gift tax where intra-family transactions often occur.

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Step Transaction Doctrine, continued

The IRS has typically raised the step transaction doctrine in FLP or LLC gift tax valuation cases in conjunction with or as an alternative to an ‘indirect gift’ or ‘gift on formation’ argument. This intermixing of legal theories itself leads to some confusion as the step transaction doctrine is based on common law principles while the ‘indirect gift’ argument finds its legal footing under an expanded reading of Treas. Reg. 25.2511-1(h)(1).17

Notwithstanding this intermixing of theories, practitioners have reasonably assumed from case law (with the notable exception of dicta by the Eighth Circuit in Senda v. Commissioner) that so long as a proper sequence of events was followed in the funding and subsequent gifting FLP or LLC interests (i.e., facts usually sufficient to withstand a gift on formation challenge) the step transaction doctrine would not be applicable. The reality may now be, however, that the timing and sequence of transaction events are no longer the sole determinative factors in a step transaction doctrine challenge in such cases.

IV. Recent Case Law

LINTON

In Linton, the U.S. district court, relying on Shepherd v. Commissioner and Senda v. Commissioner found that the formation of a LLC and gifts of the LLC interests were so integrally related that the plaintiffs had made indirect gifts of the underlying assets under Treas. Reg. 25.2511-1(h)(1) rather than direct gifts of the LLC interests as they had claimed. The result of this finding was, of course, the disallowance of the 47% gift tax valuation discounts claimed by the plaintiffs in their refund suit.

Although only a district court decision, this case holds significant importance for estate planners. Its importance lies not with the court’s finding that a disputed and uncertain sequence of transaction resulted in indirect gifts being made, but rather because the court held the following:

The Court also finds persuasive the Government’s alternate theory that, even if plaintiffs could establish the proper sequence of events, namely funding the LLC before gifting interests in it, they nevertheless made indirect gifts to their children’s Trusts under the step transaction doctrine (emphasis added).22

Furthermore, in its step transaction analysis, the court did not rely on any one of the three legal tests, but instead applied each test as follows:

The binding commitment test is met because the plaintiffs executed binding Trust Agreements and Gift Documents at the same time they took the first step of contributing property to the LLC; as counsel for plaintiffs conceded during oral argument, these documents would have been valid after signing had they never been dated. The end result test is likewise satisfied because plaintiffs undisputedly had a subjective intent to convey as much property as possible to their children while minimizing their gift tax liability, pursuant to which they created, with the aid of an attorney and a tax advisor, a scheme consisting of “pre-arranged parts of a single transaction.” Penrod, 88 T.C. at 1429. The pre-arrangement is most apparent in Mr. Linton’s explanation for why he did not date the Gift Documents, namely in an effort to ensure, for tax purposes, that [the broker] completed the transfers of securities before the gifts became effective….In addition, the interdependence test is met because the undisputed evidence demonstrates that plaintiffs would not have undertaken one or more of the steps at issue absent their “contemplation of the other integrating acts.” (Bold emphasis added).

The court distinguished Linton from two cases in which the step transaction doctrine was determined not to apply, Holman v. Commissioner and Gross v. Commissioner, because in those cases there was a purposeful delay (6 and 11 days, respectively) between the funding and gifting of interests. In distinguishing those cases, the court noted that the plaintiffs in Linton did not present any evidence of real economic risk to assets during the period between funding and gifting.

HECKERMAN

As mentioned above, Heckerman is a gift tax valuation case factually similar to Linton and decided by the same federal district court in a refund suit. The plaintiffs in Heckerman transferred significant liquid assets into an LLC and, on the same day, transferred LLC interests to several family trusts. The reported value of the gifts reflected a 58% discount, based on a lack of marketability for minority interests.
Step Transaction Doctrine, continued

As in Linton, the court in Heckerman initially focused on the sequence of steps taken by the taxpayers. Although the contributions to the LLC and the assignments to the children’s trusts occurred on the same date, the taxpayers argued that the gifts were subsequent to the contributions, and testified that they could not recall the exact date when the documents were executed. The court rejected taxpayers’ argument saying there was a “plethora of evidence to the contrary.” The court again relied upon Shepherd and Senda as well as Treas. Reg. 25.2511-1(h)(1) and upheld the IRS determination that an indirect gift had been made of the underlying assets and taxpayers were not entitled to a discount.

Similar to Linton, the court distinguished the case from Holman and Gross by pointing out that there was no delay between the Hecker mans’ transfer of property and the gifting of interests. The court noted that there was no evidence submitted to prove that there was real economic risk that the LLC units would change in value between any alleged time intervening between funding and gifting. The nature of the assets transferred to the LLC apparently included a beach house in Malibu and $2.85 million in mutual funds.

Most importantly, the court did not stop with its gift on formation analysis, but also agreed with the IRS’s alternative argument that the two-step process of transferring assets to the LLC and gifting the LLC interests was a single “integrated transaction” under the step transaction doctrine.

The court found that two of the three alternative tests of the step transaction doctrine were met under the facts at hand. The end result test was met because the court found that taxpayers clearly had a subjective intent to convey property to their children while minimizing their tax liability under a scheme consisting of pre-arranged parts of a single transaction. The interdependence test was also met because the court found sufficient evidence in the record to prove that the plaintiffs would not have made the contribution to the LLC, but for the anticipated discount in calculating gift taxes. The court did not find that the binding commitment test was met, but determined that such a finding was not necessary to the application of the step transaction doctrine to the case.

PIERRE

At first read, Pierre does not seem to address the step transaction doctrine. The immediate issue before the Tax Court was whether an owner’s transfers of her interests in a single-member LLC (which was treated as disregarded entity for federal income tax purposes) to family trusts were to be valued for gift tax purposes as transfers of LLC interests or as transfers of the LLC’s underlying assets as the IRS determined. In a 9-6 decision in favor of the taxpayer, the Tax Court held that the New York LLC would not be disregarded under the federal gift tax regime and that the transfers were thus to be treated as transfers of interests in the LLC itself.

What is of significance was the court’s decision to “address in a separate opinion: (1) whether the step transaction doctrine applies to collapse the separate transfers to the trusts and (2) the appropriate valuation discount, if any.” The fact that the court did not summarily dismiss the step transaction raised by the IRS in its brief should be alarming because the court found that there was a twelve day period of time between the contribution of cash and marketable securities to the LLC and the gifts of LLC interests. Perhaps even more troubling was the court’s footnote commentary that while the IRS raised the step transaction doctrine in the context of the funding and gifting events, it failed to “advocate applying the step transaction doctrine to disregard the Pierre LLC.” These comments, while dicta, can’t help but lead planners to conclude that the Tax Court will be willing to at least entertain an expanded application of the step transaction doctrine to gift tax cases involving intra-family transfers.

V. Conclusion

As has been shown above, recent case law suggests that the IRS will likely increase its use of the common law step transaction doctrine to deny gift tax valuations in cases involving the funding and transfer of interest in FLPs and LLCs. Estate Planners should now be alert to the fact that the proper sequence and timing of events in such transactions may no longer be enough to defend IRS assertions that the funding and gifting events be treated as a single integrated transaction for gift tax purposes. Practitioners will now want to arrange the transactions not only to avoid a gift on formation challenge by demonstrating that there was a sufficient and identifiable time period between the funding of the LLC and the gifting of its interests, but also in a way sufficient to demonstrate that the underlying assets held by the LLC were subject to real economic risk during this time period. How to do this, exactly, will seemingly depend on the underlying assets. It is conceivable that two identically sequenced and timed transactions could fare differently under a step transaction challenge depending on the economic nature of the underlying assets. In this author’s view, continued on Page 6
practitioners should advise clients who are funding LLCs or FLPs (with the view toward a possible subsequent gift of those interests) to contribute at least some portion of assets whose price can be demonstrated to have fluctuated during the time period between funding and gifting. The price fluctuation should be able to be proved by objective data including public market pricing (marketable securities) or private valuations based on defensible criteria. What portion of assets and how much fluctuation will need to be determined on a case by case basis. Questions such as these are likely to be flushed out in future decisions, but certainly the longer the time period between the funding and gifting of the entity and the greater the price fluctuation during this period the better the chances of success in defending an IRS challenge.

ENDNOTES


4 For a concise and useful summary of the various doctrines explained in the context of a JCS proposal to codify the economic substance doctrine as a possible revenue raising source see DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2010 BUDGET PROPOSAL [JCS-03-09 September 2009], Section II. See, e.g., Id. citing inter-alia, Joseph Bankman, “The Economic Substance Doctrine,” 74 S. Cal. L. Rev. 5, 12 (2000-2001).

5 See, ACM Partnership v. Commissioner, 73 T.C.M. at 2215.


9 See, e.g., King Enterprises, Inc. v. United States, 418 F.2d 511 (Ct. Cl. 1969).


12 Id.


14 Penrod at 199.

15 For an excellent summary of the doctrine and its application to estate planning techniques with legal citation sources see Zaritsky, Practical Estate Planning Under Circular 230, Sections 2.03 and 3.03 (WGL 2005).


