Recent Developments
By the Trusts and Estates Team of Moore & Van Allen PLLC

Federal Administrative Developments

Service issues final and proposed regulations for pass-through deduction for qualified business income.

In 84 Fed. Reg. 2952 (Feb. 8, 2019), the Service finalized Regulations Sections 1.199A-1 through 1.199A-6 and 1.643(f)-1 regarding the deduction permitted for qualified business income (QBI) from pass-through entities under Code Section 199A, which includes:

- Defining "net capital gain" to incorporate the definition from Code Section 1222(11) (i.e., net long-term capital gain in excess of short-term capital loss) plus income from qualified dividends, as defined under Code Section 1(b)(11)(B).
- Defining a "relevant passthrough entity" (RPE) as a partnership, other than a publicly traded partnership, or an S corporation owned by at least one individual, estate, or trust, with a trust or estate also to be treated as an RPE to the extent it passes through taxable items for purposes of Code Section 199A.
- Confirming the adoption of the definition of a “trade or business” consistent with its meaning under Code Section 162 (with a rental real estate safe harbor provided in Notice 2019-7) and providing that, in addition, renting or licensing tangible or intangible property between commonly controlled trades or businesses owned by related parties that are individuals or RPEs will also qualify as a trade or business for purposes of Code Section 199A.
- Computational guidance regarding the application of QBI from a specified service trade or business (SSTB) before applying a "netting" approach to multiple trades or businesses.
- Providing that trades or business conducted through a disregarded entity are considered to be conducted by the entity’s owner.
- Computational guidance regarding allocations among partners of the unadjusted basis immediately after acquisition (UBIA) of property that does not produce taxable depreciation in a particular year under Code Section 704(b), not taking into account allocation methods under Code Section 704(c).
- Computational guidance regarding the UBIA of property contributed to a partnership or S corporation, property involved in an exchange under Code Section 1031 or involuntary conversion under Code Section 1033, and property owned by a partnership subject to basis adjustments under Code Sections 734(b) and 743(b).
- Guidance regarding the application of previously disallowed losses in tax years either before or after Jan. 1, 2018 on a first-in-first-out (FIFO) basis.
- Allowing aggregation by an RPE of lower-tier trades or businesses.
- Clarifying the application of the SSTB limitation among various lines of business.
- Clarifying that for purposes of a deduction, an electing small business trust (ESBT) counts as a single trust for both its S portion and non-S portion.
- Clarifying that for purposes of a deduction, a trust or estate determines whether its taxable income exceeds the threshold amount after taking into account any distribution deduction.
- Clarifying that creation of a single trust to obtain the benefit of an additional threshold amount can be invalidated as a result of the general anti-abuse rules.

In REG-134652-18 (84 Fed. Reg. 3015, Feb. 8, 2019), the Service also issued additional portions to proposed Regulation Section 1.199A-6 regarding the QBI deduction under Code Section 199A to include a charitable remainder trust (CRT) as an RPE for purposes of a deduction permitted for a taxable recipient of a unitrust or annuity amount.

Service issues proposed regulations regarding life insurance transfer for value rules.

In REG-103083-18 (March 22, 2019), the Service issued proposed regulations regarding the transfer for value rules relating to life insurance transactions, specifically, reportable sales. The proposed regulations include information that is generally applicable to life insurance companies issuing life insurance policies and life settlement companies that purchase life insurance policies from insureds. Included in the proposed regulations, the Service clarifies what constitutes a reportable sale and the reporting requirements for insurance companies issuing policies and acquirers purchasing life insurance policies in a reportable sale transaction. Furthermore, the proposed regulations provide transition rules for sales that take place after Dec. 31, 2017 and before the issuance of final regulations.

Service approves the terms of an incomplete gift non-grantor trust.

In Private Letter Ruling 201908008 (Feb. 22, 2019), the Service approved the following requested rulings regarding a trust:

1. The settlor’s transfers to the trust were not completed gifts for federal gift tax purposes because the settlor retained the power to approve certain distributions of trust income during the settlor’s lifetime, and the power was not exercisable in conjunction with any person having a substantial adverse interest in the trust for purposes of Regulations Section 25.2511-2(e). The power was exercisable in conjunction with the income beneficiaries of the trust, but neither the settlor nor such beneficiaries had any power with respect to the income of the trust after the settlor’s death (at which time the entire trust passed to charity), and under Regulations Sections 25.2511-2(e) and 25.2514-3(b)(2), one co-holder of a power is only considered to have a substantial adverse interest to another co-holder with respect thereto for federal gift tax purposes when the first co-holder retains the power after the second co-holder’s death and may then exercise such power in favor of himself or herself. Further, the settlor retained both inter vivos and testamentary powers to appoint the trust principal among one or more charitable organizations, so the settlor retained dominion and control over the trust principal within the meaning of Regulations Section 25.2511-2(b).
2. Distributions of trust income authorized by the settlor and the income beneficiaries were not completed gifts by the income beneficiaries because the income beneficiaries' power to authorize income distributions was exercisable only in conjunction with the settlor, as the creator of the power, and therefore the income beneficiaries' powers were not general powers of appointment pursuant to Code Section 2514(c)(3)(A).

