By Timothy W. Jones

I am honored to serve as Chair of the Estate Planning & Fiduciary Law Section for the 2019-2020 year. Our Section has over 1500 members. One of my goals for this year is to increase membership by connecting with members of our profession who may not yet realize the value that comes with Section membership, but I need your help. Be on the lookout for announcements of Section social events. If you have been a member of our Section for a while, I encourage you to join us and talk freely about our wonderful Section. If you are a newer member of our Section, I encourage you to join us to network with your fellow professionals. If you know someone who would benefit from learning more about our Section, I encourage you to invite them. Feel free to remind others that under the new NCBA dues model, attorneys in their first and second year of practice pay no dues. In addition, all NCBA members can join one Section at no additional charge.

Becoming active in the Section as a volunteer is easily one of the best decisions of my professional career. I have become friends with many of our best estate planning attorneys, and I have seen first-hand the work that is done by our Section on behalf of our profession and on behalf of the people of North Carolina.

I want to thank Rebecca Smitherman for her leadership as Chair during the past year and for her previous work on behalf of the Section, including as Chair of our Legislative Committee. I also want to thank our outgoing council members, Elie Foy, Jim Hickmon, Carl King, Holly Norvell, and John Veasey.

Electronic Wills:
The Future Has Arrived —
Are You Ready?

By Janice L. Davies and S. Blaydes Moore

Electronic wills are recognized today in a number of jurisdictions outside the United States and in at least four states in the United States. Statutory law recognizes electronic wills in Nevada, Indiana, Arizona, and Florida, and other states are considering legislation to recognize electronic wills. Case law has recognized the validity of electronic wills under the existing Statute of Wills. In July 2019, the Uniform Law Commission approved and recommended the Uniform Electronic Wills Act (the “UEWA”) for enactment in all states. Therefore, electronic wills are coming, and it is simply a matter of when, where, and how for North Carolina.

A testator makes her wishes known by creating a will that lays out her intent regarding disposition of her property upon her death. When doing so, a testator must follow a set of formalities in creating and executing a will to ensure the authenticity of the will presented to probate. A traditional or non-electronic will is written on paper signed and attested with wet ink. An electronic will is written, signed, and attested all using an electronic medium. These formalities ensure authenticity of the will by creating a reliable and efficient form and method for will creation and execution, by cautioning the testator of the gravity of the action she is about to take, and by protecting the testator from those who may attempt to take advantage of her.

Traditionally, the three formalities of a will are referred to as a writing, a signature, and an attestation. The formalities associated with a will, by and through the four functions of those three formalities, help ensure that a valid will is admitted to probate. The four functions of the formalities are evidentiary, channeling, ritual/cautionary, and protective. The formalities ensure that (i) a will provides accurate and enduring evidence of the intent of the testator; (ii) the testator's wishes are expressed such that practitioners can operate efficiently in carrying out those wishes, (iii) execution of a will imposes solemnity on the testator such that she appreciates the final and enduring nature of the will, and (iv) the testator is protected from fraud, undue influence, delusion, coercion, forgery, and perjury. John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975).

Technology has become commonplace in communicating, shopping, banking and addressing many other matters. Similar to other technology, the technology of electronic wills may present testators, attorneys, and, particularly, probate courts and clerks of court with novel circumstances. In the future – and even now – attorneys will present an electronic will to probate while...
Carl King and Holly Norvell will remain on the Section Council as each was elected to an additional three-year term at our annual meeting in July at Kiawah. Our membership also elected Ansley Cella, Caitlin Horne, and Anna Winger each to serve a three-year term on the Section Council. The other members of our Section Council are Stephanie Daniel, Paula Kohut, Kemp Mosley, Todd Stewart, Carter Webb, Andrea Chomakos, Janice Davies, Mark Hale, Larry Meyo, and Adam Shealy. Our other officers are Rebecca Smitherman (Immediate Past Chair), Jessica Hardin (Vice Chair), David Lewis (Treasurer), and Elie Foy (Secretary).

The work of our Section is primarily performed by our committees and task forces, so I would like to acknowledge all of the chairs of the following committees and task forces:

- CLE Committee: Caitlin Horne and B.J. Kilgore
- Communications Committee: Lucy Siler and Heidi Royal
- Estate Administration Manual Committee: Anna Winger and Zac Lamb
- Ethics Committee: John Kelso
- Fiduciary Litigation Committee: Kim Kirk
- Fundraising Committee: Linda Johnson and Tanya Oesterreich
- Legislative Committee: Kemp Mosley and Judy Linville
- Pro Bono Committee: Brooks Jaffa
- Technology Committee: Carter Webb
- Joint Task Force with the NC Bankers Association: Andrea Chomakos
- Joint Task Force with the Clerks of Court: Mark Hale
- Joint Task Force with the Family Law Section: Rebecca Smitherman

In addition, Tyler Chriscoe is our Section's liaison with the Young Lawyers Division, Kara Gansmann is our Section's liaison with the Elder & Special Needs Law Section, and Linda Johnson is our liaison with the NCBA Board of Governors.

I look forward to working with our entire Section leadership as well as the many other attorneys and paralegals who serve on our committees. As you can see, numerous professionals volunteer their time to make our Section a success, and our reputation is well-deserved. If you would like to contribute your time, become more familiar with the Section's activities, and meet many other wonderful attorneys who share our practice area, please contact me at tim@jonesbranz.com to discuss opportunities to get involved.

Section CLE Scholarship Opportunity

One of the greatest benefits of being a member of our Section is the unparalleled CLE sponsored by our Section throughout the year. Our Section Council annually considers and adopts as part of its budget an allowance for scholarships to be awarded to members of the Section. These scholarships may be awarded to pay for the cost of tuition and related travel expenses for live CLE programs sponsored by the Section during such fiscal year, including the Section Annual Meeting. Scholarships may also be awarded to pay for the cost of tuition for online CLE programs sponsored by the Section. The purpose of awarding the scholarships is to facilitate participation and attendance at valuable CLE and meetings for members of our Section who otherwise may not be able to attend such events due to financial or other constraints. If interested, please email Andrea Bradford at abradford@ncbar.org to obtain an application and a description of scholarship qualification factors.
Electronic Wills, continued from page 1

probate courts or clerks of court will need to determine the validity of an electronic will. If you doubt that electronic wills are approaching simply because North Carolina has not yet enacted legislation on electronic wills, you must realize that a resident of Nevada, Indiana, Arizona, or Florida may move to North Carolina and die a resident of North Carolina having executed an electronic will valid in one of those jurisdictions.

Advocates of electronic wills expect e-wills to reduce barriers to estate planning such as accessibility. A client’s inability or resistance to come to the office may represent a significant hurdle to planning. A client may be more likely to move forward with her planning if she can meet with an attorney via real time audio-visual conferencing and later sign before witnesses and a notary electronically, each of them observing over distance via a real time audio-visual conference. Especially in a field that assists older or less mobile clients, technology provides increased convenience and access, but advocates and opponents alike are concerned with the logistics of distance witnessing and notarizing and the inherent potential for fraud.

Over the past months, the authors have been met with questions and concerns after simply mentioning electronic wills. To answer these questions, practitioners should turn to reliable, time-honored methods of assessing testamentary instruments. For centuries, attorneys have relied on the formalities of a will and their functions to alleviate concerns about the probate of a traditional, non-electronic will. It is safe to say that many North Carolinians do not want to forge the path ahead in this new field of electronic planning documents. During our journey through these pioneer days and into the future, attorneys should find comfort in their reliance on traditional will formalities and the protections they provide when probating electronic wills.

Cases

An introduction to electronic wills is not complete without a summary of a subset of the growing number of cases in the United States in which courts address electronic wills in the absence of a direct electronic wills statute. While most of these cases do not offer significant precedential value because they are probate or intermediate appellate cases, and two of the cases decided on traditional probate law do not present issues unique to electronic wills, these cases are demonstrative of courts’ attempts to protect the interests of testators when faced with non-traditional testamentary instruments in the absence of clear legislative safe harbors.

United States. In Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003), Steve Godfrey personally prepared a will on his computer and affixed his computer generated signature at the end of the document in the presence of two neighbors, Hershell Williams and Teresa Williams, who also witnessed the will by signing with a pen by hand at Godfrey’s request. In the document, Godfrey devised everything he owned to a person identified only as Doris. Godfrey died approximately one week later. Doris Holt (Defendant), Godfrey’s live-in girlfriend and the sole beneficiary of the will in question, submitted the will for probate. Donna Godfrey Taylor (Plaintiff), Godfrey’s sister, filed a complaint alleging, in part, that the will was not signed and that Godfrey had died intestate. The trial court granted Defendant’s motion for summary judgment.

Tenn. Code Section 32-1-104 (1984) addresses the requisite formalities for executing and witnessing a (non-electronic) will in Tennessee:

The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator shall signify to the attesting witnesses that the instrument is his will and either:
   (A) Himself sign;
   (B) Acknowledge his signature already made; or
   (C) At his direction and in his presence have someone else sign his name for him; and
   (D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.

(2) The attesting witnesses must sign:
   (A) In the presence of the testator; and
   (B) In the presence of each other.

Crucially, Tennessee’s definition states that “‘signature’ or ‘signed’ includes a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed.” Tenn. Code § 1-3-105(27) (1999).

The appellate court affirmed the trial court’s judgment, holding that the computer generated signature made by Godfrey falls into the category of “any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record,” and, because it was made in the presence of two attesting witnesses, was sufficient to constitute proper execution of a will. The court noted that Godfrey simply used a computer rather than a wet ink pen as the tool to make his signature, and, therefore, complied with Tenn. Code Section 32-1-104.

The signature in Taylor was an electronic signature, but it is only one example. The court’s reasoning focused on the lack of significance of the medium used to affix a signature, but it may not have accepted the signature had it been a clickwrap signature or the affixation or association of some other authentication characteristic. The court found the signature acceptable under non-electronic wills law for all intents and purposes; the only unique aspect was the application of software rather than application of a wet ink pen. The court in this case admitted the instrument to probate because the considerations of the four functions were met.