17 The regulation deals with transfers of property to a corporation, but has been applied to apply to FLPs and LLCs. See Senda v. Commissioner, citing Shepherd v. Commissioner, 115 T.C. 376, 389 (2000), aff’d 283 F.3d. 1258 (11th Circuit 2002).

18 Senda v. Commissioner.

19 115 T.C. 376 (2000), aff’d 283 F.3rd 1258 (11th Cir. 2002).

20 433 F. 3d 1044 (8th Cir. 2006), aff’g T.C. Memo 2004-160.


22 Linton at 1298.

23 Linton at 1288 et seq.


25 T.C. Memo. 2008-221.

26 Linton at 1289.

27 Heckerman at 2 and 15.

28 Heckerman at 15.

29 Pierre at Footnote 3.

30 On September 15, 2000, petitioner transferred $4.25 million in cash and marketable securities to Pierre LLC. On September 27, 2000, 12 days after funding Pierre LLC, petitioner transferred her entire interest in Pierre LLC to the trusts. She first gave a 9.5-percent membership interest in Pierre LLC to each of the trusts to use a portion of her then-available credit amount and her GST exemption. She then sold each of the trusts a 40.5-percent membership interest in exchange for a secured promissory note. Id.

31 Id. at Footnote 4.
Overview

For those of you with New York clients, it is important to understand when a trust may become subject to income tax in New York. Generally, a trust is an individual taxpayer unless it is a so-called grantor trust. If a trust is an individual taxpayer, its earnings are subject to federal income tax as well as local income tax, if applicable. Most states impose an income tax on earnings by trusts. In New York, a trust may be taxed at a combined top rate of 12.618%, which is one of the highest state and local income tax rates for trusts in the United States. Therefore, it is important to understand the rules for taxation in New York as well as any planning strategies that may mitigate the tax effect.

Rules for Resident and Nonresident Trust

A resident trust is subject to New York state income tax on all of its income. A trust is a resident trust for New York state income tax purposes if it consists of (1) property transferred by will of a decedent who at his death was domiciled in New York; (2) property of a person domiciled in New York at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable; or (3) property of a person domiciled in New York at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.

In contrast, a nonresident trust is subject to New York state income tax only to the extent that it has New York source income. A trust is a nonresident trust for New York state income tax purposes if it is not a resident trust or part-year resident trust. New York source income includes income derived from (1) ownership of real or tangible property in New York; (2) a business, trade, profession or occupation carried on in New York; and (3) sales, conveyances or other dispositions of shares of stock in a cooperative apartment. Income derived from ownership interest in an entity such as a partnership or limited liability company is typically an intangible property and therefore not considered New York source income. However, in May of 2009, the New York law was amended to expand the definition of “real property” to include income derived from certain entities that hold real estate, if certain requirements are met.

References

1. I.R.C. §641(b) directs that “[t]he taxable income of an estate or trust shall be computed in the same manner as in the case of an individual, except as otherwise provided.”


4. NY CLS Tax §601(c).

5. NY CLS Tax §605(b)(3).

6. NY CLS Tax §601(e).

7. NY CLS Tax §605(b)(4).

8. NY CLS Tax §633; NY CLS Tax §631.

9. See NY State Department of Taxation and Finance Advisory Opinion TSB-M-09(5)I (May 5, 2009). The definition of “real property” was amended to include interest in a partnership, limited liability corporation, S corporation, or non-publicly traded C corporation with 100 or fewer shareholders (“entity”) that owns real property that is located in New York and has a fair market value that equals or exceeds 50% of all the assets of the entity on the date of sale or exchange of the taxpayer’s interest in the entity. Only assets held by the entity for at least 2 years before the date of sale or exchange would be used to determine the fair market value of all the assets of the entity on the date of sale or exchange. The income that would be considered New York source income would be pro rata to the value of the real estate assets held by the entity on the date of such sale of exchange. NY CLS §631(b)(A)(1).
Income Tax on NY Trusts, continued

New York City follows the New York state rules on its taxation of trusts and the definition of resident and nonresident trusts. For example, if a New York City resident created an irrevocable trust, then the trust would be a New York City resident trust for New York City income tax purposes. Similarly, if a trust is a nonresident New York City trust, then it would be subject to New York City income tax only to the extent that it has New York City source income.

Resident Trust Exception

Although a trust may, by definition, be a resident trust for New York state income tax purposes, it may be exempted from paying New York state income tax if it meets the resident trust exception. The exception has three requirements: (1) all the trustees are domiciled in a state other than New York; (2) the entire corpus of the trust, including real and tangible property, is located outside the state of New York; and (3) all income and gains of the trust are derived from or connected with sources outside of the state of New York. Note that all three requirements must be met in order for the exception to apply. In addition, for the purposes of this exception, the location of intangible property is deemed to be located at the domicile of the trustee.

An example of the use of this resident trust exception is as follows: A New York resident creates a trust for the benefit of his children. The trustee does not reside in New York. The trust’s only assets are cash, stocks and bonds. The trust is a resident trust for New York state income tax purposes because it has a New York grantor. However, because there is no New York trustee, the trust does not hold any personal or real property in New York and the trust does not have any New York source income, the trust meets all of the requirements of the resident trust exception and is exempt from New York state income tax.

The domicile of the trustee becomes a critical determination when considering the applicability of the resident trust exception. Generally, a person’s domicile is based on his intent. A trustee who is a natural person would be a New York resident if his intent is to domicile in New York (and hence, the trust would not be eligible for the resident trust exception). However, a person may be a statutory resident of New York even if he does not intend to domicile in New York. A person is a statutory resident of New York state for income tax purposes if he maintains a permanent place of abode for substantially all of the taxable year in New York and spends in the aggregate more than 183 days of the taxable year in New York. Although the author is unaware of any authority where this statutory rule is applied to a trustee for the purposes of disqualifying the trust from the resident trust exception, it seems likely that a person who is deemed a New York resident for income tax purposes would also be deemed a New York resident for the purposes of the resident trust exception.

In addition, an advisor who has the power to direct or control a trustee in his performance of trustee functions and duties, or has a veto power over such functions or duties, would be deemed a co-trustee. Therefore, even if there is no named New York trustee, if a New York person has the powers mentioned above, he would be deemed a trustee and the trust would not be eligible for the resident trust exception.

Planning Opportunities

The resident trust exception provides a planning opportunity to mitigate New York state income taxes on New York resident trusts. For trusts that hold only securities and other intangible assets, a grantor may consider naming a non-New York person or corporation as trustee of the trust in order to take advantage of the resident trust exception and therefore exempt the trust from New York state income tax. If there is already a New York trustee, then the New York trustee may consider resigning and appointing a non-New York trustee as his successor. If there is not an individual outside of New York who can serve as successor trustee, a client may consider appointing a corporate trustee with a domicile outside of New York.

If it is not possible to change the domicile of the trustee under the terms of the existing trust instrument, the trustee may consider decanting the trust in favor of a new trust with a non-New York trustee. The subject of decanting is a complex matter and is beyond the scope of this article. However, a trustee may examine the trust instrument for decanting authority or may utilize the New York decanting statute under New York law.

NYC Administrative Code §§11-1705(b)(3)-(4).
NY CLS Tax §605(b) (3)(D).
NYCRR §105.23(c).
20 NYCRR §105.20(d).
20 NYCRR §105.20(a)(2).


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Income Tax on NY Trusts, continued

In some situations, it may be desirable to involve a New York person with the investment decisions of the trust asset. Yet, if there is a New York trustee, the trust cannot utilize the resident trust exception. In such a case, one may still take advantage of the resident trust exception by using a LLC. For example, a New York person may create a non-New York LLC where the New York person is the managing member owning 1% of the LLC interests and the trust is the non-managing member owning 99% of the LLC interests. The New York trustee will resign and appoint a non-New York person or corporation as the successor trustee. The Trust will now fall under the resident trust exception but the investment decisions are controlled by the manager of the LLC, who is a New York person. It is important to note, however, that the effectiveness of this strategy may be limited for holding assets of real estate. As noted earlier, New York law was amended in 2009 to expand the definition of New York source income to include interest in certain entities that hold real estate. Therefore, if the assets include real estate and the LLC meets the test where its interest is considered New York source income, then the trust would not qualify for the resident trust exception because it has New York source income.

Lastly, even if a trust cannot utilize the resident trust exception and is subject to the full New York state income tax, it is important to consider whether the trust is subject to the taxation of another jurisdiction. In most cases, New York law provides for a credit for income taxes paid to another state. This credit would generally eliminate the possibility of double taxation with another jurisdiction. However, New York’s credit is limited to income tax paid to another state that is also derived from that other state. Therefore, for income with no source such as interests or dividends, the credit would not be available. In those circumstances, it may be possible for a New York resident trust to be taxed by New York and another jurisdiction on the same income without a corresponding New York credit.