3. Any exercise of the settlor's inter vivos power of appointment in favor of one or more charities would be a completed gift by the settlor eligible for a gift tax charitable deduction.

4. The trust property will not be includible in the gross estates of the income beneficiaries for federal estate tax purposes because the income beneficiaries' powers were not general powers of appointment, as described above.

5. The settlor will not be considered the owner of the trust property for federal income tax purposes because the settlor's power to authorize income distributions during the settlor's lifetime was subject to the approval of an adverse party for purposes of Code Section 674(a).

6. The trust will generally be entitled to a charitable income tax deduction for any property that passes to charities pursuant to the settlor's inter vivos and testamentary powers of appointment.

7. The trust was not a tax-exempt entity for federal income tax purposes. The trust also was not a charitable/non-charitable split-interest trust under Code Section 4947(a)(2) because the trust had no amounts for which a charitable income tax deduction was previously allowed, and the settlor represented that the trust would not hold any such amounts in the future, including any amounts for which the trust had previously claimed a charitable deduction as a set-aside under Code Section 642(c)(2). As such, the trust was not subject to the self-dealing rules applicable to private foundations.

A surviving spouse who is the sole beneficiary of a decedent's IRA as the result of several qualified disclaimers is permitted to rollover such account into her own IRA.

In PLR 201901005 (Jan. 4, 2019), the Service ruled that a surviving spouse could roll over her deceased husband’s IRA into an IRA in her own name even though the surviving spouse was not named as the beneficiary of the IRA on the IRA's beneficiary designation form. The decedent died after having begun to receive his required minimum distributions. Within nine months of the decedent’s death, the beneficiary named in the beneficiary designation form of the IRA executed a qualified disclaimer of its interest in the IRA, causing the IRA to be payable to the decedent’s estate. Subsequently, but within nine months of the decedent’s death, all of the beneficiaries of the decedent’s estate, other than the decedent’s surviving spouse, executed qualified disclaimers of their interests in the IRA, leaving the decedent’s surviving spouse as the only beneficiary of the IRA. The Service found that because the surviving spouse is effectively the individual for whom the IRA is being maintained, for purposes of Code Section 408(d)(3), the surviving spouse will be deemed to have received the IRA directly from the decedent and may roll over the IRA into an IRA in her own name, provided that the remaining requirements of Code Section 408(d)(3)(A)(i) are met.

Trustee-to-trustee transfer to separate IRAs for estate beneficiaries do not constitute taxable distributions or payments.

In PLR 201909003 (March 1, 2019), a decedent’s IRA was payable directly to his estate, with the beneficiaries as the only beneficiaries of his estate. The decedent died after reaching age 70½ and after his required beginning date for distributions for purposes of Code Section 401(a)(9). Separate IRAs were created in the name of the decedent for each of the beneficiaries of the estate and funded by a trustee-to-trustee transfer from the decedent’s IRA. The Service found that the transfers were not taxable distributions or payments to the decedent’s estate under Code Section 408(d)(1), were not sales generating income in respect of the decedent under Code Section 691, and the required minimum distributions of each separate IRA would be based on the life expectancy of the decedent and would be taxable solely to the individual beneficiaries of each separate IRA.

Disposition of property following the modification of a stipulation and order after a divorce constituted a transfer of property incident to divorce for income and gift tax purposes.

In PLR 201901003 (Jan. 4, 2019), a divorced couple modified a stipulation and order regarding the disposition of property owned jointly by the couple during the marriage. The original stipulation and order regarding the property satisfied the requirements of Code Section 1041, providing that the disposition of the property pursuant to the stipulation and order constituted a transfer incident to divorce and would not result in income tax consequences, and of Code Section 2516, providing that the disposition of property pursuant to the stipulation and order constituted a transfer for full and adequate consideration and would not result in gift tax consequences. The modification of the stipulation and order took place six years after the date of divorce and thus did not satisfy the timing requirements of Code Sections 1041 and 2516. Nevertheless, the Service ruled that because the modification was to a stipulation and order that satisfied the requirements of Code Sections 1041 and 2518, the disposition of the property pursuant to the modified terms of the stipulation and order was a transfer incident to divorce for purposes of Code Section 1041 and was a transfer for full and adequate consideration for purposes of Code Section 2518 and thus did not result in income or gift tax consequences.