In Litevich v. Probate Court, 2013 W.L. 2945055 (Conn. Super. Ct. 2013), an unmarried woman ordered a will from LegalZoom in 2011 and provided her social security number in the process. The testatrix died after her document arrived, but before she could execute it. Beneficiaries under a previous will executed in 1991 successfully probated the previous will, but beneficiaries of the 2011 LegalZoom will sought to probate the unsigned instrument. The court found that the attestation requirement was not antiquated but was instead of more vital importance than ever given the rise of online fraud and catfishing. The beneficiaries of the 2011 will contended that providing her social security number acted as the testatrix’s signature, but the court found that providing a social security number - regardless of its unique and private nature - did not act as a signature. The court further held that providing a social security number
would not legitimize the document even if Connecticut recognized the harmless error rule. The court noted that in eight of the jurisdictions recognizing it, the harmless error rule had not been used to save a will featuring no signature on the face of the document.

The “harmless error” rule - or “harmless error” doctrine - is a feature of some states’ wills statutes that provides for the admission of documents as wills in the absence of strict adherence to the statutory formalities in certain cases where the testator's intent that the document act as his or her last will can be proven. Generally, the harmless error rule occasionally allows errors in signature and attestation but not in the writing requirement.

In In re Estate of Castro, Case No. 2013ES00140 (Probate Div., Court of Common Pleas, Lorain County, Ohio 2013), while at the hospital shortly before his death, Javier Castro dictated his testamentary intentions to his brother, who recorded them on a Samsung tablet using a stylus. Later, at another hospital, Mr. Castro signed the will electronically on the tablet using the stylus in the presence of his brothers, who then used the stylus to electronically sign their names on the tablet as witnesses below the electronically handwritten will. Mr. Castro died a short time later, and his brothers printed the electronic will onto paper and presented it for probate.

Ohio's requirements for a valid will are found in Ohio Rev. Code Section 2107.03, which provides that “except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.”

Ohio's statutory chapter on wills does not define “writing.” Therefore, the court relied on a definition of “writing” in Ohio Rev. Code Section 2913.01(F), which states that “writing,” in the criminal context of theft and fraud, “means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.”

Employing this definition of “writing” borrowed from Ohio’s criminal code, the Castro court found that the stylus marks made on the tablet by hand and saved by the application constituted a “writing” for purposes of the law of wills. The court reasoned that the testator's mark created with the stylus and captured by the application was a signature because it was a graphical image of Mr. Castro's handwritten signature stored by electronic means on the tablet.

In the absence of an attestation clause, the court appeared uncomfortable admitting the will under Ohio’s requirements for a traditional or non-electronic will found in Ohio Rev. Code Section 2107.03. The court ultimately admitted the "handwritten" will to probate under Ohio Rev. Code Section 2107.24(A), Ohio's modified version of the Uniform Probate Code's harmless error provision. In summary, Ohio’s harmless error doctrine permits rescue of a noncompliant or defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent: (i) prepared or caused the document to be prepared, (ii) signed the document and intended the document to constitute his or her will, and (iii) signed the document in the conscious presence of two or more witnesses.

Castro appears to indicate that wills executed electronically but in conformity with traditional execution formalities would likely be valid under existing statutes in most states (or at least in Ohio), without a need for legislation specifically authorizing electronic wills.

In In re Estate of Horton, 325 Mich. App. 325, 925 N.W.2d 207 (2018), Guardianship and Alternatives, Inc. (GAI) filed a “final note” consisting of “apologies and personal sentiments directed to specific individuals, religious comments, requests relating to … funeral arrangements, … many self-deprecating comments … [provisions] regarding the distribution of decedent's property after his death … explanations for his suicide, final farewells, and advice” drafted on Evernote note-taking software as the will of Duane Francis Horton II in the Probate Court of Berrien County, Michigan. Id. at 327, 336. The court found that Horton took his own life shortly after drafting the note, which was found near a handwritten journal entry intended to lead whoever discovered Horton to the Evernote document. Horton's mother, Lanora Jones, appealed the decision to admit the Evernote document to probate.

The Estates and Protected Individuals Code, Mich. Comp. Laws Section 700.1 et seq., governs wills in Michigan. Generally, to be valid, a will must be executed in compliance with Mich. Comp. Laws Section 700.2502, which requires that a will be (i) in writing, (ii) signed by the testator or by someone in the testator's presence and at his direction, and (iii) witnessed by two independent witnesses. Alternatively, a holographic will is valid if it is dated and the testator's signature and the material provisions of the documents are in the testator's handwriting. Michigan also recognizes the harmless error rule found in Mich. Comp. Laws Section 700.2503, which provides that if the proponent of the document in question can establish by clear and convincing evidence that the decedent intended the document to constitute his will, then the document will be treated as if it was executed in compliance with Mich. Comp. Laws Section 700.2502.

The Horton court held the Evernote document did not satisfy the formal requirements of a will, but that the harmless error rule does not require any specific formalities of execution in order for a document to constitute a valid will. The court further held that the Probate Court did not err in determining the contents of the Evernote document were sufficient to express Horton's testamentary intent because the document (i) was written with the testator's death in mind, (ii) contains requests regarding funeral arrangements, and (iii) dictates the distribution of the testator's property after his death.

Extrinsic evidence supported the Horton court's conclusion. The handwritten journal entry directed readers to the Evernote document, and there was not a significant period of time between the time when the testator concluded drafting and discovery of the document. The court found that it was unlikely that the document was modified between the time of drafting and the point in time it was submitted for probate. The circumstances of the case -- namely the timing of events, the tragedy of the suicide, and Horton's strained relationship with his mother -- all support the conclusion that the Evernote document sufficiently satisfied the requirements of the wills formalities and functions to admit it to probate under the harmless error rule.

Absent a statutory solution spelling out safe harbors, similar circumstances with different specific facts could lead a court to conclude that an instrument similar to Horton's should not be admitted to probate. More importantly, harmless error analysis is unavailable in a majority of jurisdictions and case by case litigation is inefficient and a frustration of the channeling function of the formalities.
International. Cases outside the United States in Canada, Australia, and South Africa also provide a historical perspective for electronic wills. In Rioux v. Coulombe (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.) (Canada), a word processing document preserved on a disk was admitted to probate pursuant to the jurisdiction’s dispensing power because the imperfect will satisfied a form of the harmless error rule requiring that the instrument submitted for probate unquestionably and unequivocally contain the last wishes of the deceased.

Two Australian cases warrant mention. In Re: Yu, 2013 Q.S.C. 322 (Q.S. Ct., 2013), the court admitted for probate an iPhone document, holding that the instrument satisfied the jurisdiction’s writing requirement because it was intended to form the testator’s will and purported to state testamentary intention. In Re Nichol, 2017 Q.S.C. 220 (Q.S. Ct., 2017), an unsent text message to the decedent’s brother was admitted to probate as decedent’s will because the court determined that the decedent’s unsent text message was an electronic document satisfying the applicable definition, the contents of the message indicated the decedent’s intent that it represent his testamentary intentions and, based on extrinsic evidence, the decedent had testamentary capacity and intended the unsent text to act as his will.

South African cases also evidence a trend toward accepting noncompliant instruments under a harmless error analysis. In MacDonald and Others v. The Master and Others, 2002 (5) SA 64 (N) (South Africa), the court admitted to probate a word document saved to computer secured by password found as a result of a suicide note because the court found that the document was highly likely to have been written by decedent. In Van der Merwe v Master of the High Court and another (605/09) (2010) ZASCA 99, a man’s unsigned will emailed to his sole beneficiary, his best friend, in fulfillment of their oral agreement to prepare reciprocal wills naming each other the beneficiary of the other’s estate was admitted to probate under South Africa’s harmless error equivalent due to the nature of the relationship between the testator and beneficiary, the fact that the word “TESTAMENT” was written in large font at the head of the emailed document, the testator’s lack of any family, and the lack of opposition.

These cases demonstrate a growing trend toward admitting instruments to probate that do not satisfy the traditional strict formalities in situations where testamentary intent is clear and the four functions of the formalities have been satisfied in other ways. For example, cases in which the decedent died by suicide leaving a writing with testamentary intent demonstrate how facts can show that the functions were fulfilled for the testator. In Horton and MacDonald, the facts led those courts to conclude that the testators appreciated the solemnity of making a testamentary instrument due to their expectation of death and were protected from fraud or tampering due to the security possible through software and timing.

Courts have wielded the harmless error doctrine as a useful tool to allow probate of non-traditional testamentary instruments fashioned through the use of new technology where the circumstances indicate that the functions of the formalities have been satisfied, but such a broad doctrine with inconsistent application across jurisdictions despite factual similarities does not provide the necessary security or consistency created by a statutory solution that provides a tailored safe harbor for electronic wills in lieu – or in fulfillment of – non-electronic will formalities.

Statutes

Multiple states have sought to create the necessary framework by enacting statutes for electronic wills and other electronic estate planning documents. Nevada, the first such state, has permitted digital will signing since 2001 and updated its statute in 2017. The Nevada statute addresses the needs of the four functions by relating their fulfillment back to traditional wills formalities interpreted in light of the technology available in the modern age.

Nevada. Under Section 133.085 of the Nevada Revised Statutes, electronic wills must be in writing and signed, but the form of the writing and signature may be electronic. Furthermore, the attestation formalities may be satisfied by at least one of the following: an electronic notary, electronic signatures of two witnesses, or an authentication characteristic of the testator. “Authentication characteristic’ means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature or other commercially reasonable authentication using a unique characteristic of the person.” Nev. Rev. Stat. § 133.085 5(a). Finally, to satisfy the electronic wills statute, the electronic instrument must be “created and maintained in an electronic record.” Nev. Rev. Stat. § 133.085 1(a).

Nevada’s statute respects the traditional formalities while recognizing the distinctions inherent in the use of emerging technology. By allowing the formalities to be satisfied electronically, Nevada has opened itself to the possibility of new technology while preserving the core functions practitioners have relied on throughout living memory. But allowing the use of electronic means to create a testamentary disposition invites questions as to security. What prevents a will from falling prey to the same questions that plague electronic authenticity, namely verification that the information is accurate, intentional, and traceable to a reliable source? Nevada and other jurisdictions meet such concerns through special requirements for making electronic wills self-proving.

