Report of the Chair

By NINA STRYKER
OBERMAYER REBMANN MAXWELL & HIPPEL LLP

With December 31st recently past, it is my turn to reflect on a year that simply flew by! As past Chairs have commented, the work of our Section and the volunteer contributions by its members are truly inspiring. There are many individuals who serve on more than one committee and give selflessly of their time, too many to mention in this column. However, I would like to single out and thank Gene Gillin specifically for all of his many contributions, including serving as a volunteer for matters related to the Philadelphia Estate Practitioners Handbook (PEPH), and serving on the “help desk.”

This year has witnessed the formation of a new Committee (the Business Planning Committee), three new lunch/discussion groups and the re-emergence of the Elder Law Committee (now known as the Elder Law and Guardianship Committee). Alison Altman Gross has “jump-started” our younger practitioners’ initiative, and I am happy to report that Alison has indicated that she is willing to continue as our Section’s Young Lawyers liaison for 2012. The Executive Committee will continue its outreach program for newer practitioners and is forming a task force to study diversity issues for our practice area. We are also exploring outreach to the area law schools - stay tuned.

Our annual meeting on December 6th was a wonderful event, attended by 130 people - a good increase in attendance over past years. I was pleased to note greater participation from our younger lawyers and those who are newer to our practice. The brief business meeting included the election of Joan Agran, Don DiCarlo, Aaron Fox and Laura Stegossi to the Executive Committee as voting members. At the meeting we also elected Judy Stein as Secretary and Karen Stockmal as the Vice Chair. In accordance with our By-laws, Susan Collings automatically moves to Chair Elect and Robert Louis is the incoming Chair. Congratulations to all!

Thank you also to our sponsors, Intervention Associates, The Pennsylvania Trust Company and Sotheby’s, for their participation in this meeting and for their assistance to the Section.

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What Shall We Do with A New Exemption?

By CHARLES M. AULINO
THE GLENMEDE TRUST COMPANY, N.A.

How many estate planners expected to be offering advice about a $5 million lifetime exemption from US wealth transfer tax on Thanksgiving Day, 2010? Chances are the answer is “none,” and perhaps we would all have recognized an additional reason to be thankful, had we known what was about to happen.

On December 17, 2010, the greatest opportunity for tax-free wealth transfer since 1932 came into being. Important estate and gift tax provisions1 signed into law that day include:

1. An exemption of $5 million ($10 million for a married couple), up to all of which may be used for lifetime transfers, with the balance available to the estate.2

2. Availability of any unused exemption of a married person, who dies after 2009, to the surviving spouse if certain requirements are met.3

3. A reduced tax rate of 35%.4

Unless extended, these provisions expire after December 31, 2012 with return to a $1 million exemption and a 55% wealth transfer tax rate.5

The advantage of making large gifts is complicated by fear (without basis in current law) of “claw back;” donors who transfer (during 2011 & 2012) more than the future exemption amount might have a tax liability on the excess. That, however, is a subject for another article.

Wealth Transfer Taxes In Our Nation’s History

A review of the history of US Wealth Transfer Tax Laws may put the substantial new exemption into perspective.6 Four estate tax laws have been enacted since American independence: 1797,7 1862,8 18989 and 1916,10 each to pay for wars. The 1797 law created a 10 cents stamp tax on estate inventories with 50 cents stamps for the probate of wills and letters of administration. Widows (but not widowers) were exempt. The revenue was used to build ships for the undeclared (but shooting) naval war with France at the time of the XYZ Affair. My neighbors in Richmond, Virginia used to refer to the 1862 conflict as “The War of Northern Aggression.”

1 The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (“The 2010 Tax Act”)
2 §§302(a) & (b) of the 2010 Tax Act.
3 §303(a) of The 2010 Tax Act.
4 §§302(a) & (b) of The 2010 Tax Act.
7 Stamp Act of 1797, 1 Stat. 527.
8 Revenue Act of 1862, 12 Stat. 432.

continued on Page 3
A New Exemption, continued

though it is more commonly known as the Civil War. In addition to stamps, the 1862 law imposed an inheritance-type tax with different rates depending on relationship to the decedent. No tax was paid by a surviving spouse and the rates were 1% on descendants, 2% on siblings, and 6% on nonrelatives and on amounts passing to charity (ouch!). The 1898 law, enacted to pay for the Spanish-American War, was the first tax imposed on the value of the estate itself, although the tax rates continued to vary depending on relationship with the decedent. It was the first example of a U.S. death tax involving graduated rate schedules that topped out at 15%.

These first three estate tax laws were allowed to expire when the associated wars were paid for, but the 1916 tax, originally used to finance WWI, has remained in effect ever since (except, arguably, for the year 2010) with numerous revisions in the intervening years. The modern estate tax began with a $50,000 exemption and rates ranging from 1% to 10%. The top rate soared to 77% during WWII and remained nearly that high until 1982.

Most intriguing is the fact that Congress never did enact a gift tax until 1924. The result was a seven or eight year period, during which it was possible to transfer unlimited wealth and thereby remove it from the taxable estate, without paying gift tax. The 1898 law, enacted to pay for the Spanish-American War, was the first tax imposed on the value of the estate itself, although the tax rates continued to vary depending on relationship with the decedent. It was the first example of a U.S. death tax involving graduated rate schedules that topped out at 15%.

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Many expected that tax legislation would curtail availability of those opportunities by:

1. Requiring a minimum term of years for a GRAT, such as 10 years, and/or limiting the annuity so that the result is a taxable gift equal to a specified percentage of the value placed in the GRAT, such as 10%.

2. Eliminating valuation discounts on gifts and sales of limited partnership (“LP”) and limited liability company (“LLCs”) interest and non-voting S-corporation shares.

The fact that no such changes were made by the 2010 Tax Act gives renewed vitality to these strategies.

It may seem ironic that, with all the emphasis on using as much of the new exemption as possible, advisers are still interested in using GRATs. But on closer examination, it makes perfect sense. If there is sufficient wealth, a client transfer, if the borrower earns more than “hurdle rate” on the loan. It is appealing for some related-party lenders to use part or all of their new exemption to cancel loans owed to them.

Some Changes The 2010 Tax Act Did Not Make

For 10 or 15 years before the 2010 Tax Act became law, techniques involving zero-gift Grantor Retained Annuity Trusts (“GRATs”) and pass-through entities to obtain valuation discounts became popular.

Applicable Federal Rates (“AFRs”) for related-party loans to avoid an adverse gift tax result has decreased dramatically. For example, the required rate on a loan to a child originating in December, 2011 for a term of up to 9 years was 1.27%, or 2.8% for longer terms. The result has been mortgage loans to children and grandchildren and other loans to family members or to irrevocable trusts. Proceeds of other than mortgages are invested with the objective of tax-free wealth

A Question not of “Whether,” but of “How”

That it is wise to take maximum advantage of the new, higher, lifetime exemption has not been the issue for many practitioners. The question has become “what is the best way to do so?” Of course, no one is suggesting that a client jeopardize her/his own financial security by making large gifts, but “transfer as much as is financially feasible, consistent with your own needs” has become standard advice given by many.