Pending Legislation

On January 19, 2010, a Bill was introduced to the New York State Assembly that would significantly limit the applicability of the resident trust exception. If enacted, the resident trust exception would no longer apply to New York resident testamentary trusts. Furthermore, for New York resident inter vivos trusts, the exception would apply only if there were no New York “ascertainable beneficiaries.”

If a New York resident inter vivos trust has both New York and non-New York “ascertainable beneficiaries,” then the portion of the trust that would be subject to New York state income tax is calculated as follows: (1) the sum of all New York source income and (2) proportionate share of all non-New York source income to the number of New York resident “ascertainable beneficiaries.” For example, Taxpayer A, a New York resident, created an irrevocable inter vivos trust for the benefit of his five children, two of whom are New York residents and three are not. The trust has $100,000 worth of New York source income and $200,000 worth of non-New York source income. The New York taxable income would be $180,000 ($100,000 + [2/5]*$200,000). The Bill defines “ascertainable beneficiaries” as a currently living ascertainable beneficiary who has a present or future interest in the trust, including beneficiaries whose interest has not yet vested. If enacted, the Bill would take effect immediately and would apply to taxable years begin-

16 The above strategy has been approved in NY State Department of Taxation and Finance Advisory Opinion TSB-A-00(2)I (Mar. 29, 2000). Note that an Advisory Opinion may not be cited or used as precedent. However, they are “indicative of the commissioner’s position concerning the applicability of statutory and regulatory provisions to specific sets of facts as of the date the opinion is issued or for the specific time period at issue in the opinion.” 20 NYCRR 2375.5.

17 NY CLS Tax §620(a).

18 See Matter of Tamagni, 91 N.Y.2d 530 (N.Y. 1998) (discussing the same issue as related to income tax on individuals).


20 Id.

21 Id.

22 Id.

23 Id. The Bill also provides that if a beneficiary of a trust is a partnership, limited liability company or S Corporation for which an election has been made under applicable New York law, the trust shall, for purposes of determining the number of ascertainable beneficiaries of the trust who are New York residents, count each partner, member, or shareholder as a separate beneficiary and determine each individual partner’s, member’s or shareholder’s residence separately.
Income Tax on NY Trusts, continued

ning on or after January 1, 2010.\textsuperscript{24}

Conclusion

New York state has one of the highest income tax rates on trusts in the country. It is important to understand when a trust may be deemed a New York resident trust and therefore subject to New York state income tax. New York provides for a resident trust exception that if applicable, would exempt a New York resident trust from incurring New York state income tax. This provides planning opportunities to mitigate the New York state income tax burden. However, pending legislation, if enacted, would significantly minimize the scope of the New York resident trust exception.

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\textsuperscript{24} Id.
a number of states have proposed statutes that would address how, in the absence of a federal estate tax and generation-skipping tax, to interpret wills and trusts which contain federal tax formulas. Our Legislative Committee is currently considering a possible Pennsylvania statutory provision and is working in concert with other lawyers and groups statewide. In addition, the Tax Committee is considering additional programming for practitioners. This is a subject matter that will no doubt continue to occupy the time and resources of the Section through the year.

It is a cliché, but a true one, that the work of the Section is done through its Committees. Our Section is blessed with able Committee chairs and hard-working and enthusiastic Committee members who devote significant time and talent to our work and who have promptly taken up the challenge of addressing these new issues.

My job and the job of the other officers this year will be, for the most part, simply to facilitate the on-going and productive work of the Committees. I look forward to reporting to you about the work of the Committees as the year progresses.

I encourage Section members who are not actively involved with one or more Committees to volunteer to join one; and I welcome suggestions from any member about new projects or ideas or improvements.
Case Summaries From the Orphans’ Court Litigation Committee

Flagg Trust, 29 Fid. Rep. 2d 203 (O.C. Mont. 2009)
and
Stern Trust, 29 Fid. Rep. 2d. 207 (O.C. Mont. 2009)

By TIMOTHY J. HOLMAN, ESQUIRE AND BRADLEY D. TEREBELO, ESQUIRE
HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

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Two recent cases, Flagg Trust, 29 Fid. Rep. 2d 203 (O.C. Mont. 2009) and Stern Trust, 29 Fid. Rep. 2d. 207 (O.C. Mont. 2009), both issued by Judge Ott in the Montgomery County Orphans’ Court, are the first reported cases concerning modification under the UTA.


In Flagg Trust, testator created a residuary trust under his will, which provided for certain specified amounts from income each year to his children (with a share for a deceased child passing per stirpes to his or her then living descendants). The trustees were also authorized to pay income or, if income is not sufficient, principal, to testator’s children and their descendants “for such expenses as may result from illness or similar emergency afflicting any of such income beneficiaries; provided, however, that it first be established that the beneficiary is financially unable to pay such expenses and that bills or similar vouchers for such expenses are submitted to and approved for payment by my executors and trustees.” All remaining income was to be distributed in certain proportions to charities. The trust terminates 21 years from the date of death of the last survivor of testator’s wife and his descendants living at his death.

Testator’s four grandchildren were each receiving $20,000 per year pursuant to the terms of the trust. The trust’s annual income exceeded $200,000, and so the remaining $120,000+ was passing to the charitable interests. One of testator’s grandchildren filed a petition to modify the trust to pay “$25,000, adjusted upward each year for inflation . . . from principal to each of the testator’s descendants then entitled to receive income. This payment shall be in addition to any income distribution[.]” (Emphasis in original.) The charities, along with the Attorney General, objected to the modification. The court agreed with the Respondents and dismissed Petitioner’s petition.

The first argument addressed by the court was whether modification was permitted under 20 Pa. C.S. §7740.2(a), which allows a court to modify a noncharitable irrevocable trust “if, because of circumstances that apparently were not anticipated by the settlor, modification will further the purposes of the trust.” The court noted that 20 Pa. C.S. §7740.2(a) was derived from Uniform Trust Code (“UTC”) §412, which applied to both noncharitable and charitable trusts. Petitioner argued that the Pennsylvania legislature only adopted UTC §412 as it applied to noncharitable trusts in order to “prevent an IRS argument that a trust could not qualify for a charitable tax deduction if the court could modify the charities’ interest.” Because no charitable deduction was claimed in this case, Petitioner argued the trust was not a charitable trust despite the charitable interests.

Pursuant to 20 Pa. C.S. §7703, a charitable trust is a “trust, or portion of a trust, created for a charitable purpose[.]” The court noted that the statute does not address the rules that apply to trusts with both charitable and noncharitable beneficiaries, so it turned to the Comment to UTC §103, which defines charitable continued on Page 13
and noncharitable trusts and from which Pennsylvania’s definition of “charitable trusts” was based. The comment to UTC §103 states, in part:

Under the Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a “charitable trust”… The great majority of the Code’s provisions apply to both charitable and noncharitable trusts without distinction. The distinction between the two types of trusts are found in the requirements relating to trust creation and modification. . . . To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

The court then stated that it “is difficult to conceive of this trust as non-charitable since charitable organizations are entitled to and are currently receiving all excess income not paid to the settlor’s descendants.... Here, the charities will take nothing upon termination, and, if the requested modification is permitted, there will be an immediate and substantial decrease in the amounts they receive presently.” Thus, the court held that the trust was a charitable trust and not subject to modification under 20 Pa. C.S. §7740.2(a).

Petitioner also argued that modification was permitted pursuant to 20 Pa. C.S. §7740.3(c), which permits a court to modify the administrative provisions of a charitable trust to the extent necessary to preserve the trust. The court concluded that the modifications requested were dispositive, not administrative, and therefore rejected Petitioner’s argument.

The court then turned Petitioner’s argument that modification was permitted pursuant to 20 Pa. C.S. §7740.5, which permits reformation to correct mistakes. Petitioner argued that there was a mistake of fact in testator’s will because it did not take into account how much income would be generated, how many descendants the testator would have and how inflation would rise, which “stymie[d]” the testator’s intent to provide the means for his family members to live independently. The court rejected this argument, noting that the will “makes no reference to a standard of living. The inquiry into the propriety of reformation begins with the intent as expressed in the trust instrument. Clearly the petitioner can not advance his case by relying on Section 7740.5.” (Emphasis in original.) In a footnote, the court noted that while testator did not address his descendants’ standard of living, testator did intend to provide for them “should they not have sufficient funds to cover the cost of an illness or other emergency. . . . This provision is indicative of the careful and comprehensive drafting that went into the document, and further militates against allowing a deviation from its express language.”


Stern Trust concerned a testamentary trust which provided that the net income was to be paid to testator’s wife for life, and upon her death, the principal of the trust is to be divided into three trusts, one for each of testator’s children. Testator’s family petitioned the court to modify the trust to (i) permit the appointment of two of testator’s sons to serve as co-trustees along with testator’s wife and to allow each son to appoint his successor, (ii) permit the trustees to distribute principal to testator’s wife for her “health, support and maintenance” pursuant to 20 Pa. C.S. §7740.1 and (iii) permit testator’s wife to appoint the remaining principal of the trust to testator’s descendants, also pursuant to 20 Pa. C.S. §7740.1. A guardian ad litem was appointed to represent the interests of minor, unborn and unascertained beneficiaries. The guardian ad litem objected to modifications (ii) and (iii).