To be self-proving, the witness declarations or affidavits must be “incorporated as part of, attached to or logically associated with the electronic will, as described in Nev. Rev. Stat. Section 133.050,” and the instrument must designate a qualified custodian which must maintain custody of the electronic will until it is reduced to a certified paper for probate. Nev. Rev. Stat. § 133.086. The qualified custodian contributes to satisfaction of the evidentiary and channeling functions. By requiring that electronic wills be preserved by a qualified custodian, Nevada ensures that the instrument is protected from tampering in the intervening time between execution and submission for probate, and that the instrument will be in a form that allows practitioners to process the will efficiently.

The traditional will formalities ensure that a will is not tampered with through a requirement that the testator sign in wet ink before witnesses because the wet ink signature cannot be replicated. That an electronic image or mark can be so easily replicated means that such an image must be guarded. The traditional will formalities ensure that a will is in an efficient form through the writing requirement. Nevada’s electronic will statute satisfies this formality by delineating what forms of writing and attestation will be accepted. The definition is sensible given the myriad forms of electronic information transfer and authentication.
Qualified custodians make up a framework of information fi-
duciaries. Such custodians, qualified by the State of Nevada, watch
over the electronic record and ensure that the document is preserved
under an uninterrupted chain of custody from the date of execution
to such time as the electronic will is reduced to paper for probate.
The qualified custodian may transfer custodianship of an instrument
by executing an affidavit affirming that the chain of custody under
qualified custodians has not been broken, which essentially verifies
that the functions have been satisfied for the period of time during
which the affiant – and all previous qualified custodians – watched

Similar to a chain of title of real property, a chain of custodianship
is created through the use of these affidavits up to the point when an
electronic will is ready for submission to probate. Nevada still requires
that wills be probated in paper, and a final affidavit must accompany
an electronic will when it is reduced to a certified paper copy. Such
affidavits verify the chain of qualified custodianship and affirm that
the functions have been satisfied. See also Nev. Rev. Stat. § 133.340, ad-
dressing electronic wills with a broken chain of custodianship.

Nevada’s statute does not require that testators be physically
present in the state or that they be in the physical presence of the wit-
nesses or notary. This means that a testator located in a jurisdiction
that does not recognize electronic wills that is outside the geographical
boundaries of the state could execute an electronic will according to
Nevada rules and still have a valid instrument. While Nevadans may
accept this, other states, including North Carolina, reject electronic
wills not executed within the physical bounds of the jurisdiction
governing the instrument.

**Indiana.** Indiana is one such jurisdiction. Under the Indiana statute,
“an electronic will is legally executed if the manner of its execution
complies with the law of: (1) [Indiana]; (2) the jurisdiction that the tes-
tator is actually present in at the time of execution; or (3) the domicile
of the testator at the time of execution or at the time of the testator’s
death.” Ind. Code § 29-1-21-7. Indiana further distinguishes its elec-
tronic wills statute from Nevada’s by requiring under Ind. Code Sec-
tion 29-1-21-4(3) that the witnesses sign in the “actual presence” of
the testator, defined as “physically present in the same physical location
as the testator. The term does not include any form of observation or
interaction that is conducted by means of audio, visual, or audiovisual
telecommunication or similar technological means.” Ind. Code § 29-
1-21-3(1).

Otherwise, Indiana’s statute does not differ grossly from Ne-
vada’s. It makes similar use of an information fiduciary framework in
establishing “a statewide electronic estate planning documents reg-
istry under rules adopted by the Indiana Supreme Court.” Ind. Code
§ 29-1-22-2(a). Electronic records maintained by the registry, which
is publicly available, include electronic wills, trust instruments, and
powers of attorney, and may be accompanied by document integ-
rety evidence, which is the part of the electronic record that prevents
tampering and verifies the identity of the testator. Ind. Code § 29-1-
22-1(2). For example, an electronic record may be protected through
public key encryption which serves a dual purpose of verifying iden-
tity and securing the contents of the record. An in depth discussion
of public key encryption is outside the scope of this article, but pub-
lc key encryption renders data unintelligible except when unlocked
with a password unique to the creator of the document, rendering it
impossible to edit without authorization and ensuring it was created
and verified by a single person.

The administrator of the Indiana registry will prepare a certified
transcript of an electronic record when an interested party makes a
written request. Such a transcript takes the form of a complete con-
verted copy of the electronic instrument, including any document
integrity evidence associated therewith. The definition of the com-
plete converted copy produced in the transcript reflects Nevada’s
requirement that electronic wills be probated in hard copy: a com-
pleted converted copy is one that “(A) can be visually perceived in
its entirety on a monitor or other display device; (B) can be printed;
and (C) contains” the text, signatures of the testator and witnesses, a
readable copy of all document integrity evidence, and, if applicable,
a self-proving affidavit. Ind. Code § 29-1-22-1(1). Like Nevada, by
defining and limiting the medium of delivery, Indiana’s statute con-
strains testators and practitioners to reasonable means of creating a
testamentary instrument that ensure clerks and probate judges will
receive a document that can be efficiently processed.

**Arizona.** Other states are passing similar statutes. Arizona’s elec-
tronic will statute allows wills to “be created and maintained in an
in the physical presence of the testator as the testator signs. Ariz. Rev.
Stat. § 14-2518 A.3(a). Electronic wills may be made self-proving
with the application of an electronic notary and with storage by a
qualified custodian from the time of execution until the time the
Qualified custodians must be independent and unrelated to the tes-
tator, they may not benefit from the will, and they must employ soft-
ware that tracks changes, destruction, and attempted unauthorized
access. Qualified custodians must also keep an audio-video recording
of the signing and pictures of the signing testator, witnesses and
for reducing an electronic will to paper as well as further require-
ments for qualified custodians including rules for access, amend-

**Florida.** On April 28, 2017, Florida House Bill 277 (2017) passed
111-8. That bill would have created the Florida Electronic Wills Act,
which would have created rules for electronic wills, probate of elec-
tronic wills created in other jurisdictions, and service as a qualified
custodian. However, Governor Rick Scott vetoed the bill citing con-
cerns over the authentication measures required of remote notaries.
Letter from Rick Scott, Governor of Florida, to Ken Detzner, Florida
Secretary of State (June 6, 2017), available at <https://floridaprobate.
lexblogplatform.com/wp-content/uploads/sites/206/2017/06/HB-

Florida Senate Bill 548, passed on May 1, 2019, is a new elec-
tronic documents and notary law that will take effect on Jan. 1, 2020,
which lays out requirements for electronic wills, electronic distance
notaries, and qualified custodians. An electronic signature must be
“visibly manifested in a record as a signature.” Fla. Stat. § 732.521(3)
(effective Jan. 1, 2020). Electronic wills may be signed, witnessed,
and notarized electronically. Fla. Stat. § 732.522 (effective Jan. 1,
2020). Florida further follows other jurisdictions in its application of
the information fiduciary framework. Florida requires that a quali-
fied custodian be designated to store the will for the duration of time
from execution to submission for probate in order for the electronic
Unlike some other jurisdictions, however, Florida allows for direct e-
filings of the electronic will for probate under Fla. Stat. § 732.526 (ef-
A North Carolina resident, domiciled in this State, who is not, has never been, and never will be physically present in Nevada, or have any other connection with Nevada for that state to treat an electronic will as a Nevada will executed in Nevada. As a result, for example, a North Carolina resident, domiciled in this State, who is not, has never been, and never will be physically present in Nevada, prior to July 26, 2019, could have remotely executed a Nevada will while physically present in North Carolina, and Nevada would have treated that will as having been executed in Nevada.

However, North Carolina law now states that "a will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator, or if any of the following apply: (1) The will's execution complied with the law of the jurisdiction in which the testator was physically present at the time of execution. (2) Its execution complied with the law of the place where the testator was domiciled at the time of execution or at the time of death. (3) It is a military testamentary instrument." N.C.G.S. § 31-46.

North Carolina does not desire to be a pioneer in this burgeoning field. North Carolina must likely adopt a process by which electronic wills that come to North Carolina alongside their testators can be probated according to existing or traditional processes. The process of admitting such electronic wills to probate may reflect the general process for admitting foreign wills to probate. Regardless of whether the applicable state electronic wills statute makes use of the information fiduciary framework espoused by Nevada and Indiana, an affidavit proving the completion of formalities similar to the affidavit required in many jurisdictions swearing to the validity of a foreign will likely prove the most effective way of efficiently probating electronic wills from a foreign jurisdiction that are reduced to a physical copy for domestic probate.

North Carolina currently requires the personal representative to submit an affidavit confirming the validity of a foreign will before admitting the foreign will to probate (AOC-E-309, Rev. July 19) (2019). Florida law requires petitioners to submit proof that a foreign will was probated or validly executed in the foreign jurisdiction when submitting a foreign will to probate (Florida Bar Form No. P-3.0140) (2013). Indiana requires document integrity evidence proving the validity of an electronic will (Ind. Code § 29-1-22-1(2)), and Nevada requires that the electronic record of the electronic will be reduced to a certified physical original accompanied by an affidavit from the qualified custodian satisfying Nev. Rev. Stat. Section 133.340.

As discussed above, consistency and reliability in a statutory framework will assist practitioners as the use electronic wills grows and spreads. In July, the Uniform Law Commission recommended all states adopt the UEWA. The UEWA is discussed by Linda Funke Johnson in this issue of The Will and the Way.

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The Future of Estate Planning: Uniform Electronic Wills Act ("E-Wills")

By Linda Funke Johnson

"Without change there is no innovation, creativity, or incentive for improvement. Those who initiate change will have a better opportunity to manage the change that is inevitable." William Pollard, as-quotes.com (last visited October 30, 2019). At the annual conference held on July 12-18, 2019 held in Anchorage, Alaska, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states the Uniform Electronic Wills Act. The Final Act, with comments, is available at https://www.uniformlaws.org/viewdocument/final-act-with-comments-130 (last visited Oct. 26, 2019). This article discusses the reasons for initiating the E-Wills Act and provides a summary of all sections of the Act and Comments as shown on the Uniform Law Commission website.