For certain clients, a simple approach may be best. Transfer money, investments, business ownership interest and/or real estate, directly into the names of children and/or grandchildren. Some regard this as an ideal opportunity to help their children learn about investments and the responsibility that comes with wealth, and to develop a philosophy of “stewardship.” What better time to begin that process, than while parents are still available to provide guidance and counsel?

In recent years, the rate of interest that must be charged on related-party loans to avoid an adverse gift tax result has decreased dramatically. For example, the required rate on a loan to a child originating in December, 2011 for a term of up to 9 years was 1.27%, or 2.8% for longer terms. The result has been mortgage loans to children and grandchildren and other loans to family members or to irrevocable trusts. Proceeds of other than mortgages are invested with the objective of tax-free wealth

Applicable Federal Rates (“AFRs”) provided for under IRC §1274(d).

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2 Eliminating valuation discounts on gifts

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2. Eliminating valuation discounts on gifts
A New Exemption, continued

can use the new higher exemption for other transfers and continue to roll zero-gift GRATs. Also, the use of taxable-gift GRATs for special assets can be particularly attractive.

Consider, for instance, commercial real estate held in an LLC with a value of $15 million that generates net rental income of $450,000. If a married couple transfers ownership of the LLC to a 10-year GRAT that requires annual annuity payments of $450,000, and if a 30% valuation discount is appropriate, the resulting taxable gift is $6.6 million (§7520 rate of 1.6%). Assuming gift-splitting, only part of the couple’s combined exemptions is used. If the property appreciates at an annual rate of 4.5%, the (undiscounted) value of the property at the end of the GRAT term will be $23.3 million, 3 1/2 times the exemption used to make the transfer.

A Few Creative Uses of Trusts

In the days before Married Women’s Property Acts were enacted by the states, everything a woman owned became the property of her husband upon marriage. To avoid that outcome, the father of a future US Supreme Court Justice had some advice for wealthy young women: “Put not your trust in money, but put your money in trust.” In light of the new higher exemption, that advice now seems appropriate for a great many clients, married or single.

One simple technique is lifetime funding of a Dynasty Trust. Amounts contributed utilize the new higher exemption. Design the trust so that it falls under the “grantor trust rules” for income tax purposes, and you give your client the privilege of paying the tax on trust income without making an additional gift. Want to accomplish more? How about a related-party loan to the trust? Assuming the fund earns more than the interest rate on the loan, additional wealth transfer occurs. Design the trust to continue for as long as the client has surviving descendants and you will have created the potential for a future financial goliath.

The Lifetime Dynasty Trust Enhanced with an AFR Loan

Married Couple

Related-Party AFR Loan $90,000,000 @ 1.27% Annual Interest With Balloon Principal Payment after 9 Years

Pay No Gift Tax

Transfer $10,000,000 To Trust

Transfer Covered by Exemptions

Family Dynasty Trust

Grantor Pays Income Tax on all Trust Income During his/her Lifetime

$90 Million Loan Proceeds

Initial Beneficiaries: Children and Grandchildren

No Estate Tax or GST on Any Future Transfer

Future Beneficiaries: Successive Descendants, to Continue Indefinitely

Growth & Accumulation is Free of Estate Tax & GST

Loan Not Treated as a Gift

15 “The Autocrat of the Breakfast Table,” Oliver Wendell Holmes, Sr.
A New Exemption, continued

Ideal funding is limited to growth investments that offer the opportunity for accumulation of value outside the taxable estate. If the trust as described produces an annual total return of 7% and pays interest only for the first nine years and then repays the note principal, at the end of that time, it will have a projected value of $80.1 million. If 3% total return distributions to beneficiaries begin at that point, the projected value 20 years after inception is $123.4 million. After that, the sky is the limit.

If One is Good, Is Two Better?

For couples with more limited means, a potential solution is “Husband and Wife Trusts,” in which each spouse is beneficiary of a trust fund created by the other. Think of it as creating “B” trusts while both spouses are still alive. Of course, you will draft the trust agreements so that the dispositive provisions are sufficiently different to avoid application of the “reciprocal trust” doctrine. Notice that this approach keeps the wealth available for the future needs of the beneficiary-spouse, a factor that appeals to couples who are motivated but could not otherwise afford to undertake the transaction.

While both spouses live, all value transferred remains available for their common support. When the first of them dies, however, will the negative economic impact caused by distribution of the remainder make the transaction unaffordable? If so, how about giving the beneficiary-spouse a non-general power of appointment, the objects of which are anyone other than the donee of the power, her/his estate and creditors? The beneficiary-spouse might exercise that power to create a lifetime beneficial interest for the grantor-spouse. Notice the transaction is not caught by the “string sections” because the interest is not “retained” but rather “returned.” Yes, IRS might claim there was a pre-arranged plan, so perhaps this is not for the faint of heart, but a careful letter of explanation to the client could avoid liability. Also consider that even in the worst case, the outcome is no worse than if the couple had done nothing.


17 In particular IRC §§2036, 2037 and/or 2038.

JOIN A COMMITTEE

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

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Second: [ ]
Third: [ ]

Probate and Trust Law Section Newsletter No. 129
Husband & Wife Trusts

John Doe

One Time Gift
$5,000,000

John Doe Trust

No Gift,
Estate or GST Tax on Distributions

Initial Beneficiary:
Mary Doe

Future Beneficiaries:
Children, Grandchildren, Then Successive Descendants to Continue Indefinitely

Mary Doe

One Time Gift
$5,000,000

Mary Doe Trust

No Gift,
Estate or GST Tax on Distributions

Initial Beneficiaries:
John Doe and Children & Grandchildren

Future Beneficiaries: Successive Descendants to Continue Indefinitely

Growth & Accumulation is Free of Estate Tax & GST

continued on Page 7
A New Exemption, continued

What About Unmarried Clients?

A single client may accomplish tax-efficient wealth transfer while maintaining financial security by creating a domestic asset protection trust (“DAPT”) in which the grantor is a permissible beneficiary. The traditional concern has been that the “string sections” apply if assets held in a self-settled trust are available to satisfy claims that might arise against the grantor. Inclusion of the trust in the grantor’s taxable estate is simply not an acceptable outcome.

The fact that states such as Delaware provide protection against claims for certain self-settled trusts originally did little to assuage the fear of estate inclusion until recently, however encouragement has come from an unlikely source: The Internal Revenue Service.

IRS has ruled privately\(^1\) that an Alaska grantor who created an Alaska DAPT made a completed gift and that the date of death value will not be included in the grantor’s taxable estate. The trust permits “sprinkle” distributions among a class of beneficiaries, including the grantor, in the sole discretion of an independent trustee. Of course, a PLR has the force and effect of law only in favor of the taxpayer(s) to whom it is addressed. Should each taxpayer obtain her/his own PLR? What if a Pennsylvania resident creates a Delaware DAPT and obtains a favorable PLR? Word around town (Philadelphia as well as Wilmington) is that such applications are pending. Stay tuned.