The court granted the appointment of testator’s sons as co-trustees to serve with testator’s wife, noting that 20 Pa. C.S. §7764(e) permits the court to appoint an additional trustee “if the court considers the appointment desirable for the administration of the trust.” However, the court rejected the modification to permit the sons to appoint their successors because the modification “goes against this Court’s long-held policy that future vacancies should be dealt with as

2 It is not clear in Stern why a guardian ad litem was appointed. Based on the facts presented, there were sui juris beneficiaries of the trust who would be able to represent the interests of minor, unborn and unascertained beneficiaries without a conflict of interest in the matter pursuant to 20 Pa. C.S. §7723. It is possible that, pursuant to 20 Pa. C.S. §7724, the court made a sua sponte determination that the representation was inadequate and appointed a guardian ad litem.
they arise. Accordingly, we will approve only the addition of the two sons as trustees, and, if replacements are needed, they will be chosen in accordance with the provisions of the Uniform Trust Act.”

Because the guardian ad litem objected to the modification of the trust to permit the distribution of principal to testator’s wife, the court looked to 20 Pa. C.S. §7740.1(d), which permits a court to approve the modification of a noncharitable irrevocable trust even if a beneficiary objects if the court determines that “(1) if all the beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.” Because the modification could result in the depletion of the trust, thereby potentially leaving nothing to the remainder beneficiaries, the court held that the interests of the beneficiaries represented by the guardian ad litem would be “clearly impacted.” In addition, because the trust contained a spendthrift clause, and, pursuant to 20 Pa. C.S. §7740.1(b.1), a spendthrift clause is a material purpose of the trust, the court concluded that modification of the trust was not permitted even if all beneficiaries had consented because 20 Pa. C.S. §7740.1(b) requires that the modification cannot be inconsistent with a material purpose of the trust. Thus, the court did not permit the modification to permit the trustees to distribute principal to testator’s wife.

Testator’s wife and her children, all in agreement, requested that the trust be modified pursuant to 20 Pa. C.S. §7740.1 so that testator’s wife could appoint the principal to her descendants unequally. This was because one son had managed the family business (the business’ stock was held in the trust), and as a result of his management, the business was sold for $20,000,000, and testator’s wife and her children all agreed that the son should receive more than the other two children. Again, the guardian ad litem objected to the modification. The court rejected this modification because it “runs contrary to decedent’s intent to treat his children equally”, and if the family wished to reward the son for his work, they could do so through other means, such as disclaimers, inter vivos gifting or testamentary gifts. Although not addressed by the court, had the court granted the modification, query whether the beneficiaries would be making a taxable gift to the son who would receive more through the power of appointment.
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ED NOTE: Practice Points is a new feature in the Probate Section Newsletter. Readers are encouraged to send their questions or ideas for consideration in future columns to Bernice J. Koplin at bjkoplin@sglk.com.

A decree or adjudication by the Orphans’ Court does not constitute a judgment which can be used to collect an amount awarded by the Orphans’ Court. Thus the following procedure was used following an adjudication, in order to collect. The attorneys waited until time to take exceptions expired. Then they filed a “Praecipe to enter judgment on the adjudication”, which the Orphans’ Court Clerk’s office would not act upon. As a result, the attorneys then requested the Orphans’ Court to enter an Order which read (names changed to protect the guilty):

“And now, the ___ day of ______, 20__, upon consideration of the Praecipe filed ______ seeking entry of judgment, it is ORDERED and DECREED that John Smith shall pay to Priscilla Brown the sum awarded by the Adjudication dated_________ in the amount of $______ together with interest from __________.” [information underlined would be utilized from your actual case].

A certified copy of this Orphans’ Court Order was then presented to the Prothonotary (along with the payment of applicable fees) who filed it under caption of Brown v. Smith. The docket of the Trial Division reads as follows: “Certification of judgment and docket entries from Orphans Court Division at OC ___ of 1996 to the Court of Common Pleas, Trial division, State of Pennsylvania in favor of the plaintiff(s) Priscilla Brown against defendant(s) John Smith in the amount of $______ filed. Judgment entered and recorded in Philadelphia County Notice under Rule 236.”

Having done that, the attorneys were then able to file a Praecipe to issue Writ of Attachment to garnish defendant’s bank account, and proceeded to attempt collection.
What is an attorney to do if the executor he or she represents fails to account for an estate asset or improperly deprives a beneficiary of his or her rightful interest in the estate?

Regardless of the stage of the estate administration, the attorney has the right, and a right that most attorneys would feel obligated to exercise, to warn the executor-client that the attorney may notify the beneficiary, the court and District Attorney if the executor fails to account for an estate asset or intends to improperly deprive a beneficiary of his or her rightful interest in the estate.

The Rules of Professional Conduct, specifically Rule 1.6, makes that possibility clear. Rule 1.6(c) permits the attorney to reveal the information when necessary to prevent a client from committing a criminal act and when necessary to rectify the consequences of a criminal or fraudulent act in the commission of which the attorney’s services had been or are being used.

In fact, the attorney may have a legal obligation to notify the beneficiaries, and even others. The Montgomery County Orphans’ Court has held that, although the attorney’s client is solely the executor, and not the beneficiaries, the attorney, as counsel to a fiduciary, has derivative duties to the beneficiaries in such situations. See Pew Trust, 16 Fiduc. Rep. 2d 73 (Montg. 1995).

If the estate administration is advanced, Rule 3.3 (b), which obligates attorneys to be candid to tribunals, could also apply. Rule 3.3 provides, inter alia, that an attorney for a client who “intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures, including, if necessary, disclosures to the tribunal.” Accordingly, the attorney may have an obligation to notify the Register of Wills or Orphans’ Court. For instance, if an inventory or Status Report had been filed with the Register of Wills, the attorney has an obligation to see to it that corrected documents are submitted. Also, if an executor’s account has been filed with the Orphans’ Court, the attorney has an obligation to have a revised, amended or supplemental executor’s account filed with the Court. The definition of tribunals, as used in the Rules of Professional Conduct, has been interpreted to include both the Register of Wills and Orphans’ Court.

Fortunately, an executor will usually take corrective action once the attorney has alerted him or her to the attorney’s obligations if the executor fails to do so.

For more information about the attorney’s obligations in these situations, and for support for the suggested action, see Opinion 2009-21, issued by the Pennsylvania Bar Association’s Legal Ethics and Professional Responsibility Committee, and Opinion 2008-9, issued by the Philadelphia Bar Association’s Professional Guidance Committee.

WHAT WOULD YOU LIKE TO SEE IN FUTURE ETHICS COLUMNS?

Send your questions and ideas to:

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I. FEDERAL ESTATE TAX

Family Limited Partnerships

(S.D. Tex., August 20, 2009)

The U.S. District Court for the Southern District of Texas ruled that the estate of Maude O’Connor Williams (Maude) should receive a refund whose value is determined by the value of the interests in a family limited partnership (FLP) owned by two trusts that were includible in her estate. Although Maude had not funded the FLP before she died, the court ruled that, under Texas law, her clear intent to fund the FLPs was sufficient to cause the assets destined for the FLPs to be partnership property and thus excluded from her estate.

Maude and her husband had formed a revocable Family Trust to hold approximately $300 million in cash, CDs and bonds. The Family Trust was funded after the death of Maude’s husband in 1999. It was divided into two Trusts: Trust M, a QTIP marital trust holding her late husband’s separate property and one-half of the community property, and Trust A, holding Maude’s separate property and the other half of the community property. Maude was trustee of both trusts.

Maude was credibly described by her advisors, Rayford and Lane Keller, as intellectually sharp in 2000, although she was legally blind. She and her advisors decided to form an FLP, which was to be owned by Trust M and Trust A as limited partners (each with a 49.95 percent interest) and a limited liability company (LLC) as general partners (with a 0.1 percent interest). The LLC was to have been funded with $300,000, and the partnership with $250 million in community property bonds. In addition to the assets to be transferred to the FLP, Maude had more than $110 million in assets at her disposal. Maude, who had been diagnosed with cancer in March, 2000 but was not considered to be in failing health at the time, signed the partnership agreement and the LLC incorporation documents on May 9, 2000, while in the hospital. Some of the organizational papers had blanks because the fair market value of certain assets had not been determined. The organizational documents were filed with the Texas Secretary of State in the next two days. Maude died on May 15, 2000, before any assets had been transferred to the FLP and before the LLC was funded. No funds were transferred to the FLP.