Electronic Execution of Estate Planning Documents

In commercial and other contexts not involving a will, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA § 7(a). However, UETA contains an express exception for wills and testamentary trusts, making the E-Wills Act necessary if a legislature wants to permit electronic wills. UETA § 3(b). As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001. The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) includes a similar exception. 15 U.S.C. § 7003(a)(1).

The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. ULC members are lawyers, qualified to practice law, including practicing lawyers, judges, legislators and legislative staff and law professors. ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

In 2019, four states have electronic wills legislation: Arizona, Indiana, Florida, and Nevada, with eight other states considering such bills. The ULC became concerned with inconsistency that would follow if the states adopted new legislation without uniformity. Therefore, the ULC placed priority on enacting an E-Wills Act.

The E-Wills Act seeks to (i) allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper); (ii) create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and (iii) develop a process that would not enshrine a particular business model in the statutes.

The E-Wills Act preserves the four functions of will formalities. The four functions are:

1. Evidentiary – the will provides permanent and reliable evidence of the testator's intent.
2. Channeling – the testator's intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
3. Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
4. Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.

John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975) (citing Lon Fuller, Consideration and Form, 41 Col. L. Rev. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuities Transfers, 51 Yale L.J. 1, 5-13 (1941), which identified the other functions.

Provisions of the Act

Section 1 of the Act states that the act may be cited as the "Uniform Electronic Wills Act".

Section 3. Law Applicable to Electronic Will; Principles of Equity. Section 3, Comment discusses that Section 3 ensures that an electronic will is treated the same as a traditional will. The existing statutory and common law requirements that apply to wills in general also apply to electronic wills; specifically discussed in the Comments is the testator's intent and challenges to a writing based on allegations of undue influence, duress, or fraud.

Section 4. Choice of Law Regarding Execution. A will executed electronically but not in compliance with Section 5(a) of the E-Wills Act is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

(i) physically located when the will is signed; or
(ii) domiciled or resides when the will is signed or when the testator dies.

The Comment to this Section discusses that many state statutes now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. The Comment offers the following example:

Gina lived in Connecticut and was domiciled there. During a trip to Nevada Gina executes an electronic will, following the requirements of Nevada law. The will is valid in Nevada and also in Connecticut, because Gina was physically present in a state that authorizes electronic wills when she executed her will. Now assume that Gina never leaves the state of Connecticut. While at home she goes online, prepares a will, and executes it electronically using Nevada law. The will is valid in Nevada but not in Connecticut, unless Connecticut adopts the E-Wills Act. This rule is consistent with current law for non-electronic wills.

A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy. Example: Dennis lived in Nevada for twenty years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis executed the will in compliance with Nevada law in force at the time of execution, using the lawyer's electronic platform and providing the required identification. The lawyer had no concerns about Dennis's capacity and no reason to believe that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have otherwise been valid under Connecticut law.

Section 5. Execution of Electronic Will. The E-Wills Act does not duplicate all rules related to valid will execution, therefore if it is not listed in the execution steps of the E-Wills Act, then the state rules of execution will apply. Section 5 of the E-Wills Act follows the requirements in UPC Section 2-502. Under Section 5 of this Act an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations. Furthermore, Section 8 of the Act provides the requirements to make the will self-proving if the testator and witnesses are in different locations.

The requirement of a "writing," as outlined in UPC Section 2-502, states "any reasonable permanent record is sufficient." The E-Wills Act requires the electronic will be readable as text at the time the testator executed the will. Examples include a will inscribed with a stylus on a tablet, see In re Estate of Javier Castro, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013); and a word processing document on a computer or cell phone that is not printed. The issue is whether the testator signed the will and the witnesses attested it. The Act does not cover use of a voice activated computer program to create a text document. See the Act itself for the definition of electronic signature - at the time of signing, the testator must intend the action taken to be a signature validating the electronic will.

The Execution requirements also include a witness requirement for several reasons: (i) evidentiary, (ii) cautionary and (iii) protective. However, when the testator's intent was clear, the harmless error doctrine has been used to make effective the execution of a will without witnesses. See, e.g., In re Estate of Horton, 925 N.W.2d 207, 325 Mich. App. 325 (2018). A state concerned that a will may be invalidated due to lack of witnesses can adopt the harmless error provision of Section 6 of the E-Wills Act.

The comments to Section 5 also discuss the issue of a remote witness. Must the witnesses to the testator's signature be in the physical presence of the testator, or does an electronic presence suffice? Is there sufficient contact when viewing the execution remotely to determine if there is undue influence or if the testator has capacity? The witnesses, whether physically present or by an electronic presence, must sign within a reasonable time after witnessing the testator sign or acknowledge the signing of the will. The comments suggest that remote attestation should not create new evidentiary burdens, because the current legal standards and procedures used to determine whether a witness has knowledge of a testator's capacity or undue influence can be applied to remote witnesses as well as physical witnesses.

Section 6. Harmless Error. Two alternatives are presented for adopting a harmless error rule. Alternative A provides that a propo-

nent of the record establishes by clear and convincing evidence that the decedent intended the record to be: (i) the decedent's will; (ii) partial revocation or complete revocation of the decedent's will; (iii) an addition or modification of the decedent's will or (iv) a partial or
complete revival of the decedent’s formerly revoked will or part of the will. The clear and convincing evidence must establish the testator’s intent that this record is the testator’s will despite the defect in the execution formalities. Alternative B proposes Section 2-503 of the UPC or comparable state law. Alternative B would apply to states that have enacted a harmless error rule for a non-electronic will. Eleven states have the harmless error doctrine and it has been in the UPC since 1990.

Section 7. Revocation. Revocation by physical act is permitted for non-electronic wills. The issue becomes, how is an electronic will removed? Some examples of revocation include use of a delete or trash function on a computer. The comments provide the following example of revocation for electronic wills:

Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will by the physical act of deleting the duplicate original on her computer. Under the E-Wills Act, a court could reasonably conclude that a preponderance of the evidence supports a finding of a physical act revocation. If the will on the computer had been deleted but the only person who could testify about Yvette’s intent was the niece, the court might conclude that the niece’s self-interest made her testimony less persuasive. The evidence in that case might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette’s computer.

The comments address the issue of accidental deletion of an electronic will and state that this should not be considered a revocation of the will. Instead, under common law, there would be a presumption that the will was revoked, but the presumption can be overcome by extrinsic evidence that provides another explanation. If the extrinsic evidence is sufficient to overcome the presumption of revocation, the contents of the will can be proved through a copy of the will or by testimony of the person who drafted the will.

Section 8. Electronic Will Attested and Made Self-Proving at the Time of Execution. The Electronic Will can be made self-proving by acknowledgement of the testator and affidavits of the witnesses at the time of execution. This Section outlines the language to be used in the affidavit and offers a form. A state that has not enacted the UPC should conform Section 8 to its self-proving affidavit statute. Remote Online Notarization provides that a person signing a document appears before a notary using audio-video technology. Since the signer and the notary are in two different places, extra security measures must be taken to establish the signer’s identity. Remote online notarization can only be used in states that have adopted a statute allowing remote online notarization. Otherwise, the notary must be physically present in order to administer the oath under the law of that state.

Section 9. Certification of Paper Copy. A certified paper copy of an electronic will may be made by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true and accurate copy of the electronic will. The legislative notes to this Section suggest that a state may want to include procedural rules specifically for electronic wills.

Section 10. Uniformity of Application and Construction. In application of the E-Wills Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 11. Transitional Provision. An Electronic will may be valid if executed before the effective date of the E-Wills Act if the Act’s requirements are met and the testator dies on or after the effective date.

Conclusion

Whether one embraces the use of technology or not, electronic wills are coming to North Carolina. The General Statutes Commission (GSC) and the subcommittee of the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association are studying the E-Wills Act. With our mobile population and public’s increasing use of technology, it will be wise for our state to adopt its own version of the Electronic Wills Act sooner than later. There is a strong argument to be made that the law should make it easier for people to execute valid wills. The law can leverage existing technology to accomplish this goal. This goal may be achieved by the adoption of the E-Wills Act in North Carolina. https://actecfoundation.org/podcasts/digital-will-electronic-will-ewill/ (Updated October 30, 2019).

Janice L. Davies and S. Blaydes Moore authored a companion article to this article which reflects the history of Electronic Wills, and the current state case law and statutory law in Electronic Wills. The article, in this issue of The Will and The Way, should be read in conjunction with this summary of the Act.

Please reach out to the author with comments and concerns in order that they may be presented to the subcommittee of the Legislative Committee formed to study this Act.

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Why Trustees Sometimes Wrestle With Enhanced Flexibility

By Kerri L.S. Mast

Trusts, which once conjured a notion of permanence, have become much more flexible. This flexibility can be helpful in the context of changing tax laws and unforeseen circumstances. However, this enhanced flexibility can create complex and challenging decisions for trustees.

Shhh… Don’t Tell The Kids

Generally, a trustee has a duty to keep trust beneficiaries reasonably informed as to the material aspects of a trust and its administration. Providing a beneficiary with this information ensures the beneficiary has the facts necessary to protect his or her interests. However, a grantor who is concerned about creating a negative incentive for a trust beneficiary may not wish for the trust’s beneficiaries to have information about the trust. The grantor may override the requirement that the trustee provide such information to beneficiaries. A trustee may wrestle with the relinquishment of this requirement.

In North Carolina, the trustee’s duty to inform and report to beneficiaries is covered in the North Carolina Uniform Trust Code (the “NC UTC”). See N.C.G.S. § 36C-8-813. Pursuant to the NC UTC, the trustee is under a duty to provide reasonably complete and accurate information as to the nature and amount of trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal. N.C.G.S. § 36C-8-813(a). The trustee may discharge this duty by sending to each qualified beneficiary an annual statement that describes the trust property, liabilities, receipts, and disbursements, including trustee compensation and trust assets and market values. N.C.G.S. § 36C-8-813(b)(2). In addition, in response to a reasonable request of any qualified beneficiary, the trustee is under a duty to: provide a copy of the trust instrument; provide reasonably complete and accurate information as to the nature and amount of trust property; and allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust. N.C.G.S. § 36C-8-813(b). The duty to inform and report extends only to qualified beneficiaries, as defined in N.C.G.S. Section 36C-1-103, and thus does not require a trustee to provide information to beneficiaries with remote remainder interests.