This may also have appeal for “the hopefuls,”\(^2\) second-marriage clients whose spousal obligations are limited by pre-nuptial agreements and who are not motivated to further benefit their spouses through Husband and Wife Trusts.

Let’s Also Consider Planning Opportunities for Marital Deduction Trusts

Consider the case of a surviving spouse, age 65, who is beneficiary of a $5 million marital deduction trust, also of a $7 million dynasty trust established by her/his parents, and who owns separate assets worth $3 million. Assuming the grantor of the marital trust died before 2010, exemption portability is not available. Upon death, the taxable estate is $8 million (marital trust plus separate assets), but only $3 million if that trust did not exist. If $10 million (dynasty trust plus separate assets) is sufficient for the survivor’s needs, renunciation of the lifetime interest in the marital trust could be a good move in case the exemption is reduced in the future.

The survivor makes a gift of the principal value of the marital trust rather than of the present value of the remainder regardless of whether it is a §2056(b)(5) trust\(^3\) or a §2056(b)(7) QTIP.\(^4\)

\(^1\) PLR 200944002, October 30, 2009.
\(^2\) Second marriage was described by Dr. Samuel Johnson as “the triumph of hope over experience” according to James Boswell’s *Life of Samuel Johnson*, 1751.
\(^3\) IRC §2514(b).
\(^4\) See Regs. §25.2519-1.

A married grantor may also create a lifetime descendants’ trust that purchases (from the grantor) the remainder interest in a lifetime marital trust for the benefit of the grantor’s spouse, thus accomplishing an end-run around the IRC §2523(b) terminable interest rule.\(^5\)

One Final Thought – Heaven Prevent Failure to Mention This!

Yes, life insurance may be an appropriate asset of a Dynasty, Husband and Wife or DAPT trust.

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Case Summaries from the Orphans’ Court Litigation Committee


By TIMOTHY J. HOLMAN, ESQUIRE and BRADLEY D. TEREBELO, ESQUIRE
Hecksher, Teillon, Terrill & Sager, P.C.

For many years, a person, bank or trust company who served as executor of a decedent’s estate and as trustee of a trust under the decedent’s will was prevented from claiming a principal commission for serving in both capacities. Section 45 of the Fiduciaries Act of June 7, 1917 provided as follows:

In all cases where the same person shall, under a will, fulfill the duties of executor and trustee, it shall not be lawful for such person to receive or charge more than one commission upon any sum of money coming into or passing through his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee: Provided, that any such trustee shall be allowed to retain a reasonable commission on the income he may receive from any estate held by him in trust as aforesaid.

The Act of April 10, 1945, No. 90, § 1, 1945 P.L. 1989, 1989-90 (the “1945 Act”) repealed the ban on receiving more than one principal commission. However, the Pennsylvania Supreme Court in In re: Williamson’s Estate, 82 A.2d 49 (Pa. 1951) held that the 1945 Act did not apply retroactively, stating that it would be unconstitutional: “Appellant, the corporate fiduciary, accepted this trust in 1930 under the law as it then existed. It was paid in full (except for commission thereafter received by it on income it received and distributed). Such acceptance fixed the rights, liabilities, exemptions, defenses and expectations of both life tenant and remaindermen. Their rights were vested under what necessarily is an implied contract. Such rights having vested, and appellant having been paid in full, the imposition of additional compensation under a retroactive interpretation of this statute would be unconstitutional under the Fourteenth Amendment of the United States Constitution.” Id. at 54. Therefore, trustees of testamentary trusts created before 1945 who also served as executors of the testator’s estate and claimed a principal commission on the assets of the estate were still prevented from claiming a commission on the principal of the testamentary trust.

The legislature again amended the law concerning trustee commissions when it enacted the Probate, Estates and Fiduciaries Code, Act of June 30, 1972, No. 164, §§ 2, 3, 1972 P.L. 508, 524, 692. Section 7185 provided:

(a) When allowed. The court shall allow such compensation to the trustee as shall in the circumstances be reasonable and just, and may take into account the market value of the trust assets.

In response to Williamson, in Section 2 of the Act of May 1, 1953, No. 10, 1953 P.L. 190, 191, the legislature provided that multiple commissions were acceptable, and stated that the act applied “[t]o all services heretofore rendered by any beneficiary[.]” However, in Scott's...
Case Summaries, continued

the time of the allowance, and calculate such compensation on a graduated percentage.

(b) Allowed out of principal or income. Neither the fact that a fiduciary’s service has not ended nor the fact that the trust has not ended shall be a bar to the fiduciary’s receiving compensation for his services out of the principal of the trust. Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts, shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him. The provisions of this section shall apply to ordinary and extraordinary services alike.

Upon the adoption of the Pennsylvania Uniform Trust Act in 2006, Section 7185 was replaced by 20 Pa. C.S. §7768. Section 7768(c)(3) makes clear that the trustee of a testamentary trust is permitted to claim a trustee commission on principal notwithstanding the fact that the trustee claimed a commission on the testator’s estate for his, her or its services as executor.

In Fridenberg, the corporate trustee of a Williamson-type trust, which had previously claimed an executor commission on the testator’s estate, sought commission payments for the period of 1998 through 2005 (when Section 7185 was in place). The Attorney General objected to the commissions based on Williamson and Scott, although it stipulated that the commissions sought were reasonable. The Orphans’ Court sustained the objections and denied the commissions. Estate of Fridenberg, 28 Fid. Rep. 2d 349 (O.C. Phila. 2008). On appeal, the Superior Court reversed the Orphans’ Court. Estate of Fridenberg, 982 A.2d 68 (Pa. Super. Ct. 2009). The Supreme Court granted allocator, and it affirmed the Superior Court, holding that it was permissible for a trustee of Williamson-type trusts to claim reasonable commissions on principal even where the trustee had claimed an executor’s commission. Estate of Fridenberg, No. 32 EAP 2010 (Pa. Nov. 23, 2011).

The Attorney General had objected to the retroactive applicability of Section 7185 (the provision then-applicable during the period when the corporate trustee sought to claim the commissions) for the following reasons: (1) based on the holdings of Williamson and Scott, the doctrine of stare decisis prevented the corporate trustee from claiming commissions; (2) the Due Process Clause of the 14th amendment to the United States Constitution prevented the retroactive applicability of Section 7185; and (3) retroactive applicability would violate the Contracts Clause of the United States Constitution.

The doctrine of stare decisis provides that, “for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same[.]” Fridenberg at p. 12 (quoting Commonwealth v. Tilghman, 673 A.2d 898, 903 n.9 (Pa. 1996). However, the Supreme Court noted that when “precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function.” Fridenberg at p. 12 (quoting Ayala v. Philadelphia Board of Public Education, 305 A.2d 877, 886-887 (Pa. 1973)).