The estate initially paid estate tax of $148 million, claiming no discounts for the FLP interests, because the advisors believed that the FLP had not been properly formed. The estate paid $30 million of interest on a loan made to the estate by the FLP in order to provide liquidity for estate taxes. The Court rejected the government’s arguments that the transfers to the FLP were retained interests based on IRC §§ 2036 and 2038, and it found that the primary purpose of the FLP was not avoidance of federal estate tax. It cited the following factors as evidence of a bona fide sale for adequate and full consideration in money or money’s worth:

- Maude and her advisors had conducted extensive discussions in forming the FLP;

The Court ruled in favor of the estate, holding that the FLP had been fully formed prior to Maude’s death, and that, in signing the partnership and LLC formation documents, Maude clearly intended the community property Bonds to be the property of the FLP and the LLC to be capitalized by the $300,000 check. The Court determined that the 49.95% limited partner interests were entitled to a 47.51% valuation discount. The court also held that $30 million of interest on a loan made to the estate by the FLP in order to provide liquidity for estate taxes was deductible by the estate.

The estate then filed a claim for a refund of about $40 million, plus interest. When the government denied the claim, the estate filed suit in Federal court.

The Court ruled in favor of the estate, holding that the FLP had been fully formed prior to Maude’s death, and that, in signing the partnership and LLC formation documents, Maude clearly intended the community property Bonds to be the property of the FLP and the LLC to be capitalized by the $300,000 check. The Court determined that the 49.95% limited partner interests were entitled to a 47.51% valuation discount. The court also held that $30 million of interest on a loan made to the estate by the FLP in order to provide liquidity for estate taxes was deductible by the estate.
Tax Update, continued

- Maude retained a substantial amount (over $100 million) of personal wealth outside the FLP;
- Maude’s intent was to protect family assets from attachment by ex-spouses of her children;
- Even at her advanced age, Maude was a shrewd businesswoman who lived frugally;
- The FLP Agreement had been validly executed, with provisions for each partner’s capital account and distributions.

Estate of Malkin v. Commissioner, T.C. Memo. 2009-212 (September 16, 2009)

In this fact-rich case, the IRS prevailed in bringing family limited partnership (FLP) assets back into a decedent’s estate under IRC § 2036(a)(1) and in assessing a deficiency in the payment of gift taxes because of indirect gifts.

In 1998 and 1999, Roger D. Malkin (Decedent), who had been Chairman and CEO of Delta & Pine Land Co. (D & PL) wished to transfer more than $16 million in shares of stock and options to his son and daughter. He created two FLPs (MFLP and CRFLP) and four trusts, naming himself the general partner of each of the FLPs and appointing himself and the trusts the limited partners of the FLPs. His two children were the beneficiaries of the trusts. Decedent transferred D & PL shares to the MFLP. He transferred D & PL shares plus the interest in four limited liability companies (LLCs) that he controlled with his son to the CRFLP. By means of this series of transactions Decedent transferred all of his assets to the FLPs. His will left nothing to his children, and his estate was insolvent. He was diagnosed with pancreatic cancer in May, 1999 and died in November, 2000. The IRS assessed a $6.1 million deficiency in his estate’s federal estate tax and gift tax deficiencies of $7.8 million for 1998, 232,000 for 1999 and $3.4 million in 2000.

IRC § 2036(a) (1) Issues.
The Tax Court found that the transfers to the two FLPs were not made for any legitimate non-tax purpose and that Decedent therefore retained for his life possession and enjoyment of the D & PL shares under IRC § 2036(a)(1). The taxpayer’s estate was not successful in arguing that the decedent’s intention in forming the FLPs was to provide for his children, to preserve the value of the shares by preventing their sale, and to centralize the management of the family’s wealth.

The Tax Court found evidence of an implied agreement giving Decedent the use of the assets of MFLP during his lifetime, thereby creating an implied life estate that made the assets includible in the estate under IRC §2036(a). Decedent, as general partner, had pledged its stock as security to Bank of America to secure his personal debts. Two months later, he gave the MFLP a personal guaranty that he would pay back the debt plus interest. The Court noted that although Decedent and the two trusts had signed a resolution authorizing the pledge and asserting that it was made for a business purpose, this purpose was never explained. The Court found no other evidence of a business purpose. Moreover, the Court held that the transfers of the D & PL shares to CRFLP were includible in Decedent’s estate under §2036(a) because they were made subject to a personal liability of Decedent.

Gift Tax Issues. The Court found that the transfers to CRFLP were indirect gifts subject to gift tax, and not a valid transfer of partnership shares. On the same day that Decedent signed the CRFLP partnership agreement and transferred interests in the various LLCs to the new entity, he assigned shares in the partnership to each of his children’s trusts. However, the trusts had not yet been formed. The Court reasoned that CRFLP was not a valid partnership until the trusts were created, because state law did not recognize a one-person partnership. The Court did not accept the Estate’s argument that the partnership interests had been sold to the children’s trusts, finding that the notes that purchased the interests were shams because the Decedent provided the funds to pay the down payments, the estate did not make any demand for payment, and the children had adequate funds to make the down payment themselves. Similarly, the Court noted that two cash “loans” made by Decedent to the children were actually gifts, and that Decedent’s payments of some LLC debts constituted indirect gifts to the other partners.

Estate of Murphy v. United States, 2009-2 USTC para. 60,583 (W.D. Ark., October 2, 2009)

The estate of Charles H. Murphy, heir to the founders of Murphy Oil, prevailed in a decision involving issues of estate inclusion, valuation, and the deduction of administrative expenses. The Court held that the transfer of assets to a family limited partnership (FLP) was a bona fide sale and had a legitimate non-tax business purpose, because the purpose of the transfer was to institute centralized management in conformity with the taxpayer’s investment philosophy. The underlying assets of the partnership were continued on Page 20
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decedent’s estate paid estate tax of over $46 million, the IRS assessed an additional $34 million of tax, which the estate challenged in a lawsuit for an estate tax refund of $41 million.

Estate inclusion: The IRS claimed that the assets transferred by the decedent to a family limited partnership (FLP) and its general partner, a limited liability company (LLC), were includible in the estate under IRC § 2036(a). The estate claimed that the transfers were not includible because they were bona fide sales for adequate and full consideration. The Court ruled in favor of the estate, stating that the estate had successfully shown that the FLP had been formed for various non-tax purposes. It noted that the mere presence of tax advantages does not prove that a sale is not bona fide.

Valuation: The IRS questioned the estate’s valuation of the decedent’s 95.25365 percent interest in the FLP and his 49 percent interest in the LLC. The IRS also challenged the valuation of four works of art. The Court accepted the opinion of the estate’s valuation expert, whose analysis was far more elaborate and financially sophisticated than that of the IRS’ expert.

Administrative expenses: The IRS claimed that under IRC §2053 the estate could not deduct the interest paid on Graegin loans that were taken out to pay the federal estate tax. It argued that (a) the estate had insufficient liquidity to pay its taxes because Murphy had engaged in an unnecessary estate tax avoidance transaction and (b) the estate could have liquidated assets instead of borrowing money in order to pay the estate taxes. The Court rejected both arguments. On the first point, the Court found that the formation of the FLP was not an estate tax avoidance tactic and was done in good faith, as evidenced by Murphy’s retention of substantial assets outside of the partnership. These assets would have been sufficient to pay the estate taxes had they retained the value that they had during Murphy’s lifetime. On the second point, the court declined to “second guess” the business judgment of the executor.

Estate of Christiansen, 2009 U.S. App. LEXIS 24932 (8th Cir., November 13, 2009)

The Court affirmed the Tax Court’s holding that a partial disclaimer was valid as to an amount that passed to a foundation named by the decedent in her will, and the estate was entitled to a charitable deduction for that amount.

Decedent’s will provided that twenty-five percent of any disclaimer amounts would go to a foundation. The decedent’s daughter disclaimed her interest in the estate “as finally determined for federal estate tax purposes” as to all amounts over $6.35 million.

When the Commissioner challenged the validity of the disclaimer and the overall valuation of the estate, the parties agreed to a settlement that decreased the discounts for marketability claimed by estate for limited partnership interests and correspondingly increased the valuation of the estate. The effect of the adjustments was to increase the valuation of the contributions to the charitable foundation. But the Commissioner denied the increase in the charitable deduction, arguing that the IRS’s challenge to the estate’s return and the valuation adjustment that resulted therefrom served as post-death and post-disclaimer contingencies that invalidated the disclaimer under IRC § 2518 and Treasury Reg. § 20.2055-2(b)(1). The United States Tax Court rejected the Commissioner’s arguments.
Tax Update, continued

On appeal, the Commissioner made two legal arguments: first, he claimed that because the overall value of the estate could not be finally determined until his challenge had been resolved and the process of establishing the estate’s value was completed, the transfer to the foundation violated Treasury Reg. § 20.2055-2(b)(1). Second, he questioned the public policy implications of allowing the use of partial disclaimers whose practical effect is to disclaim all amounts above a certain dollar amount, asserting that such disclaimers remove the IRS’s incentive to audit the estate’s return because any increase in the estate’s valuation could only lead to an increase in its charitable deduction, and not to an increase in tax receipts.