The provisions of the NC UTC outlined above are default provisions, and the extent to which the grantor should be permitted to override these provisions and prevent a beneficiary from receiving this information was one of the more debatable issues in the consideration and adoption of the NC UTC. See N.C.G.S. § 36C-8-813, North Carolina General Comments. Ultimately, the drafters concluded that in North Carolina, the grantor should have the right to override any duty of providing information to beneficiaries. This outcome is consistent with Taylor v. NationsBank Corp., where the court said that “trust beneficiaries are entitled to view the trust instrument from which their interest is derived” so long as that right is not waived by the grantor through “an explicit provision in the trust instrument to the contrary.” 125 N.C. App. 515, 481 S.E.2d 358 (1997).

In addition to the duty to inform and report, the trustee has a duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. N.C.G.S. § 36C-8-801. Importantly, while the grantor may override the duty to provide certain information to beneficiaries, as discussed above, the grantor cannot waive the mandatory duty of a trustee to act in good faith and in accordance with the terms of the trust and the interests of the beneficiaries. N.C.G.S. § 36C-8-813(b)(2). To the extent the lack of information interferes with a beneficiary’s ability to enforce his or her rights, the beneficiary might prevail. For example, in Wilson v. Wilson, the Court of Appeals held that the trial court may compel discovery of information that will assist a beneficiary in enforcing the beneficiary’s rights under the trust, even if the grantor expressly provides that the trustee is not required to provide information. 203 N.C. App. 45, 690 S.B. 2d 710 (2010). A claim for breach of fiduciary duty must be brought within three years of the time the claimant knew or should have known of the facts constituting the basis for the claim.

Given this context, it is understandable that a trustee might wrestle with the direction not to inform and report to beneficiaries. If a beneficiary is not receiving statements, there may not be an event to trigger the statute of limitations. Certain jurisdictions, including Delaware, have statutes that specifically provide for a surrogate – a third party who can receive information regarding a trust on behalf of a beneficiary and bind the beneficiary. The extent to which the surrogate serves in a fiduciary capacity differs by jurisdiction. North Carolina does not specifically provide for a surrogate in the context of the duty to inform and report. It is possible that a trust protector could serve in that role, but it is unsettled whether a trust protector could trigger the statute of limitations and effectively bind the beneficiary.

For a grantor who does not wish for a beneficiary to have information about the trust, consider including a specific provision that enumerates privacy, creditor protection and deferral of notice as material purposes of the trust until such time as the grantor dies or the beneficiary attains a certain age. This language would be in addition to language overriding the duty to provide information to the beneficiary. These provisions together may help the trustee get comfortable with delaying notice.

Flexibility around the information that flows to the beneficiaries can be useful. It might give the grantor desired privacy and protect the beneficiary from information that would be harmful or disincentivizing. However, the attempt to balance the intent of the grantor with the ability of the beneficiaries to enforce their rights is challenging, and it may be difficult to find a trustee who is willing to serve in these roles.
Slicing and Dicing the Fiduciary (or Non-Fiduciary?) Role

Another strategy that has been used with increased frequency is the use of a power holder, which is defined pursuant to N.C.G.S. Section 36C-8A-1 as a “person who under the terms of a trust has the power to take certain actions with respect to a trust and who is not a trustee or a settlor with a power to direct or consent.” The term “power holder” is intended to include both a “trust advisor” and a “trust protector” which are terms that have been commonly used to describe power holders. N.C.G.S. § 36C-8A, North Carolina General Comments. NC UTC Section 36C-8A-2 provides a range of specific powers that may be granted to a power holder, and these powers are intended to be nonexclusive.

One specifically enumerated power that is used frequently is the power to direct investments. This power frequently is used when the trust holds a concentrated position which the grantor wishes to retain but which could be problematic for a trustee given the duty to diversify pursuant to N.C.G.S Section 36C-9-903. This power also is often used when the trust holds a controlling interest in a private company, and the power holder is well-situated to manage, evaluate and vote the interests. There are other powers that are used granted to power holders, including the right to remove and appoint trustees, modify the trust to account for changes in the law, or change the governing law of the trust.

The ability to include a power holder can provide a tremendous amount of flexibility. But it can introduce some complexity, as well. Much of the complexity relates to the classification of the power holder’s role and the extent to which the trustee is required to review the power holder’s decisions. The power holder is deemed to be a fiduciary and, as such, is required to act in good faith and in accordance with the purposes and terms of a trust and the interests of the beneficiaries. N.C.G.S. §36C-8A-3. There are, however, several specific exceptions in the statute whereby the power holder is not deemed to be a fiduciary. Further, Article 8A is a default statute. So, the settlor could provide that the power holder is not a fiduciary at all, regardless of the power held. The drafters of Article 8A recognized that a decision by the settlor to waive fiduciary obligations of the power holder should be made with caution because the beneficiary would have no recourse if the power holder misused the power. N.C.G.S. § 36C-8A, North Carolina General Comments.

When a power holder can make decisions with respect to a trust, the trustee must consider the extent to which it has a duty to review the actions of the power holder. This issue is more challenging for trustees in jurisdictions where the Uniform Trust Code was adopted without significant modifications. The Uniform Trust Code requires the directed trustee to act in accordance with the direction, “unless the attempted exercise is manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would constitute a serious breach of fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” N.C.G.S. § 36C-8A, North Carolina General Comments. This requires the trustee to exercise a considerable amount of oversight. It requires the trustee to evaluate the decision in the context of the trust’s terms. It requires the trustee to evaluate the extent of the power holder’s fiduciary duty to the beneficiary. And it requires the trustee to consider whether the power holder has breached that duty. The drafters of the NC UTC recognized these challenges, and thus the NC UTC protects a trustee who follows the direction of a power holder “unless compliance with the direction constitutes intentional misconduct on the part of the trustee.”

North Carolina law provides protection to a trustee acting under direction of a power holder. However, if the settlor provides that the power holder is not a fiduciary, the trustee may be concerned that a beneficiary looking to enforce his or her rights might look to the trustee. A decision by the settlor to treat the power holder as a fiduciary would give the beneficiary a course of action if the power holder misused the power and, in addition, might mitigate any concerns held by the trustee that the beneficiary might otherwise look to the trustee.

Conclusion

Enhanced flexibility in the context of trust administration can be helpful in achieving the grantor’s goals and responding to unforeseen circumstances. However, this enhanced flexibility also can add complexity to the role of the trustee. Whenever possible, it is helpful to include the trustee in conversations during the drafting process to ensure the trust can be administered as expected.

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Philosophy 101 —
What is Reasonable Knowledge?

By Elie J. Foy

A good decision is based on knowledge and not on numbers. - Plato

On Sept. 27, 2019, the IRS Office of Chief Counsel turned the long-standing law regarding valuation of publicly-traded stock on its head. In the ruling, the Service held that the proper valuation for publicly-held stock was not the mean of the high and low trade prices on the date of the transfer, but rather outside factors had to be considered. Now practitioners are tasked with determining what "reasonable knowledge" a hypothetical buyer would have and how it would affect the price a buyer is willing to pay.

General Valuation Rules

Section 2512 of the Internal Revenue Code provides that when a gift of property is made, the value of the property on the date of the transfer is the amount of the gift. The Regulations under I.R.C. Section 2512 expand upon this and tell us that "the value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts." Treas. Regs. § 25.2512-1 (emphasis added). In the case of stocks or bonds, if there is a market for such property, either on a public exchange, over-the-counter market, or otherwise, "the mean between the highest and lowest quoted selling prices on the date of the gift is the fair market value per share or per bond." Treas. Regs. § 25.2512-2(b).

Do Facts That May Not Be Public Knowledge Affect the Valuation of Publicly-Traded Stock?

Horwith v. Comm'r, 71 T.C. 932 (1979). In the past, taxpayers have argued that the mean of the high and low trading prices on the date of transfer is not an accurate reflection of value because of external factors known to the taxpayers. In other words, the taxpayers sought an exception to the general valuation rule under I.R.C. Section 2512 and argued that their knowledge of the relevant facts led to a different valuation.

In Horwith v. Comm'r, the taxpayers and the IRS disagreed on the value of stock received from Mr. Horwith's employer under an alternate stock plan. During 1971 and 1972, Mr. Horwith was vice president and secretary-treasurer of Mattel, Inc. Id. at 933-934. As part of his compensation package, Mr. Horwith was granted certain stock options. In 1971, Mattel introduced an alternate stock plan whereby employees could exchange their options for Mattel shares without paying any cash. Id. at 934.

Mr. Horwith decided to take advantage of the alternate stock plan and in February and March of 1972 Mattel issued 838 and 1822 shares of Mattel stock to Horwith. Id. On the taxpayer's 1972 W-2, Mattel valued the stock at $75,954. The company arrived at that figure by valuing the stock at the closing price for the dates of issue. Id.

at 935. However, on his income tax return, Mr. Horwith valued the Mattel stock at $43,367.50. Id.

As late as Feb. 5, 1973, Mattel stated that it would report satisfactory earnings; however, less than three weeks later, Mattel reported a loss of approximately $32 million. Id. As a result, Mattel became the subject of several class action lawsuits that alleged the company had violated antifraud provisions of federal securities laws. The following year, Mattel reported that it had information which raised substantial questions about the accuracy of the company's financial statements for the 1971 and 1972 fiscal years. Id. at 936. Ultimately, a judgment was filed against Mattel in 1974, which included the following language from the special counsel's report:

The investigation revealed that Mattel's annual and interim financial reports, together with related releases of financial information to the public and filed with the SEC, were, for various periods and in various respects, deliberately false and misleading. The financial misstatements were apparently motivated by a desire to maintain the appearance of continued corporate growth.

Id.

In 1977, Mattel settled the consolidated class action cases for $34 million and in 1978 a Federal grand jury indicted five officers, directors, and employees of Mattel with securities law violations. Id. at 937. Apparently, Mr. Horwith was not one of those indicted.