The Supreme Court noted that the responsibilities placed on a trustee prior to 1945 as compared to a trustee today are quite different. Prior to 1968, the types of assets a trustee could invest in were so-called “legal investments.” However, in 1968 Pennsylvania adopted the “prudent person” standard, and “trustees could no longer simply pick an investment from a list in order to fulfill their obligations; they now had to use their own discretion in determining what investments to make.” Fridenberg at p. 13. The Supreme Court then noted that with the increased responsibility came increased risk, and the legislature’s purpose in repealing Section 45 of the Fiduciaries Act of 1917 was to permit increased compensation to reflect the increased risk. Therefore the Supreme Court concluded that “justice demands that we no longer be bound by the considerations that led to the decision in Williamson’s Estate.” Id. at 14.

The Supreme Court then turned to whether retroactive applicability of Section 7185 violated the Due Process Clause. The Supreme Court first noted that a statute can only be retroactive

2 Note that Scott was decided in 1961, when the trustees were still restricted to “legal investments.”

3 The “prudent person” standard has been replaced by the “prudent investor” standard at 20 Pa. C.S. §7203.

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if there is a “legitimate legislative purpose furthered by rational means.”  
*Id.* at 15 (quotation omitted).  The Attorney General argued retroactive applicability was neither rational nor reasonable because “its retroactive application would abandon long-settled principles regarding trustee payment; the legislation does not limit the period for retroactive application; it is uncertain whether trustees’ duties have changed as a result of changes in the law related to trust administration; trustees have the ability to request additional money from the courts for extraordinary services; and it is contrary to the public’s interest in receiving the benefits of the charitable trust for as long as possible.”  
*Fridenberg* at pp. 9-10. 

The Supreme Court disagreed, stating that the change in a trustee’s responsibility and liability justified increased compensation: “At the time of its formation, trustees, in order to meet their legal duties, merely had to choose an investment from a legislatively-created list, then sit back and clip coupons.  Since then, the legal list has been abandoned, and trustees must now rely on their own discretion and exercise ongoing discretion in determining what investments should be undertaken.  The extinction of legal lists alone would likely be enough to justify a change in trustee compensation; combined with the many other changes in the trustee landscape since 1940, the Legislature had a legitimate purpose in retroactively allowing additional trustee compensation from principal.”  
*Id.* at 15.  Furthermore, the Supreme Court noted that it would be inequitable to disadvantage trustees of trusts created before a certain date from receiving the same commission as trustees of trusts created after a certain date when the responsibilities were the same.  Therefore, the Supreme Court held that retroactively applying Section 7185 did not violate the Due Process Clause.

Finally, the Supreme Court turned to the Attorney General’s Contracts Clause argument.  The Court stated the before determining whether the Contracts Clause was violated, there must initially be a contract.  The governing instrument did not contain any compensation clause, and therefore the Court held that no contract existed, express or implied.  The Court distinguished the facts of the *Fridenberg* case from *Estate of Cahen*, 394 A.2d 958 (Pa. 1978), where the Court held that a contract existed in that case because the governing instrument expressly set forth the trustee’s compensation.  Because the governing instrument in *Fridenberg* was silent as to compensation, however, the Court rejected any “implied contract” argument and held that there could be no Contracts Clause violation.

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**NEWSLETTER ARTICLES**

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

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Probate or Continued Administration of an Estate Wherein the Decedent Died Numerous Years Ago

By BERNICE J. KOPLIN

Every attorney who has practiced for any length of time in the field of estates and trusts eventually encounters an estate that was never probated or was probated but not completely or timely administered, as a result of which some of the required information is unavailable. These circumstances pose unique problems and can result in sizable penalties and interest for the late filing of the decedent’s personal income tax returns, the Pennsylvania Inheritance Tax and the estate’s federal and state income tax returns. Following are several illustrative practice challenges which come with such an administration:

1. The length of time since death is critical to determining the date of death values of assets and bank accounts. Normally financial institutions destroy their records after a five year period. If the estate being probated or completed untimely does not have high quality financial records kept by the decedent, the financial institution must be contacted immediately after engagement with the hope that the institution has the records to determine the date of death valuation of the decedent’s assets held at that financial institution, including without limitation bank accounts, certificates of deposit, accounts held In Trust For etc.

2. If the decedent’s life period income tax returns have not been filed, and it cannot be determined what the decedent’s income was in the final taxable year, Form 4506-T should be filed with the Internal Revenue Service to request transcripts for the years at issue. Multiple years can be requested, but be certain to answer the questions on the request by indicating you are requesting form 1040 and to ensure you order the complete transcript. Since Pennsylvania does not have a comparable form or protocol, the information from the IRS could be used in preparing the Pennsylvania income tax return and the Philadelphia School Income Return (it is required). And the IRS only retains records for the past five years. If the income tax returns required to be filed are in excess of five years the information cannot be obtained, and it may not be possible to file the income tax returns except in unusual circumstances.

3. The Executor/Administrator must diligently search the decedent’s records and those of close friends and relatives for receipts of funeral expenses, payment of debts of the decedent and administration expenses. This would include the initial probate fees if the estate was probated, but not administered. Funeral directors generally keep records for many years.

4. One approach when the date of death information for the Inventory and the Pennsylvania Inheritance Tax Return is not available from the financial institution, due to passage of time, is to use the earliest figures available from the institution, and provide an explanation to the Pennsylvania Department of Revenue describing the special circumstances of the specific estate/trust. By way of example, if a decedent died in 2002 then all of the date of death values cannot be determined by requesting the information from a financial institution. Thus as an alternative, you could request that the financial institution provide the earliest figures available as well as any accrued interest stated separately. These figures could be used to calculate for the Inventory and the Inheritance Tax Return the closest figures, and this approach has been accepted in some instances by the PADR, most likely because it may not have any better information.

5. If there are special circumstances regarding why the Executor/Administrator did not timely file the Inventory, Pennsylvania Inheritance, and income tax returns, a written explanation should be provided with the specific return. While the interest for late payment is seldom waived, penalties are often waived, thus saving money for the client. Even when relief is denied, client relations may be enhanced by the effort made and sense of closure that the denial was generated by the taxing authority rather than by the professional’s lack of effort. Obviously, the special circumstances must be genuine and reasonable, and excuses involving circumstances within an executory’s or administrator’s control would not generally meet the requirements for waiver of a penalty.

While such untimely administrations provide challenges, there is also a sense of accomplishment when such an administration is finally and well completed.
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25 YEARS
Ethics Column

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

May a lawyer represent a husband and wife as separate clients for estate planning purposes?

The conventional and quite common representation of husband and wife for estate planning purposes is a joint representation with a “no-secrets” understanding. The couple is advised that any information given to the lawyer by either of them that pertains to the estate planning relationship cannot be withheld by the lawyer from the other spouse. The proper engagement letter sent to the couple includes reference to the “no-secrets” principle.