Transfer of interests in a limited liability company holding promissory notes payable from a disqualified person to a charitable trust is not self-dealing.

In PLR 201907004 (Nov. 8, 2018), the Service found that the transfer to a charitable trust of non-voting membership interests in a limited liability company whose main assets were promissory notes payable from disqualified persons for purposes of Code Section 4946 with respect to the trust was not an act of self-dealing. Typically, loan transactions between disqualified persons and charitable trusts would constitute an act of self-dealing under Code Section 4941(d)(1)(B) and result in the imposition of an excise tax. However, because the charitable trust only received non-voting interests in the limited liability company and thus could exercise no control over the limited liability company for purposes of Regulations Section 53.4941(d)-1(b)(5), which provides that if a charitable trust can control an organization and cause that organization to engage in a transaction which, if
undertaken by the charitable trust itself, would have constituted self-dealing, such transaction constitutes self-dealing, the charitable trust could take no actions with respect to the promissory notes and thus the ownership of the limited liability company interests, although the underlying assets are promissory notes which if owned directly by the charitable trust would constitute self-dealing, does not constitute self-dealing.

Service issues guidance regarding compensation for employees of tax-exempt organizations.

In Notice 2019-9 (Jan. 1, 2019), the Service issued guidance regarding the application of Code Section 4960 which provides that applicable tax-exempt organizations that pay remuneration in excess of $1 million dollars or excess parachute payments to covered employees are subject to an excise tax on such payments. The Service clarifies what constitutes remuneration and the timing of the payment of such remuneration for purposes of the tax. In addition, the Service provides guidance as to how such excess remuneration should be calculated for purposes of the tax. The Service also clarifies what constitutes a covered employee and an applicable tax-exempt organization and how compensation relationships between affiliates and third-party organizations with such applicable tax-exempt organizations are treated for purposes of the tax.

Service no longer per se prohibits lump-sum distributions from pension plans.

In Notice 2019-18 (March 6, 2019), the Service stated that it no longer intends to issue regulations under Code Section 401(a)(9) which would prevent the issuance of tax-free lump-sum payments to retirees from pension plans as the Service originally announced in Notice 2015-49. Nevertheless, the Service stated that it would not issue private letter rulings regarding whether an amendment to a pension plan providing for a lump-sum distribution would meet the requirements for tax-free treatment under Code Section 401.

Service updates addresses for filing estate and gift tax returns.

The Service announced that new addresses must be used to file estate and gift tax returns. Beginning Jan. 1, 2019, the new address for filing gift tax returns became applicable. Estate tax returns filed after June 30, 2019 must be filed at the new address. Returns will now be mailed to Missouri instead of Ohio or Kentucky.

Entities may no longer serve as the responsible party in applying for employer identification numbers.

In IR-2019-58 (March 27, 2019), the Service announced that, beginning May 13, only individuals would be permitted to serve as the responsible party on applications requesting employer identification numbers. Therefore, entities may no longer request employer identification numbers nor serve as the responsible party on such applications.

Service eliminates regulations that have become unnecessary following the passage of recent legislation.

In T.D. 9849 (March 11, 2019) and pursuant to the President’s Executive Order 13777 which, in part, required the Service to eliminate unnecessary regulations, the Service removed 296 regulations that have become unnecessary and obsolete upon the passage of various subsequent regulations and amended seventy-nine regulations to eliminate references to the removed regulations.

Federal Cases

United States Supreme Court hears case on North Carolina state income taxation of trusts.

On Jan. 11, 2019, the United States Supreme Court agreed to hear the case of North Carolina Dept. of Revenue v. The Kimberly Rice Kaestner 1992 Family Trust (U.S. Sup. Ct. No. 18-457) and then heard oral arguments for the case on April 16, 2019. The case concerns North Carolina’s statute subjecting trusts to North Carolina income taxation on the basis of having North Carolina resident beneficiaries. In Kaestner, the trust’s only connection to North Carolina was the residence of its primary beneficiary in North Carolina, and the trust challenged the constitutionality of the North Carolina trust taxation statute both on its face and as applied to the Kaestner trust. The North Carolina Business Court, North Carolina Court of Appeals, and North Carolina Supreme Court have held the statute unconstitutional as applied to the Kaestner trust under the Due Process Clauses of both the United States and North Carolina constitutions, without addressing whether the statute was unconstitutional on its face. The Business Court also held the statute unconstitutional as applied to the Kaestner trust under the Commerce Clause of the United States Constitution. The United States Supreme Court unanimously affirmed lower court findings in an opinion issued on June 24, 2019. Extensive discussion of this case and its implications will be in the August issue of The Will & The Way.