The Court took issue with both of the Commissioner’s arguments. It stated that Treasury § 20.2055-2(b)(1) was not applicable in this case because it does not concern the finality of an accounting valuation at the date of death or disclaimer. The Court also stated that there was no evidence that Congress intended to increase the incentives for the IRS to challenge or audit returns: the role of the IRS is “not merely to maximize tax receipts and conduct litigation based on a calculus as to which cases will result in the greatest collection… but rather to enforce tax laws.” Further, it held that allowing fixed-dollar amount partial disclaimers supports the broad public policy goal of encouraging charitable donations and that numerous mechanisms already exist to ensure that estate values are accurately reported to the IRS.

**Estate of Black v. Commissioner**, T.C. No. 23188-05, 133 T.C. No. 15 (December 14, 2009)

Samuel P. Black Jr. (“Mr. Black”), one of his sons, and a trust of one of his sons, and a trust for one son contributed their stock in Erie Indemnity Co. (“Erie”) to a family limited partnership (FLP) in exchange for proportionate partnership interests. Mr. Black’s concern was to maintain family control over the assets and to perpetuate the family’s Erie stock holdings. Mr. Black established a pecuniary marital trust for his wife, Irene (“Mrs. Black”). Mr. Black died in 2001 and Mrs. Black died five months later, before the funding of the marital trust. The executor of both estates, who intended to fund the marital trust with a portion of Mr. Black’s interest in the FLP, filed a federal estate tax return for Irene that deemed the marital trust to be funded as of the date of her death.

In order to obtain the liquidity necessary to pay the estate taxes and other obligations of Mrs. Black’s estate, the managing partner of the FLP and Erie arranged for the FLP to sell a portion of its stock in a secondary offering. The estate borrowed $71 million of the $98 million raised in the sale. The $20 million in interest on the loan, payable four years from the loan date, was deducted in full on the estate tax return.

In a lengthy decision, the U.S. Tax Court made the following rulings:

1. Mr. Black’s transfer of Erie stock to the FLP was a bona fide sale for adequate and full consideration, thus causing the fair market value of Samuel’s partnership interest in the FLP, and not the value of the stock transferred to the FLP, to be includable in the Samuel’s gross estate. Although the FLP did not conduct an active trade or business, it was nevertheless formed for legitimate and significant nontax purposes.

2. The marital deduction to which Mr. Black’s estate was entitled under IRC § 2056 was limited to the value of the interest in the FLP that actually passed to the marital trust.

3. Mrs. Black’s date of death, and not Mr. Black’s date of death, was the date on which the marital trust was deemed funded and the date on which the value of the marital trust property includable in Irene’s gross estate under § 2044 was determined.

4. The interest expense incurred by Mrs. Black’s estate was not a deductible administration expense under IRC § 2053(a)(2), because the loan to the estate was unnecessary.

5. Mrs. Black’s estate was allowed to deduct about one-half of the costs related to the secondary stock offering and the same proportion of executor’s fees that were incurred for that purpose. The amount of allowable deductions was proportional to the amount of funds raised by the stock offering that were used to discharge the debts of Mrs. Black’s estate.

**QUALIFIED FAMILY-OWNED BUSINESS INTEREST DEDUCTION**

**Estate of Farnam v. Commissioner, 8th Cir. No. 08-3196 (October 8, 2009)**

The Eight Circuit Court of Appeals affirmed a Tax Court ruling continued on Page 22
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that because the operation of IRC § 2057 was limited to equity ownership interest, loans by a deceased husband and wife to a family-owned corporation could not be considered interests in the corporation. In its 2-1 decision, the Court declined to consider the policy arguments made by the two estates.

The Farnam family owned and managed an auto parts business, all shareholders of which were members of the family. Every year, the company borrowed funds from the shareholders or from persons or entities related to the shareholders in order to support its operations. The company issued promissory notes evidencing the loans. The estates of both Duane Farnam and his wife Lois Farnam, who died in 2001 and 2003 respectively, claimed a qualified family-owned business interest deduction (QFOBI) on their estate tax returns under IRC § 2057. IRC § 2057(b) (1) (C) provides that to qualify for a QFOBI deduction, an estate must meet a fifty-percent liquidity test. In the case of both estates, the liquidity test could only be met if the notes were treated as QFOBIs. Because the Tax Court found that the loans could not be treated as interests in the corporation, it upheld the IRS’s determination of deficiencies in the taxes paid by both estates.

The dissenting judge affirmed that the majority’s opinion ignored the remedial purpose of IRC § 2057, which is to protect and preserve family-owned farms and businesses by reducing the need to liquidate them to pay estate taxes.

OTHER IRS GUIDANCE


On April 23, 2007, the IRS issued proposed regulations providing that only amounts actually paid to satisfy deductible expenses and claims against the estate could be deducted under IRC § 2053 (a) (3) on an estate tax return. Events occurring after the death of the decedent could be considered in determining the deductible amount, but no deduction would be allowed for potential, unmatured or contested claims. The proposed regulations provided that an estate could file a protective claim for a refund if a claim remained contested or contingent at the expiration of the limitations period for refunds.

The final regulations are effective for estates of decedents dying on or after 10/20/2009. They incorporate some changes from the proposed regulations, including the following:

- The value of assets comprising at least 10% of the gross estate may be offset by contingent claims; deductions for contingent claims of no more than $500,000 may be made;
- Settlements may be recognized even if they are not found to be within the reasonable range of settlement under applicable state law;
- After the assessment limitations period has expired, an executor does not have an affirmative duty to report claimed expenses or claims that are not actually paid;
- If a protective claim for refund is filed concerning a contingent expense or claim, marital or charitable deductions do not have to be reduced on the estate tax return by such expenses or claims;
- The final regulations do not include the rebuttable presumption included in the proposed regulations stating that a claim made by a family member, a related entity or a beneficiary is not legitimate;
- The estate is permitted to own and to deduct the cost of a commercial annuity purchased to fund a continuing obligation of the estate.


This Notice was published on the same date as the Final Regulations summarized above in order to make it clear that, when processing a timely protective claim for a refund under IRC § 2053 (a) (3), the IRS will limit its examination to the facts relating to section 2053 deductions if the claim ripens after the expiration of the limitations period on assessment under IRC § 6501.

II. GIFT TAX

Pierre v. Commissioner, 133 T.C. No. 2, No. 753-07 (August 24, 2009)

The issue in this case was whether, for federal gift tax purposes, transfers by gift or sale of interests in a “disregarded entity,” a single-member limited liability company (LLC) are valued as the transfers of interests in the LLC (with the possibility of discounts) or the transfer of a propor-

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tionate share of the underlying assets owned by the LLC. A divided Tax Court, with 10 judges in the majority and 6 dissenting, decided (in four separate opinions) that the transfers are treated as transfers of interests in the entity and are thus subject to entity discounts.

In 2000, Suzanne Pierre (Taxpayer), a mother who wanted to provide for her children but keep her family’s wealth intact, formed a single-member LLC under New York law and funded it with $4.25 million in cash and marketable securities. She did not elect to treat it as a corporation for federal tax purposes by filing Form 8832. Twelve days after funding it, she transferred her entire interest in the LLC to two separate trusts, one for her son and one for her granddaughter. The transfer took place in two steps: first, she gave a 9.5 percent interest to each trust in order to use a portion of her unified credit and GSTT exemption; then, she sold a 40.5% interest to each trust in return for a secured promissory note, whose face amount was determined by an appraisal applying a 30% discount. She filed a 2000 gift tax return to report the gifts to the trusts.

The IRS claimed that, because the Taxpayer had not filed form 8832, the LLC was a “disregarded entity” and the transfers should be valued as a proportionate share of the underlying assets, with no discount, not as transfers of interests in the LLC.

The majority agreed with the Taxpayer that, for the purposes of federal gift tax valuation, state law determines which property interest was transferred, and federal tax law determines the value of the property interest actually transferred for the purposes of determining the extent of the taxpayer’s gift tax liability. Under New York State law, a membership interest in an LLC is personal property, and a member has no legal interest in the underlying property of the LLC.

Three judges joined in a dissent on the grounds that the language of the “check the box” regulations in Treas. Regs. § 301.7701-2(a) is clear and should govern for all Federal tax purposes, not just for income tax purposes. The dissent also argued that, beginning with Rev. Rul. 99-5, 1999-1 C.B. 434, the IRS has consistently treated disregarded entities as sole proprietorships.

The issue of whether the step transaction doctrine should apply to combine the gift and sale transfers is to be addressed by the court in a separate opinion.

Petter v. Commissioner, T.C. Memo. 2009-280 (December 9, 2009)

The Tax Court upheld the use of a formula clause for a gift split between charities and grantor trusts. Anne Petter, a wealthy heiress, created the Petter Family LLC (PFLLC) and transferred $22.6 M of UPS stock into it. In 2002, she transferred PFLLC units in gift and sales transactions to intentionally defective grantor trusts. The sales transactions consisted of sales of units in exchange for promissory notes. The quantity of units gifted to each trust was determined by a formula: the gift transfers consisted of assets up to the maximum amount that could pass free of gift tax, with any excess amounts to be distributed to designated charitable organizations. Also, the parties agreed to reallocate the LLC units if, as a result of a valuation dispute with the IRS, either party received more units than it was entitled to receive based on the value of the gift as finally determined for gift tax purposes.