Mr. Horwith argued under the facts outlined above, that the stock exchange price was not an accurate reflection of the value of the Mattel shares he received in 1972. The Tax Court disagreed, noting that in a previous case the court dismissed a similar argument because it would have required the court to hold that "a universally accepted market price, the result of numerous transactions in which the general public freely participate, should be disregarded because more than two years later concealed facts were disclosed, which had they been known, might have created a different market from that which the facts show actually existed." Id. at 939 (quoting Wright v. Comm'r, 45 BTA 551 (1941)). Therefore the Tax Court held that the trading prices of the Mattel stock on the dates of issue establish the fair market of the stock received by the taxpayer.

In a similar case involving a Mattel employee, the court held that the publicly-traded share price was the best evidence of the value of Mattel shares. Johnson v. Comm'r, 673 F.2d 262 (1982).

Prentice v. Comm'r, T.C. Memo 1956-3. The Prentice case involved the valuation of stock owned by a decedent. Mr. Prentice died on June 12, 1948 owning 3,857 shares of stock in Fulton Trust Company (about 19% of the total outstanding shares). Id. at 14. (Due to an optional valuation election, the valuation date for the Fulton Trust shares was June 12, 1949.) On Mr. Prentice's estate tax return, his
Executors reported the stock at $147 per share. In June 1949, the bid prices and ask prices on the over-the-counter market for shares of Fulton Trust were $142 to $146 and $147 to $151, respectively. The actual sales prices nearest decedent’s date of death were between $143 and $148.50 per share. However, the IRS determined the value to be $250 per share.

In late 1948 through June 15, 1949, Fulton Trust had entered merger negotiations with New York Trust Company; however, these first negotiations did not result in an agreement. Id. at 18. On June 21, 1949, negotiations began again and on July 18, 1949, the parties agreed to a merger and on a price of $250 per share to be paid by New York Trust Company to Fulton Trust. Id.

The IRS argued that reliance on the market price and contemporaneous sales was not reliable because sellers and buyers did not know of the merger negotiations, and therefore did not have all relevant facts. Id. at 20. The Court disagreed and held that the “requirement of reasonable knowledge of the facts in the definition of fair market value is not a requirement that the public have knowledge of all facts concerning the corporation.” Id. The Court further held that the fact that there was no public knowledge of the merger negotiations as of the valuation date did not detract from the evidentiary value of contemporaneous sales.

CCA 201939002

With this background in mind, let’s turn to CCA 201939002. In this Chief Counsel Advice memorandum, the Service examined whether a hypothetical willing buyer and hypothetical willing seller would consider a pending merger when valuing stock for gift tax purposes. The donor was the Chairman of the Board of a publicly-traded corporation. The donor transferred shares to a grantor retained annuity trust. At a later date, the corporation announced a merger with a second corporation. The merger negotiations had been taking place over a period of time with several corporations and then exclusively with the second corporation, even before the date of the gift to the GRAT. Predictably, the value of the shares dramatically increased after the merger, although less than the agreed-upon merger price.

The Service reviewed what all practitioners know to be black-letter law in the area of valuation of publicly-traded stock. The Regulations provide that when a gift is made, the value of the gift for transfer tax purposes is the value on the date of transfer. The value is what a willing buyer would pay a willing seller, neither being under any compulsion to buy or sell and both being reasonably informed of all relevant facts.

The Regulations go on to provide a rule for the valuation of publicly-traded stock – it is generally the mean of the high and low trading prices for the date of the transfer. However, if the value established on the trading market “does not represent the fair market value, . . . then some reasonable modification of the value determined on that basis or other relevant facts and elements of value shall be considered in determining fair market value.”

The Service noted that in evaluating the hypothetical of a willing buyer and a willing seller, the parties are presumed to work for the maximum economic advantage. When the parties to the transaction are presumed to have reasonable knowledge of all relevant facts, that reasonable knowledge includes those facts that a party would uncover during the course of negotiations. Ultimately, the Service held that a hypothetical buyer would have done the legwork necessary to discover the merger negotiations.

In its holding, the Service relied heavily on Ferguson v. Commissioner, 174 F.3d 997 (4th Cir. 1999) (affirming 108 T.C. 244 (1997)). However, the facts in Ferguson are very different from those presented to the Service in the CCA.

In Ferguson, American Health Companies, Inc. (“AHC”) acquired Diet Center, Inc. (“DC”) which was wholly owned and managed by Roger and Sybil Ferguson and their five children. Id at 998. As a result of the merger, the Fergusons collectively owned approximately 18% of the outstanding AHC shares. In July 1988, AHC entered into a merger agreement with CDI Holding, Inc. (“CDI”) and CDI’s wholly owned and newly formed subsidiary, DC Acquisition Corp (“DC Acquisition”). The merger agreement provided: (i) DC Acquisition would purchase the majority of the AHC stock through a tender offer at $22.50 per share; (ii) DC Acquisition would merge into AHC, leaving AHC as a wholly owned subsidiary of CDI; and (iii) as permitted under Delaware corporate law, concurrently with the merger, each still-outstanding share of AHC stock would be converted into a fixed right to receive $22.50 in cash. Id. at 999.

On the final day of the tender offer, September 9, the Fergusons exchanged a significant amount of their AHC stock for CDI common and preferred stock, and they tendered the remainder of their AHC stock pursuant the tender offer. Id. at 1000. On September 12, DC Acquisition announced its acceptance of all tendered shares and purchased all shares in accordance with the tender offer terms. On October 14, the merger was effectuated.

While the aforementioned events were occurring, the Fergusons transferred some of their AHC stock to three charities. On September 8, the Ferguson’s broker made an in-house journal entry that transferred the stock from the Fergusons’ accounts to the accounts of the charities. On September 9, the Fergusons executed final letters of authorization. Id. at 1001.

The issue before the court was whether the Fergusons completed their transfers of the AHC stock before it had “ripened from an interest in a viable corporation into a fixed right to receive cash.” Id. at 1002. The Fergusons argued the date of delivery to the charities was the date the broker made the in-house journal entry, September 8. Id. However, the Court found that the contributions were not complete until September, 9, 1988, the date petitioners executed their final letters of authorization. Id. at 1003.

The Court then had to consider whether the right to the income from the tender of the AHC stock had “ripened.” The Ninth Circuit agreed with the Tax Court that as of August 31, 1998, “it was practically certain that the tender offer and the merger would be completed successfully.” Id. at 1004.

The Service also cited Kollsman v. Commissioner, T.C. Memo 2017-40, which was an estate valuation case involving two paintings held by the decedent at her death. Ms. Kollsman’s estate held two seventeenth-century “Old Master” paintings. Around the time of Ms. Kollsman’s death, she had spoken to Sotheby’s about auctioning the paintings. Id. at 1. A few weeks later, Sotheby’s sent a letter to the decedent’s attorney stating that “based on firsthand inspection of the property” the paintings were worth $500,000 and $100,000. Id. at 2. This letter was attached to the estate’s tax return. Sotheby’s also sent an exclusion consignment rights agreement which gave Sotheby’s the right to auction the paintings for five years.

Pursuant to the consignments right agreement, Sotheby’s sold one of the paintings approximately three and a half years after the valuation date for $2,434,000. Id. at 4. Not surprisingly, the IRS issued a notice of deficiency and argued the total value of the two
paintings was $2.6 million. To explain the vast difference between the valuation and the sale price, the Estate's expert reasoned that there was a significant improvement in quality after the painting was cleaned which he argued was a risky endeavor, so risky that a valuation before the cleaning must be discounted to account for risk of damage during the cleaning process. Additionally, he argued that there was a substantial increase in market demand of "Old Master" paintings. Id. at 7.

The Court noted the oft-quoted definition of fair value as the price a willing buyer would pay a willing seller. However, the Court believed that because of the condition of the paintings, a buyer would make a reasonable investigation about having them cleaned. Id. at 9. The Court also held that a "hypothetical willing buyer is presumed to be 'reasonably informed' and 'prudent' and to have asked the hypothetical willing seller for information that is not publicly available." Id. Ultimately, the Court held that a buyer would have gathered the relevant information regarding the cleaning of the paintings and would discover that it was a low-risk endeavor that could dramatically increase the value.

Observations

CCA 201939002 appears to ignore the holdings in Horwith and Prenitice and takes too simplistic an approach to the valuation question at issue. Further, the Service's reliance on Kollsman is misplaced. In Kollsman, it was not only plausible but possible that a buyer would have been able to obtain the relevant information. However, in the CCA, in concluding that a reasonable buyer would have done the investigation necessary to determine that the subject corporation was involved in merger negotiations, the Service assumed that such information would be available. Certainly, the CEO of a publicly-traded company involved in merger negotiations would be prohibited from publicly discussing such negotiations due to Federal securities laws. The Chief Counsel Memorandum does not address this fact.

Further, the Ferguson case is hardly dispositive of the issue. It appears the Service determined the outcome and then looked for any case it could fashion to support it. Ferguson examined the assignment of income doctrine and in that case, the shares were transferred the same day they were tendered and accepted in exchange for cash. It is not a leap to conclude that the value of stock transferred on date X, the same date the shares are tendered for cash, is the amount of the cash received. However, those are not the facts of the CCA – there was no price for the shares set in stone at the time the donor made the transfer to the trust. In fact, the Service even points out in the memorandum the share price after the merger was less than the agreed upon merger price.

The Service has previously held that outside facts should not be considered when valuing publicly-traded stock, even when that information reveals that the company at issue lied about its earnings and misled investors. Query whether the Service would have come to the same conclusion in CCA 201939002 if the merger negotiations resulted in a lower valuation. Would the Service take that consideration into account and determine that the market share price did not accurately reflect the value of the transferred stock in that instance?

Practitioners should take note of CCA 201939002, but this author believes that taxpayers can continue to rely on the average of the high and low trading prices for publicly-traded stock. This may be the one time when a good decision can, indeed, be based on numbers.

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Recent Developments

By the Trusts and Estates Team of Moore & Van Allen PLLC (April – June) and
By the Trusts and Estates Team of Young, Moore and Henderson, P.A. (July – Sept.)