Estate tax charitable deduction only allowed for value of property that actually passed to charity after charitably-devised residuary was converted at a discount after decedent’s death but prior to passing to charitable devisee. Extensive discussion of this case and its implications will be in the August issue of The Will & The Way.

In Dieringer v. Comm’r, 917 F.3d 1135 (9th Cir. March 12, 2019), a decedent’s estate planning documents provided for the residuary of the decedent’s estate to pass to a private foundation. The primary assets allocated to the residuary were voting and non-voting shares of stock in a closely-held corporation. The voting shares controlled the corporation, and the voting and non-voting shares together had a total date-of-death appraised value of approximately $14.2 million. During estate administration, before the shares passed to the foundation, the corporation redeemed most of the shares from the decedent’s revocable trust at a price that reflected significant discounts for lack of control and lack of marketability. As a result, the foundation actually received approximately $5.2 million in promissory notes and approximately $1.85 million in non-voting shares (valued with the discounts). However, the estate still claimed an estate tax charitable deduction based on an undiscounted valuation of the shares. As a result, the Tax Court initially, and the Ninth Circuit here, disallowed the portion of the deduction that did not represent value that actually passed to charity and upheld the accuracy-related penalties assessed by the Service as a result of the disallowed portion of the deduction.
**Purchase price of stock under employee stock purchase plan did not govern value of stock for federal gift tax purposes.**

In *Kress v. U.S.*, 2019 U.S. Dist. LEXIS 49850 (E.D. Wisc. March 26, 2019), a married couple gifted S corporation stock to their descendants, and the Service claimed that the couple undervalued the stock on their federal gift tax returns, but the court here disagreed. The Service first claimed that in the three tax years in question (2007-2009), the stock was respectively worth 163%, 184%, and 235% of what the taxpayers claimed. The Service based its values on the prices paid for stock in the corporation in those years by employees of the corporation under an established employee stock purchase plan (that price being 120% of the corporation's "book value"). The Service also engaged an appraiser to value the stock, and the Service's appraiser found values lower than the values the Service initially claimed but higher than the values found by taxpayer's appraiser (the Service's appraiser's values being 136%, 107%, and 185% of the taxpayer's appraiser's values respectively for the three years in question). The court criticized the Service's appraiser for (i) failing to take into account the recession that began in 2008 for purposes of his 2009 valuation, (ii) relying on an outlier comparable public company, (iii) failing to apply minority interest discounts to the corporation's non-operating assets, (iv) applying unreasonably low lack of marketability discounts, and (v) adding a premium due to the corporation's subchapter S status, which the court said should be a neutral factor as compared to C corporation status for a minority shareholder. The court in general favored the taxpayer's appraiser's valuations, with one caveat: the court did not approve of the taxpayer's appraiser considering a provision in the corporation's bylaws restricting transfers of stock in the corporation to Kress family members in determining the discount for lack of marketability. The court determined that the restriction failed the requirements of Section 2703(b)(1)-(3), because although the restrictions were a bona fide business arrangement and were not intended as a tax avoidance device, the taxpayers did not submit any specific evidence that the restrictions were similar to provisions that would be reached by unrelated parties dealing at arm's length, as required by Section 2703(b)(3). The court did not indicate whether it believed that the restrictions were reflective of what unrelated parties dealing at arms' length would agree to. Because the court disallowed consideration of the restriction, the court declared that the taxpayer's appraiser's discount for lack of marketability was 3% too great and adjusted the discount accordingly, but the court otherwise accepted the taxpayer's appraiser's valuations.

**Beneficiaries liable for estate tax nineteen years after decedent's death.**

In *U.S. v. Ringling*, D.S.D No. 4:17-CV-04006 (Feb. 21, 2019), beneficiaries who received assets from a decedent via beneficiary designation, joint accounts, and otherwise remained liable for unpaid estate tax of the decedent. No estate tax return for the decedent was filed until nine years after the decedent's date of death. The Service assessed estate tax and penalties and interest for failure to timely pay the tax owed. Nine years after the tax was assessed, when unpaid tax remained outstanding and within the ten year statute of limitations, the Service brought an action against the beneficiaries for the unpaid tax. The District Court for the District of South Dakota Southern Division granted summary judgment in favor of the Service when the beneficiaries failed to identify specific facts in the record to support their claims of waiver and reasonable cause reliance on a tax professional.