The donor’s gift tax return reported a 46% discount for non-marketability and a 15.3% discount because of the use a closed end fund. The IRS audited the return and determined that the discount should be 29.2%. The valuation claimed by the IRS resulted in a much larger gift to one of the charities. The parties agreed on an overall 35% discount.

Two issues faced the Tax Court: (a) whether the formula allocation should be respected for gift tax purposes, and (b) whether the increase gift tax charitable deduction is allowable in the year of the original transfer.

In answering the first issue, the Court held that defined value clauses do not violate public policy for four main reasons: 1) public policy encourages charitable gifts; 2) gift tax audits are not the only way to enforce the proper taxation of gift and sale transactions; 3) the charity receiving the gifts had a fiduciary relationship with PFLLC and could not police the IDGts; 4) other kinds of formula clauses are authorized in various Treasury Regulations.

With regard to the second issue, the Court affirmed under state law a gift is complete when it is “unconditional and immediate.” Because no condition existed that could defeat the gift at the time of the original transfer, the Court held that the gift was effective on that date.

Estate of Morgens v. Commissioner, 133 TC No. 17 (Dec. 21, 2009)

The Tax Court ruled that gift tax paid on the deemed gift of a remainder interest in QTIP property was includible in a decedent’s estate under IRC § 2035(b), under which gift tax paid on gifts made within three years of death is includible in
the estate tax base.

Anne Morgens’ husband Howard died in 2000, leaving assets that were divided into two trusts, a QTIP trust and a residual trust. Anne died in 2002, after having made gifts of her qualifying income interests in the trusts. The trustee of the residual trust paid the resulting gift taxes. Because the gifts were made within the three-year period preceding her death, the Tax court held that both the value of the gifts and the gift taxes related to them must be included in her estate for estate tax purposes.

Price v. Commissioner, T.C. No. 9611-06, T.C. Memo 2010-2 (January 4, 2010)

The U.S. Tax Court ruled that gifts of limited partnership interests were not entitled to the gift tax annual exclusion under IRC § 2503(b), because restrictions inherent in the partnership interest rendered the gifts not gifts of a present interest.

The partnership agreement at issue provided that members had no right to withdraw their capital accounts unilaterally and that they could neither encumber their partnership interests nor transfer, sell or assign their interests to third parties without the consent of all parties. The partnership agreement provided that a transfer to a person who was not currently a partner gave that person only an assignee interest, thus characterizing the recipients of the transfers “assignees” and not properly “donees.” Moreover, the partnership agreement did not require income distributions to the limited partners. The recipients of the limited partnership interests had no reasonable expectation of access to income because income distributions were made solely at the discretion of the general partner.

Relying on and expanding on the methodology in Hackl v. Commissioner, 118 T.C. 279 (2002), which set forth the requirements for the gift of a present interest, the Court held that “petitioners have failed to show that the gifts of partnership interests conferred on the donees an unrestricted and noncontingent right to immediately use, possess, or enjoy either the property itself or income from the property.” For that reason, the taxpayer was not entitled to the gift tax exclusion.

26 CFR 301.7477-1 Final Regulations for Tax Court Declaratory Judgment on Gift Tax Issues. 74 Fed. Reg. 46347-01 (Sept. 9, 2009)

Final Regulations for Tax Court Declaratory Judgments on Gift Tax Issues were promulgated on September 9, 2009. The new regulations apply to requests for declaratory judgment filed after September 9, 2009.

IRC § 7477 permits taxpayers to seek a declaratory judgment in Tax Court of the value of a lifetime gift that is disclosed on a gift tax return or a statement attached to a return. The assessment of a deficiency or refund is not required. The declaratory judgment is available after all other remedies have been exhausted, including examination and appeal. Treas. Regs. § 1.7477-1(d) (4). The declaratory judgment applies to all legal and valuation issues concerning gift taxes, including whether the transfer is a completed gift. Treas. Regs. §§ 1.7477-1(b); 1.7477-1(e), E.R. The declaratory judgment can only be used in the case of matters contested by the IRS. Treas. Regs. § 1.7477-1(e).

III. GENERATION-SKIPPING TRANSFER TAX

Proposed Regulations on GSTT Listed Transactions


Under the IRS published proposed regulations, taxpayers would have to disclose listed transactions involving generation-skipping transfer taxes. A listed transaction is a transaction identified by the IRS as a reportable transaction or a transaction of interest under IRC § 6011. The material adviser would be given thirty days to prepare a list of advice once a reportable transaction is added to the list.

IV. IRS PRIORITY GUIDANCE PLAN

Office of Tax Policy and IRS 2009-2010 Priority Guidance Plan (November 24, 2009)

The Treasury Business Plan of its Office of Tax Policy of the IRS contains 315 projects scheduled for action between July 2009 and June 2010. Some of the items have been completed before the publication of the Business Plan. Items related to gift, estate and GST transfer taxes include the following:


2. Revenue ruling concerning the consequences under income, estate, gift, and GST transfer tax provisions of using a family-owned company as trustee of a trust. A proposed Revenue Ruling was published on August 4, 2008.

3. Final regulations under § continued on Page 25
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2032 regarding restrictions on estate assets during the six-month alternate valuation period. Proposed regulations were published on April 25, 2008.

4. Final regulations under §2036 regarding the calculation of the portion of assets includable in the estate of the grantor of a GRAT when the grantor dies during the retained term, and the annuity or unitrust amount payable to the grantor increases or decreases every year. Proposed regulations were published on April 30, 2009.

5. Guidance under § 2053 (regarding the deductibility of expenses and claims against an estate) providing procedures for filing protective claims for refunds for deductions. Guidance under §2053 regarding personal guarantees and the application of present value calculations in determining the deductions for administration expenses and claims against the estate.

6. Final regulations under § 2053 concerning the consideration of post-death events in determining deductions of claims against the estate. Proposed regulations were published on April 23, 2007 and finalized on October 20, 2009. [See discussion in this Tax Update.]

7. Limited Reexamination of Estate Tax Return applicable to certain § 2053 claims for refund. [See discussion in this Tax Update.]

8. Final regulations under §2642(g) regarding extensions of time to make allocations of the GST transfer tax exemption. Proposed regulations were published on April 17, 2008.

9. Final regulations under §7477 regarding declaratory judgment procedures for gift tax valuation. Proposed regulations were published on June 9, 2008 and finalized on September 8, 2009. [See discussion in this Tax Update.]

10. Final regulations under §7520 updating the mortality based actuarial tables to reflect 2000 census data. Proposed regulations were published on May 4, 2009.

11. Guidance concerning the estate tax inclusion of insurance policies under §2042 when the grantor retains a power of substitution held in a nonfiduciary capacity.

12. Guidance under §2801 concerning the taxability of gifts from certain expatriates received by U.S. citizens and permanent residents.

13. Regulations regarding furnishing security in the case of an election to pay estate tax in installments under § 6166. Interim guidelines were issued in Notice 2007-90.

V. PENNSYLVANIA INHERITANCE TAX


All taxes owed to the Commonwealth administered by the Department of Revenue are eligible for a tax amnesty which will take place between April 26, 2010 and June 18, 2010 (the “Amnesty Period”). Amnesty for unpaid or underpaid Pennsylvania Inheritance and Estate Tax will be available for estates in which the decedent died on or before September 29, 2008. To participate, taxpayers must file an online Amnesty return, file all delinquent tax returns and make the required payment within the Amnesty Period. All penalties and one-half of the interest due will be waived.
Corporate Fiduciaries Association of Philadelphia  
Steve Klammer, Chair

The Corporate Fiduciaries Association of Philadelphia is a group which is comprised of senior representatives from 16 area banks and trust companies. The Chair of the group is Steve Klammer, of Davidson Trust Company, the Vice Chair is Matthew Walker, of BNY Mellon, and the Secretary/Treasurer is Bob Pindle, of Vanguard. The group meets once a month to discuss concerns and issues common to banks and trust companies.

At most meetings there is a speaker discussing an educational topic. This past year the speaker’s included Howard Vigderman analyzing the pending estate tax proposals, Karen Stockmal briefing us on the state of Section 529 Plans, Ted Watters updating us on the Uniform Trust Act and Margaret Thompson discussing the Probate Section’s initiatives.

Special thanks is due to Bill Levy, of Brown Brothers, who serves as ours group’s representative on the Probate Section Executive Committee, to Charlie Ingersoll, of Haverford Trust Company, who reports monthly on the activities of the Pennsylvania Bankers Association and any pending estates legislation and to Eileen Dougherty, of Semper Trust Company, who briefs the group on upcoming professional education opportunities.