Brad Rainer and Kirby Upright discussed the possibility of a separate representation during their always well-attended and interesting ethics session in this year’s PBI Estate Law Institute. They advised that they have never represented a husband and wife as separate clients for estate planning matters, know of no experienced practitioners who do and also agreed that the potential for problems is high. As they asked rhetorically: What kind of information bearing on the estate planning engagement would one spouse not want the other to hear?

A spouse’s reason for withholding information about his or her background, family, assets and dispositive provisions from the other could be quite significant and place the lawyer in an impossible position. Is there a criminal history or a child born out of wedlock? Does he or she own a significant asset, such as a Swiss Chalet, that is to be kept secret? The spouse may even desire to leave most of his or her assets in a highly restrictive trust, outright to the children or to a lover.

Suppose the clients had each signed engagement agreements in which they gave informed consent to a secrecy wall prohibiting the lawyer from giving to one spouse confidential information learned from the other spouse. Then suppose the lawyer later gains information from one spouse detrimental to the other spouse or is asked to take action that is detrimental to the other spouse. If that were to occur, the lawyer, who has a fiduciary relationship with both clients and has an absolute duty of loyalty to both, would be in a quandary: The lawyer is obligated by Rule 1.6 to maintain the confidence of one spouse while being constrained by a material limitation from properly counseling the other spouse in view of the information learned. That is known as a 1.7(a)(2) conflict. If the lawyer cannot convince the confiding client to release the information or refrain from taking the detrimental action, the lawyer, who has an absolute obligation of loyalty to both clients, has only one recourse: withdraw from the representation of both clients without explaining why.

Unfortunately, as Messrs. Rainer and Upright pointed out, the possibility of this novel representation continues to surface from time to time and there is even reference to the type of representation in two highly regarded publications: The Restatement (Third) of the Law Governing Lawyers §130 (2000) and The American College of Trust and Estate Counsel’s Commentaries on the Model Rules of Professional Conduct (4th Ed. 2006). See also Moore and Hiker, Representing Both Spouses: The New Section Recommendations, 7 Prob. & Prop. 26, 30 (July/Aug 1993). Of course, both the Restatement and the Commentaries warn of the potential hazards of this type of representation. However, it would seem preferable if both went a step further and at least discouraged such representation because of the high potential for difficulties that arrangement can cause for a lawyer.

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TAX UPDATE

By MARGERY J. SCHNEIDER, ESQ., LLM (Tax)
ROSENN, JENKINS & GREENWALD, LLP

FEDERAL ESTATE TAX

Family Limited Partnerships

Estate of Liljestrand v. Commissioner,
T.C. Memo 2011-259 (November 2, 2011)

The Tax Court determined that the value of the assets transferred by Paul H. Liljestrand (“Decedent”) were includible in the value of his gross estate under IRC §2036(a)(1). Decedent died on May 31, 2004, a resident of Hawaii. In 1978 he set up a real estate business consisting of properties acquired in a Section 1031 exchange. The business was operated by one of his sons, Robert, and a non-family manager. In 1984, Decedent entered into a revocable trust agreement and funded the trust with the real estate. In 1997, in consultation with his attorney, Decedent formed the Paul H. Liljestrand Partners Limited Partnership (PLP) to hold the real estate, give equal shares to his four children, and ensure that Robert remained in the role of manager after Decedent’s death. Through the trust, Decedent contributed real estate with an appraised value of $12.1MM and debt of $6.2MM to PLP and was granted all of the general partnership units, all of the Class A limited partnership units (preferred) and 5,545 of the 5,546 class B limited partnership units. He therefore held a 99.98% interest in PLP. Robert was granted 1 unit of class A limited partnership interest. In 1998 the trust gifted class B limited partnership units such that the children owned 2.38% of the outstanding class B limited partnership units.

In 1997, 1998 and 1999 the partnership funds were deposited in the trust’s bank account and Decedent reported the real estate income on Form 1040. When the failure to treat the real estate as a partnership asset was discovered, amended Federal income tax returns were not filed and the partnership was treated as having commenced business on January 1, 1999. The real estate was managed in the same way as before the transfer of the properties to the partnership. In order to make up for shortfalls in Decedent’s income, the partnership made disproportionate distributions to the trust and paid Decedent’s personal expenses between 1999 and 2003. PLP funds also paid for personal expenses of the four children.

Upon Decedent’s death, the estate reported a taxable estate of $5.7MM and federal estate tax due of $2.3MM. The tax was paid by the refinancing of a loan on one of the properties. The IRS claimed that the gross estate should include the value of the real estate transferred to the PLP and issued a notice of federal estate tax deficiency of $2.6MM.

The court held that the full value of the transferred property must be included in Decedent’s estate because the three conditions of IRC §2036(a) were met, as follows: (1) Decedent made an inter vivos transfer of property; (2) the transfer was not a bona fide sale for adequate and full consideration; and (3) Decedent retained a right in the transferred property which was not relinquished before his death.

(1) The estate admits that Decedent made transfers of property to PLP.

(2) The court held that the primary reason for the transfers was tax savings and that the transfers of assets to PLP were not bona fide sales. The court disagreed with the estate’s claims that the following were legitimate nontax business purposes for forming PLP: (a) to guarantee that the properties would be centrally managed and that Robert would be ensured long-term employment as manager; (b) to prevent partition or division of the real estate; and (c) to protect the real estate from potential creditors. In countering the estate’s first argument, the court stated that the formation of PLP did nothing to change the conflict of interest inherent in Robert’s dual roles as manager of the real estate and trustee of the trust. As manager he had a personal interest in having the trust retain the real estate, but as trustee he had a fiduciary duty to sell the real estate if doing so was advantageous for the beneficiaries. In countering the estate’s second claim, the court stated that there was no real threat of partition.
litigation because most of the property was not located in Hawaii and was not subject to Hawaii partition law, the trust agreement protected against partition, and no child had threatened partition. Furthermore, the court cited the holding in *Estate of Bigelow v. Commissioner*, 503 F.3d 955, 972 (9th Cir. 2007) that “fear of partition without an actual threat of litigation was not a significant nontax purpose.” The court rejected the argument that the estate needed protection from creditors because there was no evidence of any concern with creditors’ claims.

In addition, the court listed factors that affirmatively prove that the transfers were not bona fide sales. First, the partnership neglected to follow the most basic partnership formalities, such as opening a separate bank account, holding regular partnership meetings, keeping partnership funds separate from personal funds, and making the required proportionate distributions. The decedent was financially dependent on partnership distributions to cover his personal expenses. Also, PLP made undocumented and unrepaid loans to its partners, thereby violating the pro rata distribution requirement. Second, the transfers were not made at arm’s length because the interests of the family members were not sufficiently divergent. The decedent “stood on all sides of the transaction,” and the PLP was formed only to fulfill his goals.