**Estate planning trust ineligible to declare Chapter 11 business reorganization bankruptcy.**

In *Murphy v. Bernstein (in re Dille Family Trust)*, 598 B.R. 179 (U.S. Bankr. Ct. W.D.Pa.), the Bankruptcy Court dismissed a Chapter 11 bankruptcy proceeding upon determining that the debtor was an ordinary estate planning trust, which is not eligible to declare Chapter 11 bankruptcy, as opposed to a business trust, which is so eligible. Chapter 11 relief is intended to enable corporate or other business reorganizations and has the benefit of forcing a stay of pending litigation against the debtor. The trust here was in fact the subject of ongoing litigation regarding its intellectual property rights with respect to the fictional character "Buck Rogers," and the movants here claimed that the trust's Chapter 11 filing was exclusively a stall tactic with respect to that litigation. The court dismissed the bankruptcy proceeding despite the fact that a Chapter 11 Bankruptcy Trustee had previously been appointed for the case by the same court. The court maintained that such appointment was in the interests of facilitating resolution of the outstanding matters, even though the court was aware then that the trust was likely ineligible for Chapter 11 relief.

**Court clarifies look-back period for the issuance of income tax refunds.**

In *Borenstein v. Commissioner*, No. 17-3900 (2nd Cir. Ct. App. April 2, 2019), the Court of Appeals for the Second Circuit clarified the Tax Court's jurisdiction under Code Section 6512(b)(3) to issue refunds for overpayment of taxes for returns that were not timely filed, such as an overpayment arising from excess withholding. Specifically, the court addressed such a situation where a notice of deficiency was issued in the "third year after the due date (with extensions)" and before a return was filed. If a notice of deficiency is filed prior to the "third year after the due date (with extensions)," the taxpayer is entitled to a two year look-back period to recover his or her overpayment, whereas a three year look-back period applies for notices of deficiency issued in the "third year after the due date (with extensions)." The Service argued and the Tax Court found that the phrase "third year after the due date (with extensions)" referred to the year beginning three years after the due date of the return, with such due date to include any applicable extensions. In this case, the taxpayer's 2012 income tax return was at issue, but the taxpayer timely filed for a six-month extension. Therefore, the Service argued and the Tax Court found that the "third year after the due date (with extensions)" ran from Oct. 15, 2015 to Oct. 15, 2016. The taxpayer argued and the Court of Appeals agreed, overturning the Tax Court's decision, that the "third year after the due date (with extensions)" referred to the third year after the due date, extended by any applicable extensions, in this case, April 15, 2015 until Oct. 15, 2016. Because the notice of deficiency was issued on June 19, 2015 and the taxpayer filed her late return on Aug. 29, 2015, under the Service's argument and the Tax Court's ruling, the taxpayer would have been subject to the two year, instead of the three year, look-back period. Because the overpayment...
occurred as a result of excess withholding, which is deemed paid on the due date for the return, not including extensions, the claim for a refund would have fallen outside of this two year period. Nevertheless, as a result of the Court of Appeals' holding, the claim for refund was subject to the three year look-back period and the Tax Court thus retained jurisdiction to issue a refund.

Land in a constructive trust may not be subject to a federal tax lien incurred by the holder of legal title to the land.

In Wadsworth v. Talmage et al, 911 F.3d 994 (9th Cir. Ct. of App. Dec. 27, 2018), the Ninth Circuit Court of Appeals certified a question to the Supreme Court of Oregon to determine if a constructive trust is created at the time that an illegal action is taken or whether a constructive trust is simply a remedy awarded by a court and thus not created until a court order is issued. The majority rule, applicable in Kansas, California, and Indiana, among others, is that a constructive trust arises as soon as fraudulently obtained funds are used to make a purchase. Under the majority rule, any claim against the fraudulent actor that arises after the purchase, including the imposition of a federal tax lien, cannot be satisfied by the purchased property because the fraudulent actor is not the beneficial owner of the property at any time after the purchase. Under the minority view, however, a constructive trust is not created until ordered by the court as a remedy. Therefore, claims arising after the purchase but before the order of a constructive trust could be able to be satisfied with that property. The fraudulent actor is the beneficial owner of the property until the order of the constructive trust and thus the property may be subject to the claims of the fraudulent actor's other creditors, including a federal tax lien. Because federal tax liens have super priority status, the federal tax lien would have priority over the claims of the beneficiaries of the constructive trust. Because different states follow different rules and Oregon law is unclear as to whether it follows the majority or the minority rule, the Ninth Circuit Court of Appeals certified the issue to the Oregon Supreme Court.

Court denies motion to dismiss which would have prevented trust assets from potentially being subject to claims.