Education Committee  
Aaron Fox, Chair

There are approximately twenty Committee members who meet eight times a year to discuss current topics relevant to the Section. Those topics become the basis for three programs (March, June, and October) that provide CLE credits for program attendees. Besides deciding on the topics, the Committee selects qualified panelists, helps organize the materials, and evaluates the feedback from program attendees to improve future programs. For 2009, the topics ranged from estate planning in low interest rate environments, to the current use of non-judicial settlement agreements. The Committee welcomes suggestions for program topics, and any interested Section members may volunteer to become a member of the Committee.

Orphans’ Court Litigation and Dispute Resolution Committee  
Timothy J. Holman, Chair

The Orphans’ Court Litigation and Dispute Resolution Committee continued to discuss recent developments in the law and procedure governing Orphans’ Court litigation, practice before the Orphans’ Court, and alternative dispute resolution techniques. Among the interesting topics we discussed were: (1) electronic discovery and the importance of metadata - the “hidden” information located within computer systems and within documents transmitted electronically; (2) the applicability of the attorney-client privilege and the attorney work-product doctrine to litigation involving fiduciaries; (3) joint defense/common interest agreements; (4) ethical issues applicable to trust and estate lawyers; and (5) engagement letters in fiduciary litigation matters. Our Committee is also speaking with the Education Committee about presenting a continuing legal education seminar on the subject of the mediation of Orphans’ Court disputes.

I am thankful for the input and participation of the dedicated members of the Committee, whom I thank for their time and their work on behalf the Section.

New members are always welcome. We meet on the second Tuesday of each month at 8:30 p.m. at the office of Heckscher, Teillon, Terrill & Sager, P.C. at 1500 Market Street, Center Square East, East Tower, 12th Floor (the “HQ” space). All members of the Probate & Trust Section are welcome at our meetings, and are also welcome to contact the Chair at any time to discuss joining the Committee or to raise any issues which may be of interest to the Committee.
**Legislative Committee**  
Kathleen Stephenson, Chair

The Legislative Committee was busy on two fronts this year looking at issues concerning Assisted Reproductive Technology and the Uniform Prudent Management of Institutional Funds Act.

Under the capable leadership of M. Brooke Wilson, the Legislative Committee reviewed a draft statute prepared by a Joint State Government Commission Subcommittee on Assisted Reproductive Technologies, comprised of representatives from the Commission’s Advisory Committees on Adoption Law, Decedents’ Estates Laws and Domestic Relations Law. The Legislative Committee offered suggestions for revision of provisions that address estate and trust administration.

William C. Bullitt is taking the lead as the Legislative Committee addresses whether UPMIFA should be considered for enactment in Pennsylvania and, if so, how.

**Elder Law Committee**  
Keelin Barry and Rise P. Newman, Co-Chairs

The Elder Law Committee continued to provide monthly educational meetings. Our 2008-2009 presentations included Medicaid Planning, a presentation on serving and representing Guardianships, discussion on Diminished Capacity and Power of Attorney instruments, a presentation on Pennsylvania Assisted Living Regulations, and Estate Planning for Incapacitated Individuals.

These presentations were a great success thanks to the willingness of Anne S. Maxwell, Jerry Rothkoff, Paul Feldman, and Sandy Pfeffer, among others, who willingly shared their knowledge, skill and time with our committee.


The draft Manual is currently with an editor.

The Elder Law Committee wants to extend deep thanks to our guest speakers, committee members and attendees, and especially to the Guardianship Manual Committee for their vision, contribution, and dedication. We also wish to thank the members of the Rules and Practice Committee for their comprehensive review of the initial draft of the Guardianship Manual. The Co-Chairs wish to personally thank Amanda Paggi, who coordinated meetings, agendas, and handled various administrative tasks for the Guardianship Manual Committee.

This year, we continue with our topical presentations on topics such as elder abuse and long term care insurance, to name a few, and of course, with the editing, finalizing, and publication on line of the Guardianship Manual.

New members and fresh ideas are invited. We look forward to seeing you on the third Thursday of the month at 1:00 P.M. in the offices of the Philadelphia Bar Association, 1101 Market Street, 11th floor.

**Rules and Practice Committee**  
Bernice J. Koplin, Chair

In 2009 the Rules and Practice Committee completed its proposed revision of Rule 2039.1 (addressing the procedure for the approval of compromises involving minors, incapacitated person and survival actions) and forwarded it to the Executive Committee, who then forwarded it to the Court for consideration, where it currently resides. The subcommittee which worked on Rule 2039.1 was chaired by Gordon Wase and included Tracy DeVlieger, Margaret Thompson, Nina Stryker, and Dominic J. Rossi. The subcommittee compared it with rules 2064 and 2206, which overlap 2039.1 somewhat, for consistency and to address how these three rules should be cross-referenced to each other for the practitioners’ convenient reference.

The Committee drafted a rule to address the filing of accounts by Agents under power of attorney; and this has resulted in a new proposed Rule 6.9.D(4) and the proposed renumbering of the remainder of rule 6.9.D A practice comment to accompany the new rule was also drafted. Committee member Thomas A. Bell was especially diligent in preparing a Checklist for Agents Under Power of Attorney who are filing accounts. This checklist has been added to PEPH and appeared on the website promptly around February. Since the Committee’s proposed Rule 6.9.D was awaiting the completion of the overall review and clean-up of the local rules, now put on hold, the Committee will reconsider submitting Rule to the Executive Committee for forwarding to the Court in the interim.
Rules and Practice Committee, continued

The Committee revised its mission statement and it was promptly added to the Committee page on the Section’s website around March.

A subcommittee comprised of Mary Jane Barrett, Bernice J. Koplin, and Tracy DeVlieger, commenced tackling an overall review and cleanup of all of the local rules, not only for the impact of e-filing but for other anomalies caused by the passage of time. After several months of hard work on this project, the project was put on hold as a result of renewed efforts by the Supreme Court Orphans Court Rules Committee’s efforts to revise those rules. The Committee has been asked to review the rules. If you think well of it, perhaps the Rules Committee could review and provide conceptual comments and observations by the end of November 2009.

The Committee provided a review of the draft of the Guardianship Manual, created by a subcommittee of the Elder Law Committee for use by attorneys appointed as Guardian or assisting those appointed. An in-depth conceptual review was provided specifically addressing any impact or by the local rules. The text as well as the sample forms included in the Manual were reviewed, as well as some editing prior to returning the draft to its committee.

A filled in sample Petition for Adjudication for estate accounts for inclusion in the PEPH and an update of the trust forms in the PEPH impacted by the UTA is in progress and expected to be completed no later than January 2010.

The Committee’s accomplishments are made possible by the extraordinary dedication of its members. My appreciation for them and their dedication and diligence is unbounded.

New members are welcome to join this Committee. The committee meets on the second Tuesday of the month at 4:00 p.m. at the offices of Schachtel, Gerstley, Levine & Koplin, 123 South Broad Street, Suite 2170. Although the Committee does not generally meet in December, July and August, the subcommittees have worked continuously throughout the year.

Taxation Committee
Terrance A. Kline and Don Dicarlo, Co-Chairs

Furthering its educational mission, the Taxation Committee sponsored six events during 2009. Prior to the commencement of each program, a discussion ensued about recent developments in state and federal tax law that affect our practices. New this year, most of the committee’s programs have been recorded and podcasted on the Bar Association’s website. Links can be found on the homepages for the section and the committee. The following is a list of 2009 meetings and available podcasts:

April 7 - Estate Planning with S Corp and Closely Held Business Assets with Mark Blaskey, of Pepper Hamilton.

May 5 - Tax Developments in International Estate Planning with Paula Jones, of McCarter & English.

June 2 – Trust Decanting and Select Issues in Delaware Law with Dick Nenno, of Wilmington Trust Company

October 6 – Pennsylvania Inheritance Tax Update with J. Paul Dibert and A. James Millar representing the Pennsylvania Department of Revenue.


December 1 – Federal Gift and Estate Tax Update by representatives from the Internal Revenue Service.

The Taxation Committee wishes to thank Wilmington Trust Company for making its conference room at One Liberty Place available to the committee for meetings.
The PEPC invites the Philadelphia Bar Association Probate and Trust Law Section to join our Council for membership and programming!

Ethics Forum
April 27, 2010
8:30 - 11:00 a.m.
BNY Mellon, 1735 Market Street, 8th Floor, Philadelphia, PA 19103
Topic: "Ethical Issues We Face in Working With Clients With Diminished Capacity"
Speaker: Michele M. Mathes, JD & Charles P. Sabatino, JD

Annual Meeting
May 10, 2010
3:00 – 7:00 p.m.
Hyatt at The Bellevue, 200 South Broad Street, Philadelphia, PA 19102
Topic: "State Your Trust, Trust your State! Current Challenges of Estate Planning and Fiduciary Administration in an Age of Multi-Jurisdiction Practice"
Speaker: John J. Scroggin, JD, LL.M., AEP & Thomas M. Forrest, CPA, AEP

Golf & Tennis Outing
May 25, 2010
RiverCrest Golf Club
100 Golf Club Drive
Phoenixville, PA 19460

For more information on joining the Philadelphia Estate Planning Council or to register for any upcoming programs, please visit www.philaepc.org.
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