Lead Developments

United States Supreme Court confirms that North Carolina law taxing irrevocable trust on the exclusive basis of a beneficiary's residence in North Carolina is unconstitutional.

In N.C. Dept. of Revenue v. Kimberly Rice Kaestner Family 1992 Family Trust, U.S. Sup. Ct. No. 18-457 (June 21, 2019), the United States Supreme Court, in a 9-0 decision, confirmed the previous rulings of the North Carolina Supreme Court, the North Carolina Court of Appeals, and the North Carolina Business Court that North Carolina's statute taxing irrevocable trusts that have North Carolina beneficiaries violated the Due Process Clause of the United States Constitution as applied to a trust whose sole connection to North Carolina was the residence of a beneficiary. The trust in Kaestner was created by a grantor from New York and was administered under New York law by a trustee in Connecticut. At the time of the trust's creation, no trust beneficiary lived in North Carolina, though a family of trust beneficiaries later moved to North Carolina. The Supreme Court found that North Carolina did not have a minimum connection to the trust that was rationally related to its claim to tax the trust's income and therefore that its taxation of the trust violated the Due Process Clause. The court focused on the "extent of the [North Carolina beneficiaries'] right to control, possess, enjoy, or receive trust assets," and found that the North Carolina beneficiaries in Kaestner received no distributions from the trust during the applicable tax years, had no right to demand or withdraw assets from the trust, had no vested right to future trust distributions, did not have the power to direct trust investments, and were restricted from diverting their beneficial interests in the trust due to a spendthrift clause. The Court declined to determine whether the North Carolina statute taxing trusts on the basis of the residence of beneficiaries was unconstitutional on its face. Justice Sonia Sotomayor provided the court's opinion, but Justice Samuel Alito (joined by Justices John Roberts and Neil Gorsuch) wrote separately to clarify his belief that the court's decision in Kaestner was simply an application of existing precedent and represented no development in the law.

United States Supreme Court denies certiorari for Fielding case regarding Minnesota income taxation of irrevocable trust.

On June 28, 2019, the United States Supreme Court declined to hear the case of Baurly v. Fielding, U.S. Sup. Ct. 18-664, which was an appeal from the Minnesota Supreme Court's ruling in Fielding v. Minnesota Comm'r of Revenue, Minn. Sup. Ct. A17-1177 (July 18, 2018) that Minnesota did not have the minimum connection to a trust required by the Due Process Clause of the United States Constitution to tax the trust's non-Minnesota sourced income when the trust was created by a Minnesota grantor, was prepared and executed in Minnesota, was governed by Minnesota law, owned stock in a Minnesota S corporation, and had at least one Minnesota beneficiary, which beneficiary received distributions from the trust during the tax year in question, but the trust had no Minnesota trustee, and no portion of the administration of the trust occurred in Minnesota.

Federal Statutes

Taxpayer First Act sets goals for Service's customer service, modernization, and cyber-security.

On July 1, 2019, President Trump signed the Taxpayer First Act, Pub. L. 116-15, which sets goals for the modernization of the Service's operation and its interaction with taxpayers. The law targets increased opportunities for the electronic filing of tax returns and focuses the Service on protecting taxpayers' electronically-stored personal information. The law also dictates certain changes to the Service's internal procedures and operations and restricts certain seizure and debt collection activities the Service may pursue.

Federal Administrative Developments

Service releases Modernization Plan.

In Fact Sheet 2019-9 (April 2019), the Service issued a Modernization Plan centered on four major goals: modernize operations, provide simplified and proactive services for taxpayers, provide complete and integrated data to taxpayers with respect to their accounts and interactions with the Service in real time, and protect taxpayer data that is stored electronically. The Service described the plan as a six-year initiative with a cost of $2.3 billion to $2.7 billion.

Service issues proposed regulations for opportunity zone program.

In 84 Fed. Reg. 18652 (May 1, 2019), the Service issued proposed Regulations Sections 1.1400Z-2(a)(1) through 1.1400Z-2(g)(1) regarding the qualified opportunity zone program, which include:

- Providing that a transfer of a qualified opportunity fund (QOF) interest as a gift, other than a gift to a grantor trust, is an inclusion event that results in recognition of a taxpayer's deferred gain invested in the QOF.
- Providing that a change of grantor trust status as a result of a grantor's death for a trust owning a QOF interest will not be an inclusion event, but any other change to grantor trust status during a grantor's lifetime will be an inclusion event.
- Providing that dispositions of a QOF interest upon its owner's death under an estate or trust will not result in an inclusion event.

Services releases final regulations and safe harbors regarding deductions for state and local taxes.

On Aug. 27, 2018, the Service issued proposed regulations regarding the limitations on deductions for state and local taxes and the
treatment of state and local tax credits granted for charitable deductions. In TD 9864 (June 13, 2019), the Service issued final regulations, making only clarifying and technical changes to the proposed regulations. In Rev. Proc. 2019-12 (Dec. 28, 2018) and Notice 2019-12 (June 11, 2019), the Service released guidance regarding two safe harbors for the participation in state and local tax credit programs. In JXC-35-19 (June 24, 2019), the Joint Committee on Taxation released a report providing further background and explanation of these final regulations and safe harbors. The first safe harbor applies to C corporations and other entities taxed separately from their owners and provides that the payment to charity made as part of a state and local tax credit program may be treated as an ordinary and necessary business expense for purposes of Code Section 162(a). The second safe harbor applies to individuals and provides that individuals may treat the portion of their charitable contribution that is not deductible pursuant to Regulations Section 1.170A-1 as payment of a state or local tax for purposes of Code Section 164.

**Service finalizes regulations authorizing disclosure of business return information to Census Bureau.**

In TD 9856 (April 9, 2019), the Service finalized temporary regulations authorizing the Service’s disclosure of certain business tax return information to the United States Census Bureau for purposes of its data collection activities. Examples of the information subject to such disclosure include expenses, deductions, dividend losses, liabilities, research activities, wage information if a business has stopped paying wages, whether a business is a seasonal employer, and certain information regarding income-producing real estate.

**Service releases final regulations for Code Sections 4963, 6011, and 6071.**

On Nov. 7, 2018, the Service issued proposed regulations for Code Sections 4963, 6011, and 6071 regarding the imposition of excise taxes on tax-exempt organizations. In T.D. 9855, April 5, 2019, the Service adopted these proposed regulations without change as the final regulations for the aforementioned Code sections. The final regulations provide that a Form 4720 is required for paying excise taxes issued under Code Sections 4960, 4966, 4967, and 4968 and that such return is due by the fifteenth day of the fifth month after the end of the taxable year of the tax-exempt organization owing such excise tax. In addition, excise taxes imposed under Code Sections 4966 and 4967 applicable to donor advised funds were characterized as first-tier taxes subject to abatement under Code Section 4962.

**Service will stop faxing tax transcripts and will stop providing them to certain third parties.**

In IR-2019-101 (June 4, 2019), the Service announced that to help protect against identity theft, it will no longer fax tax transcripts to anyone. Taxpayers and their agents may obtain transcripts online or by mail. The Service also announced that third parties like lenders and colleges will no longer be permitted to request tax transcripts from the Service in order to verify a taxpayer’s income. The Service referred such third parties to its Income Verification Express Service.

**Service will issue determination letters involving formation of retirement plans.**

In Rev. Proc. 2019-20 (May 1, 2019), the Service announced that it will accept requests for determination letters from retirement plan sponsors regarding individually defined statutory hybrid plans, defined in Regulations Section 1.411(a)(13)-1(d)(3), for the period from Sept. 1, 2019 through Aug. 31, 2020 and regarding plans resulting from the merger or consolidation of two or more plans into a single individually designed plan on an ongoing basis.

**Service confirms automatic allocation of GST exemption to misreported transfers.**

In PLRs 201921004 and 12 (May 27, 2019), two taxpayers created trusts for the benefit of their grandchildren, misreported gifts to the trusts as indirect skips instead of direct skips, and opted out of the automatic allocation of their generation-skipping transfer (GST) exemptions to the transfers to the trusts. The taxpayers later requested that the Service rule that the taxpayers’ GST exemption had been automatically allocated to the transfers. The Service acquiesced, ruling that the taxpayers’ election out of automatic allocation of GST exemption applied only to indirect skips and therefore did not actually apply to their gifts to the trusts, which were direct skips.

Similarly, in PLRs 201924001-2 (June 14, 2019), PLR 201924016 (June 14, 2019), PLR 201925001 (June 21, 2019), and PLR 201925013 (June 21, 2019), taxpayers created trusts for the benefit of their respective descendants but misreported their gifts to their trusts as gifts subject only to gift tax instead of indirect skips and made no representation regarding the application of their GST exemptions to the transfers. The Service ruled that the taxpayers’ GST exemptions were automatically allocated to their respective transfers.

**Trust modification effective to prevent inclusion of proceeds of trust-owned life insurance policy insuring trustee’s life in trustee’s gross estate.**

In PLRs 201919002-3 (May 10, 2019), the Service confirmed that when a trust owned a life insurance policy insuring the life of its trustee (who was also a beneficiary of the trust), the trustee would not have any incidents of ownership with respect to the policy (which if present would cause the insurance proceeds to be includible in the trustee’s gross estate for federal estate tax purposes) if the trust were modified to remove the trustee’s non-fiduciary testamentary power of appointment with respect to the trust property and to appoint another trustee (the “Insurance Trustee”) to exercise the powers of the trustee with respect to the policy. The modified terms of the trust permitted the trustee to remove and replace the Insurance Trustee but prohibited the trustee from appointing a successor Insurance Trustee who is related or subordinate to the trustee within the meaning of Code Section 672.