In U.S. v. Hovnanian et al, No. 3:18-cv-15099 (March 18, 2019), the U.S. District Court for the District of New Jersey denied a trustee's motion to dismiss against the Service's claim that two trusts were nominees of a related party taxpayer and thus the assets of the trusts were subject to claims of unpaid taxes. In determining whether the trusts could be considered the nominee for the taxpayer, the court looked to the six factor test propounded by New Jersey courts: (i) whether the nominee paid adequate consideration for the property, (ii) whether the property was place in the nominee's name in anticipation of the imposition of liabilities against the taxpayer, (iii) the relationship between the nominee and the taxpayer, (iv) the failure to record the transfer, (v) whether the property remained in the taxpayer's possession, and (vi) the taxpayer's continued enjoyment of the property. Although the taxpayer was not the settlor of one of the trusts, the taxpayer's familial relationship with the settlors and the trustee combined with the fact that the taxpayer received income from the trust assets was sufficient evidence to suggest that the trusts could be considered the nominees of the taxpayer and defeat the trustee's motion to dismiss.

Charitable contribution of improvements for deconstruction prior to demolition disallowed because interest in improvements was not properly severed from underlying land.

In Mann v. U.S., D.Md. No. 8:17-cv-00200 (Jan. 31, 2019), two taxpayers wanted to demolish their house in order to build a new house on the same property. The taxpayers arranged for a charitable organization to deconstruct the house prior to the demolition and salvage the materials therefrom. The charitable organization uses the deconstruction process to provide disadvantaged individuals with workforce training. On the taxpayers' income tax return, they claimed charitable deductions for contributions to the charitable organization of the house (purportedly excluding the underlying land), personal property from the house, and cash, which the taxpayers donated to the charity to fund the costs of the deconstruction.

The deduction for the house was calculated by subtracting an appraised value of the underlying land from an appraised value of the entire property. The court disallowed the deduction for the house because the house did not represent a severed, undivided, or other partial interest in the real property for which a deduction is permitted under Code Section 170(f)(3). The law of the taxpayers' state did allow for an interest in the improvements on a parcel of real property to be severed from the interest in the underlying land, but only if the severance is publicly recorded, which the taxpayers had not done with respect to their property here. Further, the court provided that the appraisal of the property was not a qualified appraisal for charitable deduction purposes because it valued the house assuming the house would be used as a residence instead of being deconstructed and demolished, whereas the planned deconstruction of the house was expressly stipulated in connection with the donation. The taxpayers had amended their income tax return to claim a deduction for the salvage value of the house's materials instead of the house's value as a residence, but the court found that the appraisal valuing the house's materials at salvage value was not a qualified appraisal for the taxpayers' charitable deduction purposes because the taxpayers were aware at the time of the contribution that not all of the materials appraised could be salvaged, and there was no specific valuation of the materials actually salvaged, so no deduction could be substantiated.

The deduction for the personal property was based on an appraisal of the personal property contributed. The court disallowed the personal property deduction because the taxpayers had not contested the Service's denial and further because it found the appraisal's methodology faulty.

The court did permit the charitable deduction for the cash contribution. The Service had argued that the cash contribution represented a quid pro quo payment in exchange for deconstruction services. However, the court noted that the taxpayers did not benefit from the deconstruction of the house; they only needed the house demolished, and they needed to contract a commercial third party to demolish the house regardless of whether the charitable organization was permitted to deconstruct the house first. The taxpayers did make the cash contribution to induce the charity to accept the corresponding contribution of the house, but the court cited existing precedent in ruling that the cash donation's effect of enabling another charitable contribution by the taxpayers (and another opportunity for a charitable income tax deduction) did not result in a disqualifying quid pro quo exchange.
Timeshare donation arrangement declared abusive tax shelter when donated timeshares were consistently overvalued for charitable income tax deduction purposes by conflicted appraisers.

In Tarpey v. U.S., 2019 WL 1255098 (D. Mont. March 19, 2019), the court upheld penalties assessed against an individual under Code Section 6700(a)(2)(A) for promoting an abusive tax shelter when the individual established and controlled a tax exempt organization, solicited the donation of unwanted timeshares thereto, represented that donors could deduct the values of donated timeshares based on appraisals by himself and three others who either exclusively or mostly performed appraisals for the tax-exempt organization (which appraisals were not qualified for tax purposes due to the client concentration and in some cases conflict of interest of the appraisers), and used his own private company to perform compensated services in connection with the transfers of the timeshares. The appraisals consistently overstated the value of the timeshares, which the tax exempt organization would liquidate for prices significantly below the appraised values.

Service is authorized to charge fees to issue and renew preparer tax identification numbers (PTINs).

In Montrois, et al v. U.S., DC Cir. No 17-5204 (March 1, 2019), the Court of Appeals for the District of Columbia found that the Service was entitled to charge fees for the issuance and renewal of PTINs under the Independent Offices Appropriations Act because the Service provided a service to specific taxpayers in providing PTINs. The court found that by allowing individuals to use a PTIN rather than their own social security number when preparing and filing tax returns on behalf of others, the Service was providing privacy protections to these individuals, which justifies the fee charged by the Service.

North Carolina Cases

Beneficiaries holding remainder interest in life estate had valid claim against timber harvester once interest vested.