According to the court, the decedent did not contribute assets to FLP for adequate and full consideration. Citing the three factors provided in *Estate of Kimbell*, 371 F.3d 257 (5th Cir. 2004), the court stated that the evidence shows that the interests credited to each of the partners was not proportionate to the fair market value contributed by each partner to FLP and the assets contributed by each partner to FLP were not properly credited to their respective capital accounts.

(3) Finally, the court found that, within the meaning of IRC §2036(a), the decedent retained possession and enjoyment of the contributed property through an implied agreement. He did not have sufficient funds outside of PLP to meet his financial obligations. A significant portion of PLP assets had to be used to satisfy the decedent’s estate tax obligations. He commingled personal and partnership funds. According to the court, PLP was created principally for testamentary purposes, because the decedent enjoyed the economic benefits of the transferred property throughout the rest of his life and his stated reasons for creating PLP were to protect the property from partition and guarantee Robert’s management after his death.

**Estate Tax Portability**


This Notice concerns the portability election under IRC § 2010(c), allowing the surviving spouse of a decedent dying after December 31, 2010 to use the decedent’s unused exclusion amount. The Notice states that an estate makes the portability election simply by timely filing a complete Form 706. This election is irrevocable. An executor who does not wish to make the election must either attach a statement to the form that so indicates or write “No Election Under Section 2010(c)(5) across the top of the first page of the Form.

The Notice also states the following: (1) a surviving spouse cannot use the unused exclusion amount of a deceased spouse who died before January 1, 2011; and (2) the IRS reserves the right to examine the return of the predeceased spouse, even after the relevant statute of limitations has expired, to make a determination concerning the deceased spousal unused exclusion amount.

**Substitution of Assets in Irrevocable Life Insurance Trusts**

Revenue Ruling 2011-28 (December 5, 2011)

The IRS ruled that the grantor of an irrevocable life insurance trust who retains the power to substitute trust assets under the grantor trust provisions of IRC § 675(4)(C) will not be considered to have thereby retained an “incident of ownership” in the policy under IRC § 2042. The power of substitution will not cause inclusion in the grantor’s gross estate of the proceeds of the policy provided that the...
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following conditions are met: (a) the grantor is not a fiduciary; (b) the trustee has a duty to ensure that the substituted assets are equivalent in value; and (c) the substitution of assets will not shift benefits among the trust beneficiaries.

Inclusion of Grantor Retained Annuity Trusts in Decedents’ Estates


This Treasury Decision finalizes the remaining issues posed by regulations proposed in 2007 and finalized in 2008 concerning the determination of whether assets owned by a trust are includible in the estate of the grantor when the grantor has retained enjoyment of those assets for life, or for a period not ending before his or her death.

Applicable to estates of decedents dying after November 7, 2011, these regulations concern several areas: 1. If additional GRAT payments are to be received by a grantor’s estate after the grantor’s death, there will be no double counting under IRC §2036 and §2033. The GRAT interest is includable in the estate under IRC §2036 only. 2. If a decedent and a child (or another taxpayer) are both receiving GRAT payments, and the decedent has funded the GRAT, the amount included in decedent’s estate is the value of the portion of property necessary to generate decedent’s annuity payments plus the portion necessary to generate the other taxpayer’s annuity payments, reduced by the present value of the child’s interest at the time of death. 3. If a grantor retains an income interest that is effective only upon the termination of another taxpayer’s interest, and the grantor dies first, his estate includes the amount that would have been necessary to produce the income amount if the grantor had lived long enough to receive it, less the present value of the other taxpayer’s interest.

4. The method of calculating the amount includible in the grantor’s estate when the grantor was entitled to an increasing annuity amount.

Deadline for Filing Estate and Gift Tax Returns

Notice 2011-76 (October 3, 2011)

A new deadline of January 17, 2012, has been set for the filing of Form 8939 for executors of estates of decedents dying in 2010 who opt out of the estate tax and elect the carryover basis. An executor can make a timely allocation of the decedent’s GST tax exemption on a Schedule R or R-1 attached to Form 8939.

Most 2010 estates requesting an extension on Form 4768 by the due date of the estate tax return automatically have until March 19, 2012 to file their estate tax returns and pay any estate tax due. Estates of those dying after December 16, 2010 and before January 1, 2011 will have 15 months after the date of death to file. Interest will be charged on estate tax paid after the original due date, but no late-filing or late-payment penalties will be due.

Taxpayers who received property from 2010 estates and then disposed of it, and who must file their income tax returns before the estates make their election regarding carryover basis under IRC § 1022 should write “IRS Notice 2011-76” on their income tax returns and make a good-faith estimate of their income tax liability. This should preclude the IRS from assessing penalties if the income tax liability is later increased.

Deductions for Administrative Expenses

Estate of Duncan v. Commissioner, T.C. Memo. 2011-255 (No. 7549-10)

The Tax Court allowed a deduction as an administrative expense under IRC §2053 for the interest on a loan, used to pay federal estate taxes, from an irrevocable trust of which decedent was the beneficiary to a revocable trust established by the decedent. The court held that the loan, of a type commonly known as “Graegin loans,” see Graegin v. Commissioner, T.C. Memo. 1998-477, was deductible because it was a bona fide debt and ascertainable with reasonable certainty. Deductions not included on the estate tax return for the attorneys’ fees and bank fees were also allowed.

Decedent Vincent J. Duncan, Sr. received one-third of the proceeds from his father’s business as the beneficiary of his father’s irrevocable trust (the “Walter Trust”). Decedent’s son, Vincent Jr., and Northern Trust Company (NTC) served as co-trustees of the Walter Trust. Decedent also started his own business, Club Oil & Gas, Ltd., LP (Club LP) in which he held a 99-percent limited partner interest. The remaining one-percent general partner interest was held by an S corporation wholly owned by him. Decedent created a revocable trust (the “2001 Trust”) in 2001 and amended it in 2004. The trust instrument stated that the estate’s debts and death taxes were to be paid by the trust. Decedent transferred his interest in Club LP to the trust, and then reorganized the business. At the time of decedent’s death, Vincent Jr. and NTC were trustees of the 2001 Trust. Decedent held real property in

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When decedent died in 2006, Vincent Jr. and a wholly-owned subsidiary of NTC served as co-executors of his estate. At his death, decedent exercised the power of appointment granted to him in the Walter Trust by directing that its principal be distributed according to the terms of the 2001 trust.

The executors determined that it would be necessary to borrow $6.5M from the Walter Trust to pay a portion of the estate’s $11.1M federal estate tax liability. As trustees of both trusts, Vincent Jr. and NTC executed a 15-year balloon note from the Walter Trust to the 2001 Trust with an interest rate of 6.7% per annum, compounded annually. 6.7% was NTC’s prevailing interest rate for such a loan. The estate claimed the $10.7M interest owed by the 2001 Trust as an administrative expense on the estate’s federal estate tax return. The IRS denied the deduction, claiming that (a) the loan was not bona fide; (b) the loan was not actually and reasonably necessary to the administration of the estate; and (c) the amount of interest expense was not ascertainable with reasonable certainty.