In Jackson et al v. Don Johnson Forestry, Inc. et al, N.C. Ct. App. No. 18-354-2 (April 16, 2019), a decedent's will granted a life estate in real property to the decedent's children, with the decedent's grandchildren to receive the property as remainder beneficiaries in per stirpital shares upon the death of the last surviving child. During his children's life estate, the will expressly permitted the sale of timber from large trees on the property, with the children owning the property not having any obligation to share any of the sale proceeds with the grandchildren as remainder beneficiaries.

After the death of the decedent's last surviving child, the decedent's grandchildren brought suit against a timber harvester that had previously cut timber on the property. The Court of Appeals found the grandchildren, at the time they brought the claim, had a vested interest in the property even though the alleged harm occurred prior to the vesting of their interest and therefore were permitted to bring such a claim. Their claim was only a valid one, however, for smaller trees harvested on the property, as opposed to larger trees on the property for which there was an express authorization under the decedent's will for timber production to take place for the benefit of the life estate beneficiaries.

Review of appeal of clerk of court's determination for petition to revoke letters testamentary requires de novo hearing, while review of deficiency order for year's allowance requires reference to clerk of court's decision.

In In the Matter of the Estate of Clarence Maynard Johnson, N.C. Ct. App. No. 18-778 (Feb. 19, 2019), a decedent's wife was awarded a year's allowance of $30,000 from the decedent's estate, credited in part against her distributive share from the decedent's estate, with a portion of the remaining award satisfied at the time of the award from assets from the decedent's estate and the balance owed to the decedent's wife pursuant to an order of deficiency, which the executor of the decedent's estate appealed. The decedent's wife subsequently filed petitions for revocation of letters testamentary against the decedent's son from a prior marriage who was serving as executor of the decedent's estate, which the Clerk of Court denied while also issuing a written order reaffirming the deficiency owed to the decedent's wife. The decedent's wife subsequently appealed the ruling on the revocation of letters testamentary. Upon review, the Superior Court issued an order denying the petition for revocation of letters testamentary, based on findings made by the Clerk of Court, and an additional order declaring the Clerk of Court's deficiency order for the year's allowance to be invalid.

The decedent's wife appealed, arguing that the Superior Court in each case applied the incorrect standard of review to the Clerk of Court's rulings. The Court of Appeals found that with respect to the appeal of the revocation of letters testamentary, the Superior Court was required under N.C.G.S. Section 1-301.2 to have conducted a hearing *de novo* to determine the respective rights of the parties and remanded the case for that determination. For the portion of the Superior Court's decision invalidating the deficiency order, the Court of Appeals found that a *de novo* review of that issue was incorrectly applied pursuant to N.C.G.S. Section 1-301.3 and that the Superior Court was required to defer to the ruling of the Clerk of Court on that issue, also remanding the case for a new determination.

Assisted living facility did not have fiduciary duty to discuss proposed arbitration agreement with prospective patient or prospective patient's attorney-in-fact.

In Hager v Smithfield East Health Holdings, LLC, N.C. Ct. App. No. 18-651 (March 19, 2019), the North Carolina Court of Appeals declined to find that an assisted living facility owed a fiduciary duty to a patient with respect to the facility's proposal of an arbitration agreement to the patient. The agreement, which the patient's attorney-in-fact executed without discussion as part of a series of admittance documents provided by the facility, waived the patient's right to sue the facility in court with a jury, mandating arbitration for dispute resolution instead. The arbitration agreement included prominent disclaimers that it was not a condition of admittance to the facility, could be unilaterally cancelled by the patient within 60 days after execution, and waived the patient's right to a jury trial. The agreement also advised the patient to discuss the agreement with an attorney. The patient died four months after being admitted, and the executor of the patient's estate sued the facility for negligence, malpractice, and wrongful death. The facility moved to dismiss based on the arbitration agreement and prevailed in Superior Court. Here, the North Carolina Court of Appeals upheld the dismissal. The executor asked the court to find that facilities owe patients a fiduciary duty to discuss arbitration
agreements as a matter of law, or in the alternative, that the facts and circumstances of this situation created a fiduciary duty to discuss the agreement. The court declined on both counts, finding that the facility did not have the kind of specialized knowledge and skill that, when held only on one side of a contractual relationship, gives rise to a fiduciary duty (examples being attorney-client and physician-patient) and that no fiduciary duty arose from the facts of this case because the patient was not referred to the facility by a fiduciary of the patient's and the patient, through his attorney-in-fact, had ample opportunity to investigate the facility prior to entering the arbitration agreement.

Subject matter jurisdiction for enforcement of equitable distribution award against deceased former spouse lies with district court, with claim to be enforced under equitable distribution statute.