The Tax Court determined first that the loan was a bona fide loan. It stated that the questions to be answered are (a) whether the estate genuinely intended to create a debt with a reasonable expectation of repayment, and (b) whether a debtor-creditor relationship of economic consequence was created by that intention. The court gave two reasons for rejecting the IRS’s argument that debt was not genuine because the borrower and creditor trusts were identical, with the same trustees and beneficiaries. First, the court pointed to Illinois state law, which prohibited the trustees of the two trusts from commingling assets. Secondly, it stated that there is no basis in Federal tax law for treating two trusts as a single trust.

The Tax Court then turned to the IRS’s arguments for denying that the interest expense was deductible as an administrative expense. The IRS claimed that the loan was not actually necessary because the estate could have sold illiquid assets to pay the estate tax. It also argued that the terms of the loan were unreasonable. The court held that the loan was necessary because if the estate sold assets to the 2001 Trust, the assets would have been subject to a discount. The court ruled that, given the unpredictability and volatility of the oil and gas market, the terms of the loan were reasonable, and refused to use hindsight to second-guess the judgment of the trustees. Also, it rejected the IRS’s arguments that the estate should have used the long-term AFR, because the estate’s use of a market rate of interest rather than the interest rate used for government obligations was justified by the higher risk of this private loan.

Finally, the Tax Court ruled that the interest was ascertainable with reasonable certainty and would be paid. Under Treas. Reg. § 20.2053-1(b)(3), even if the exact amount of interest is not known, the estate may take an immediate interest deduction if interest can be ascertained with reasonable certainty and if it will in fact be paid. The IRS had argued that the Trusts should be treated as a single trust and that there was no economic interest in enforcing the prepayment clause. The court countered this argument by reasoning that the trustees of neither Trust could allow prepayment because, as the fiduciaries of trusts that were being administered separately, they had a duty to maximize the assets of each trust. Prepayment would disadvantage the 2001 Trust.

The court denied deductions for certain other items, including real estate expenses, debts of the decedent, and trust management fees, because of lack of proof. It found that the estate’s explanations of its need to retain properties for which it sought real estate expenses were unsatisfactory. The court also found that the estate did not properly support its claim for deduction of payment of medical expenses and that it failed to distinguish payments to trustees for estate administration from payments to trustees for management of trust assets.

Protective Claims For Refund


The IRS provides guidance on protective claims for refund of estate taxes under IRC § 2053. The guidance is provided under Treas. Reg. § 20.2053-1(d)(5)(i), which states that a protective claim for refund may be made in accordance with guidance provided by publication in the Internal Revenue Bulletin.

Under IRC § 2053(a)(3), an estate may deduct only amounts “actually paid” to settle claims against the estate and unpaid amounts which are “ascertainable with reasonable certainty and will be paid” before the examination of the estate tax return. A protective claim can be filed for claims that cannot be resolved before the expiration of the limitations period for refunds, but it must be filed within the limitations period. The limitations period is generally within three years of the filing of the return or two years after continued on Page 21
To be valid, a protective claim must conform to the following rules:

- It must be filed within the limitations period for refunds.
- It need not state a particular dollar amount, but must describe in detail the outstanding claim or expense that would have been deducted on the estate tax return and set forth the reasons for the delay in payment.
- It must be in the form of a written declaration executed under penalties of perjury.
- It must be accompanied by documentary evidence establishing the legal authority of the fiduciary or other person who is filing.
- If the decedent died on or after 1/1/2012, the claim must be filed by either attaching Schedule PC to the decedent’s federal estate tax return or, in cases where the federal estate tax return has already been filed, by filing Form 843.
- A separate protective claim must be filed for each claim or expense for which a deduction may be claimed.

The IRS reserves the right to reject a protective claim for refund if one or more of the procedural requirements are not properly followed. Deficiencies identified by the IRS must be cured within 45 days of receipt of notice.

Properly identified protective claims will be deemed to include ancillary expenses relating to pursuing the claim, such as attorneys’ fees, court costs, accounting fees and appraisal fees.

The filing of a protective claim will not delay the regular review and processing of the federal estate tax return. But if a protective claim has been timely filed, the IRS will refund overpaid federal estate tax related to the protective claim if it determines that the tax has been overpaid. To perfect the refund claim, the fiduciary or other person with legal authority must notify the IRS within the later of 90 days of paying the claim or expense or 90 days after the date that the claim or expense becomes certain or no longer subject to any contingency.

Untimely Claim for Refund


Following the death of Anthony Walker Smith, W.E. Davis, the executor of his estate, filed a federal income tax return in early 2003 and reported an estate tax liability of nearly $500,000. The estate assets consisted of a farm property believed to be possessed in fee simple by the decedent. Later that year the Chancery Court of Tate County, Mississippi ruled that the decedent held only a vested remainder in the property, and the decision was affirmed by higher state courts.

Davis filed an administrative claim for refund of overpaid federal estate taxes with the IRS in November, 2008. The IRS denied the claim as untimely because it had not been filed within three years of the date of the tax return or within two years of the date of the overpayment. Upon appeal, the issue before the District Court is whether the case should be dismissed because of Davis’ failure to file a timely claim for refund.

The government argued that the case should be dismissed because it had not waived sovereign immunity under 26 U.S.C. § 7422(a) and the court thus lacks subject matter jurisdiction over the complaint. The estate presented two arguments: (1) equitable tolling should be applied, because the estate lacked sufficient grounds to file a claim for refund before the statutory deadline; and (2) the estate will be denied its due process right to challenge the overpayment if it is barred from asserting the right to a refund before the court.

The court ruled that equitable tolling does not apply to the time limitations of 26 U.S.C. §6511 because of the estate’s failure to file the administrative claim for refund within the statutory time limits. The court refused to conclude that the estate had been denied its due process right to challenge the overpayment.
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The PEPC invites the Philadelphia Bar Association Probate and Trust Law Section to join our Council for membership and programming!

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February Luncheon Program
February 21, 2012
11:45 a.m. – 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: "Estate Planning for Unmarried Couples: Detriment or Opportunity?"
Speaker: Josh Rubenstein, Esq.

March Breakfast Program
March 20, 2012
7:45 a.m. – 10:00 a.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Speaker: Charles L. Ratner

For more information on joining the Philadelphia Estate Planning Council or to register for any upcoming programs, please visit www.philepac.org.
2011 Committee Reports

Business Planning Committee

DENNIS REARDON, CHAIR

The Business Planning Committee was formed with an initial meeting on May 6, 2011. Topics covered to date by the Committee have emphasized business succession planning, particularly with regard to income, gift and estate tax aspects of such planning. Generally, S corporations and Limited Liability Companies are the business entities of greater interest to committee members, although C corporations and partnerships will also be considered.

Members of the Probate and Trust Section who also attend the Tax Committee meetings are likely to be interested in the topics covered by the Business Planning Committee. Beyond business succession planning, the Committee will deal with other topics of interest to attorneys who advise business owners in conjunction with estate planning and administration, with respect to issues dealing with choice of entity, buy-sell planning, business valuation and family limited partnerships, as well as life insurance planning.

Elder Law & Guardianship Committee

NANCY R. LEWIS, CO-CHAIR
RISE P. NEWMAN, CO-CHAIR

The Elder Law Committee took a brief hiatus during the earlier part of the year as then Co-Chairs Rise Newman and Keelin Barry produced a draft Guardianship Handbook, a document which takes attorneys step by step through the guardianship process in Philadelphia Orphans’ Court. Now that this excellent resource is out and available for review, the Committee has resumed its monthly meetings, this time with Rise Newman acting as Co-Chair along with Nancy Lewis. As you may have noted, the Committee has changed its name, calling itself the Elder Law & Guardianship Committee to highlight the importance of the guardianship aspect of elder law.

The Committee has had two meetings this fall. Lou Horvath of Intervention Associates spoke at the September meeting concerning services to seniors and highlighting the importance of safety in the home. In October, Ellen Wase, Esq. of Wase and Wase gave a well-received presentation on Medicaid planning. The presentation was exceptionally well-attended, mostly like due to the fact that Ms. Wase presented a great deal of substantive information that was targeted at both new and seasoned practitioners.

The meeting for November and December will be held on December 1, at noon. The Committee will present a session on marketing an elder law practice. The speaker will be Caren Schiffman, Esquire, a former prosecutor in the Philadelphia and Montgomery County District Attorney’s offices and now an independent marketing consultant. Caren is very enthusiastic to have been asked to present and we know the Committee shares this enthusiasm. In January, when the Committee will return to its scheduled meeting on the third Thursday of each month, Peter Johnson, Esquire of The Pennsylvania Trust Company will present at noon on the use of corporate trustees in special needs trusts and guardianships. At the request of a Committee member, we will be taking the Medicaid Planning topic a step further and devoting a session to the preparation of the Medicaid application form. We also plan to schedule meetings on Veterans Administration benefits, public benefits, special needs trusts, and various aspects of guardianship, among other topics. Our aim is to increase participation levels in the Committee by highlighting the fact that elder law and guardianship law are growing areas and that knowledge of the law is important for most estate planners. The Committee endeavors to present speakers who can include in their presentations information that will be of interest and help to attorneys at different levels of practice.

All comments and meeting suggestions are welcome.
Legislative Committee

MICHAEL R. STEIN, CHAIR

During 2011, the Legislative Committee completed its analysis and recommendations regarding the Uniform Management of Institutional Funds Act (“UPMIFA”). The Committee submitted its report on UPMIFA to the Joint State Government Commission. Bill Bullitt took the lead in preparing the report and was ably assisted by the efforts of Kathleen Stephenson, Marla Conley, Paul Heintz, Scott Smalls and Ed Kaier.

The Legislative Committee also worked in conjunction with VIP to prepare an analysis and recommendations regarding 20 Pa.C.S. § 3546, pertaining to title issues on real estate that was not properly transferred from a decedent’s estate. Kelly Gastley (from VIP) and Barbara Little have taken the lead on this project.

As the year comes to a close, the Committee has begun work on preparing an analysis of the recently proposed Uniform Adult Guardianship and Protective Proceedings Act.

Rules and Practice Committee

BERNICE J. KOPLIN, CHAIR

The Rules and Practice Committee continued its work this year on drafting three proposed rules (2039.1, 2064.1, and 2206.1) to replace Joint Court Regulation 97-1, the Procedures for Approval of Compromises involving Minors, Incapacitated Persons, Wrongful Death and Survival Actions.

Our Committee’s work would be impossible to accomplish without the dedication of our committee’s members. My personal thanks to all of the committee members for their time, thoughtful consideration and dedication to the work of the Section.

New members are always needed and welcome. Our committee meets on the second Tuesday of the month at 4:00 P.M. in the offices of Schachtel, Gerstley, Levine & Koplin, P.C., 123 South Broad Street, Suite 2170, Philadelphia, PA 19109-1022, and members are also welcome to attend by conference call.

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Publications Committee

DAVID A. RUBEN, CHAIR

During 2011, the Publications Committee has continued with its mission of producing three informative Newsletters per year. We are fortunate to have had a number of members of the Section write for us on a wide variety of topics.

We are always looking for timely and interesting articles, and welcome contributions from Section members as well as others engaged in related areas of work. We invite Section members to suggest ways in which the Publications Committee may better serve the needs of the Section. To join the Committee, submit an article or make a suggestion, please email David at davidaruben@gmail.com.

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February 1, 2011: This was the committee’s annual organizational meeting to discuss the effectiveness of the committee and its plans for the upcoming year. Don DiCarlo agreed to chair the committee for another year. Marguerite Weese agreed to continue as secretary and Margery Schneider agreed to provide written tax updates for the quarterly section meetings and newsletter. The idea to create a listserv solely for Tax Committee members was discussed. Members felt that it would allow for a more intimate forum that would allow members to freely ask questions rather than posing questions on the larger Probate and Trust Section listserv. Everyone in attendance agreed that they liked the meeting setup with having a speaker come and present on a topic each month. The committee then discussed potential topics. Additionally, the committee reflected upon this year’s Heckerling Conference and its takeaways.

April 5, 2011: William Dorman from the NJ Department of Revenue presented to the committee. In a very informative session, William went through New Jersey’s Inheritance, Estate, and Realty Transfer Taxes. After going through his presentation, William allowed the committee to ask an array of questions.

May 3, 2011: Mary Alice Avery of Wilmington Trust and Trisha Hall of Bayard Law in Delaware spoke to the committee about Captive Insurance. Captive Insurance is an alternative form of risk financing or in other words, a formalized form of self insurance. Mary and Trisha discussed the various types of companies that could utilize captive insurance, the different types/forms of captives and the potential tax benefits from creating a captive insurance program.

October 4, 2011: An unprecedented roster of officials from the PA Department of Revenue came to the October meeting: Warren Klunk, Director of the Bureau of Individual Taxes; Mary-Jo Mullen, Chief of the Inheritance Tax and Realty Transfer Tax; Laurel Fulmer, Supervisor of the Post Assessment and Document Processing Unit; Bill Lyons, a trust Valuation Specialist; James Millar, Counsel in the Office of Chief Counsel; and Jessica McBride, AOD, from the Eastern Region’s Collections and Taxpayer Services. The panel gave updates on the move to electronic filing and the tremendous success of the Tax Amnesty program. They also made several announcements about new practice and procedures occurring in the Department. They were kind enough to answer questions from the committee after their presentation.

Updates:

• Unfortunately, unlike in past years, the IRS will not be presenting to the committee this year.
• Rebecca Rosenberger Smolen has agreed to chair the Tax Committee for 2012.
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*List closing Thursday due to holiday.