In Smith v. Rodgers et al, N.C. Ct. App. No. 18-261 (Feb. 5, 2019), a decedent's wife and the decedent became subject to an equitable distribution order as part of their divorce proceedings in District Court shortly before the decedent's death, with the decedent's wife to receive one-half of the marital estate, which the court provided in part in the form of a distributive award from the decedent to his wife over a term of 36 months. After the decedent's death, the decedent's wife filed a notice of claim in the decedent's estate for the amount of the distributive award, which the estate paid, but not for the remaining amount of the equitable distribution award. The remaining equitable distribution award was later denied by the personal representatives of the decedent's estate on the basis of it being a time barred claim against the estate. The decedent's wife filed suit in Superior Court, which granted a motion to dismiss in favor of the personal representatives of the decedent's estate.

On appeal, the Court of Appeals found that the equitable distribution claim was governed not by N.C.G.S. Chapter 28A governing the administration of estates but rather N.C.G.S. Chapter 50 governing divorce. Based on the plain language of N.C.G.S. Section 50-20(l) and prior case law, the property subject to the equitable distribution was deemed to vest in the decedent's wife at the time of the award and therefore was not property of the decedent's estate to be administered under N.C.G.S. Chapter 28A. Because that was the case, however, the Court of Appeals also dismissed the action for lack of subject matter jurisdiction, as an equitable distribution claim was the exclusive jurisdiction of the District Court and not the Superior Court.

Ruling regarding the validity of a premarital agreement is not an appealable interlocutory order under prior law.

In Helbein v. Helbein, NC COA 18-383 (March 19, 2019), the North Carolina Court of Appeals found that a ruling stating that a premarital agreement was invalid was not a final judgment on a claim for relief subject to immediate appeal because such ruling did not dispose of the divorce action or claims for equitable distribution and alimony. In addition, N.C.G.S. Section 50-19.1 (2017) provides exceptions to allow certain interlocutory orders to be immediately appealable, of which a ruling regarding the validity of a premarital agreement was not one. Therefore, the court found that the order regarding the premarital agreement was not immediately appealable. After the entry of the judgment regarding the validity of the premarital agreement in this case, N.C.G.S. Section 50-19.1 was amended in 2018 to add decisions regarding the validity of a premarital agreement to the list of interlocutory orders that can be immediately appealable.

Other State Cases

Florida District Court of Appeals determines what constitutes a qualified beneficiary under the Florida Statutes.

In Hadassah, The Women’s Zionist Organization of America, Inc. v. Melcer, et al, 2019 WL 141039 (Fla. 4th Dist. Ct. App. Jan. 09, 2019)), the Florida District Court of Appeals for the Fourth Circuit found that a charitable remainder beneficiary of a non-charitable trust qualified as a qualified beneficiary under Florida law. Three separate trusts were created for the three daughters of decedent. Upon the death of a daughter, that daughter's share was to be added to the two remaining shares of her surviving sisters. Upon the death of the last daughter to die, any remaining property was distributed to a charity. The court found that the charity was a qualified beneficiary of each of the three separate trusts created for the daughters. Under Florida Statutes Section 736.0813(1)(b), a qualified beneficiary includes a charitable beneficiary who “would be a distributee or permissible distributee of trust income or principal on termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions.” In determining that the charity was a qualified beneficiary even though it could not take until all of the daughters had passed away, the court found that, for purposes of the statute, the interest of all of the other beneficiaries shall be deemed to have been terminated simultaneously, not sequentially. In this case, the interests of the daughters were to be deemed to have terminated simultaneously and, because the charity would take if all the daughters’ interests were terminated, the charity was found to be a qualified beneficiary.

California court employs the substantial benefit doctrine to charge litigation costs to beneficiaries of a trust that did not participate in the litigation.

In Smith v. Szeyller, 31 Cal. App. 5th 450 (Jan. 16, 2019), the costs of litigation incurred by a beneficiary of a trust in an action against the trustees of the trust was charged against all of the beneficiaries’ shares of the trusts, including beneficiaries who did not participate in the litigation. The California Court of Appeals stated that, although beneficiaries typically must bear their own litigation costs in challenging trustee actions, the court may, under the substantial benefit exception, require other beneficiaries who received a benefit from the litigation to contribute to the cost. In this case, the trustees were charged with spending trust assets for impermissible purposes, preparing insufficient accountings to beneficiaries and governmental entities, and not acting in accordance with acceptable fiduciary standards. The court found that all of the beneficiaries of the trust benefitted from the action which preserved trust assets, improved accountings, and imposed higher fiduciary standards on the trustees. The court also noted that the all of the beneficiaries received notice of the action and could have participated so their rights were not violated by the imposition of this cost on their trust shares.

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