**Correction of beneficiaries’ testamentary general powers of appointment to testamentary limited powers of appointment effective to prevent inclusion of trust property in beneficiaries’ gross estates.**

In PLRs 201920001-3 (May 17, 2019), a grantor created separate trusts for the grantor’s grandchildren. Each trust terminated at the death of the grandchild for whom it was created, each grandchild had a testamentary general power of appointment with respect to such grandchild’s trust. The trusts were later modified to amend the testamentary general powers of appointment to testamentary limited powers of appointment on the basis of a scrivener’s error, with the modified trusts still terminating upon the death of the applicable grandchild. The Service here confirmed that the modifi-
fications did not constitute gifts by the grandchildren and were effective to prevent the trust property from being includible in the respective gross estates of the grandchildren for estate tax purposes. The Service further provided that the grantor's GST exemption was automatically allocated to the grantor's contributions to the trusts, as was the GST exemption of the grantor's spouse with respect to gifts the spouse was deemed to have made to the trusts. The Service did not address whether the modifications had any GST tax consequences.

**IRA payable to surviving spouse's revocable trust is eligible for a spousal rollover.**

In PLR 201923002 (March 4, 2019), the beneficiary of a decedent's IRA was the decedent's surviving spouse's revocable trust. The surviving spouse had the right to withdraw net income and/or principal of the trust, to modify, amend, or revoke the trust, and to distribute the IRA proceeds to herself from the trust at any time. For these reasons, the Service found that the decedent's surviving spouse was effectively the person for whom the IRA was maintained for purposes of Code Section 408(d)(3)(A). Therefore, because the IRA was maintained for the decedent's surviving spouse, if the surviving spouse received a distribution of the IRA from the trust, the surviving spouse could perform a spousal rollover provided that the remaining requirements of Code Section 408(d)(3)(B) were satisfied.

**Surviving spouse may roll over decedent's IRA paid to estate.**

In PLR 201931006 (Aug. 2, 2019), the taxpayer requested rulings (i) that decedent's IRA would not be treated as an inherited IRA under Section 408(d), (ii) that taxpayer would be permitted to roll over the proceeds of decedent's IRA to an IRA in her own name, and (iii) that taxpayer will not be required to include any timely rollover in her gross income for federal tax purposes. At decedent's death, decedent's IRA did not have a beneficiary designation and thus was payable to decedent's estate. Decedent died intestate and decedent's surviving spouse was both the sole heir to decedent's estate and the administrator of decedent's estate. The surviving spouse intended to distribute the IRA to the estate, pay such proceeds to himself, and roll over the proceeds into an IRA in his own name within sixty days of receipt.

**Service rules rollover of decedent's 457 plan distribution is tax-free.**

In PLR 201936009 (Sept. 6, 2019), the Service concluded that the taxpayer was eligible to roll over the distributions from the deceased spouse's 457 Plan account to an IRA in the spouse's name and would not be required to include the amount distributed in her gross income for tax purposes for the calendar year in which the distribution and rollover occurred. The taxpayer's spouse named his estate as the sole beneficiary of an account established under Section 408(d), (ii) that taxpayer would be permitted to roll over decedent's 457 plan distribution is tax-free.

**Service denies tax-exempt status to organization raising funds for patients prescribed THC and CBD treatments and educating the public about such treatments.**

In PLR 201917008 (April 29, 2019), the Service found that a non-profit corporation organized to (i) provide financial aid to individuals who could not afford the costs of prescribed THC and CBD medical treatments, (ii) educate the public about THC and CBD medical treatments, and (iii) support research into THC and CBD medical treatments did not qualify as a tax-exempt organization under Code Section 501(c)(3). Under Rev. Rul. 75-384, the purposes of a charitable organization may not be illegal or contrary to public policy. Because it is illegal under federal law to knowingly manufacture, distribute, or dispense marijuana or possess marijuana for such purposes, the Service found that the corporation's purpose was against public policy as it advocates and supports the distribution of marijuana, and thus the corporation did not qualify as a tax-exempt charitable organization under Code Section 501(c)(3).

**Charity requests clarifications regarding tax on executive compensation for tax-exempt organizations.**

In a letter to the Service dated June 18, 2019 and in accordance with the Service's request for comments in Notice 2019-09, the Alliance for Charitable Reform requested clarity and provided suggestions for proposed regulations regarding the tax under Code Section 4960 on highly compensated executives of tax-exempt organizations. The Alliance noted that under Code Section 4960 as currently written, tax could be required to be paid under Code Section 4960 for individuals for whom a tax-exempt organization itself provides minimal or no compensation. Furthermore, the Alliance notes that compensation paid to certain executives that provide services to a tax-exempt organization in early years would continue to be subject to tax under Code Section 4960 even if that executive is no longer providing services, volunteer or otherwise, to the tax-exempt organization. The Alliance requested that the Service address these issues in proposed regulations issued under Code Section 4960.

**Sale of asset from grantor trust to spouse's grantor trust does not result in capital gains/losses.**

In PLR 201927003 (July 5, 2019), the Service provided that a sale from one spouse's grantor trust to a grantor trust created by the other spouse does not result in the recognition of capital gain or loss. Specifically, Spouse 1 proposed to sell a percentage of a limited partnership to the purported grantor to a trust created by Spouse 2. Spouse 1 also purportedly created a grantor trust (Trust 1), and the trustee of that trust proposed to sell a portion of a limited partnership interest to the purported grantor trust (Trust 2) created by Spouse 2. The Service noted that because the trust were grantor trusts, the sale and purchase would be treated for federal tax purposes as though they were made by the spouses. The Service cited Code Section 1041(a)(1), which provides that no gain or loss shall be recognized on a transfer of property between spouses. The Service also cited Section 1041(b), which provides that in such case, the property is treated as though it was acquired by gift, and the basis of the transferee will be the adjusted basis of the transferor, thus, the basis of the property acquired from Trust 1 by Trust 2 would be the same as the adjusted basis in property in the hands of Trust 1.
Service addresses estate, gift and GST tax issues related to division of trust.

In PLR 201928004 (July 12, 2019), the Trustee proposed to divide a son’s trust into five subtrusts for the benefit of son and each of son’s five children and their respective issue. The terms of each subtrust were to be identical and unchanged from the original trust terms, except that each subtrust would be held for the benefit of son and his respective child for whom the subtrust was created and such child’s issue. Any distributions to son from a subtrust would be pro rata from each subtrust. The personal representative sought and received six rulings from the Service: (i) the proposed division of trust into subtrusts and the pro rata allocation of the assets of the trust among the subtrusts will not cause the trust or any of the subtrusts to lose its grandfathered status for purposes of the GST tax, or otherwise become subject to GST tax; (ii) the proposed division of trust will result in each subtrust having different primary beneficiaries, so as long as each subtrust is separately managed and administered, they will be treated as separate trusts for federal income tax purposes; (iii) the proposed division of trust is not a distribution under Section 661 or Section 1.661(a)-2(f) and will not result in the realization of gain or loss under Section 61 or Section 1001 or cause the trust, subtrusts, or beneficiaries to recognize any income, gain, or loss under Section 662; (iv) the basis and holding period of the assets received by the subtrusts will be the same as the respective basis and holding period of the assets held by the trust under Section 1015 and Section 1223(2), respectively; (v) the proposed division of trust and the pro rata allocation of the assets of trust among the subtrusts will not cause any portion of the assets of the subtrusts to be includible in the gross estate of any of the beneficiaries of the subtrusts under Sections 2035–2038; and (vi) the proposed division of trust and the pro rata allocation of trust among the subtrusts will not result in a transfer by any beneficiary of trust that is subject to the gift tax under Section 2501.

Estate can defer payment of estate tax under Section 6166(a)(1).

In PLR 201928007 (July 12, 2019), the Service ruled that multiple operating units of a single closely-held corporation qualified as the “carrying on of a trade or business” within the meaning Section 6166(a)(1). At the time of decedent's death, his revocable trust owned shares in a closely-held corporation with six operating units that filed a single consolidated income tax return. Several of the units were comprised commercial real estate leased to tenants. Several units provided management services, including procurement of tenants and day-to-day management for other units. Another unit constructed new properties and acted as an independent contractor of other units for that purpose. All of the units in question had their own non-owner employees engaged in full-time employment for the entity. The taxpayer requested rulings that the activities of four of the units constituted the carrying on of a trade or business sufficient to defer estate tax payments. The Service cited Rev. Rul. 2006-34 and its non-exclusive list of factors that are relevant in determining whether real property interests are interests in a closely-held business for purposes of Section 6166 as helpful in evaluating whether other interests are those of an active trade or business. These factors include: the amount of time the corporation’s employees devoted to the trade or business; whether an office was maintained from which the activities of the corporation were conducted and whether the corporation maintained regular business hours for that purposes; the extent to which the corporation’s employees were actively involved in finding new tenants and negotiating and executing leases; the extent to which the corporation’s employees provided services beyond the mere furnishing of leased premises; the extent to which the corporation’s employees personally arranged for, performed, or supervised repairs and the maintenance of property (whether or not performed by independent contractors); and the extent to which the corporation’s employees handled tenant repair requests and complaints.

Service rules on distribution of assets from CLAT.

In PLR 201928005 (July 12, 2019), the Service ruled that a distribution of assets from a charitable lead annuity trust (“CLAT”) to a foundation as a result of a state court order was not a distribution in satisfaction of a right to receive a distribution of a specific dollar amount or in specific property other than the distribution, and was not a distribution in satisfaction of a general claim for ascertainable value, so no gain or loss was recognized by the CLAT as a result of the distribution. The trust required annual annuity payments to a state law non-profit corporation (the “foundation”). At the conclusion of a set number of years, the remaining interest would revert to a named beneficiary or its assigns. The beneficiary assigned its remainder interest to the foundation. Under state law, the annuity interest and remainder interest merged, but the trust did not terminate. The parties proposed to terminate the trust and distribute the trust property to the foundation. Reg. Section 1.661(a)-2(f)(1) provides that if property is paid, credited or required to be distributed in kind by a trust or estate, no gain or loss is realized by the trust or estate by reason of the distribution, unless the distribution is in satisfaction of a right to receive a distribution in a specific dollar amount or in specific property other than that distributed. Rev. Rul. 83-75 further holds that a distribution by a trust of appreciated securities in satisfaction of its obligation to pay a fixed annuity to a charitable organization results in taxable gain to the trust. However, the Service ruled that the Trust’s distribution of its assets to the foundation as a result of the termination was not a distribution in satisfaction of a right to receive a distribution of a specific dollar amount or in specific property other than that distribution, nor was it a distribution in satisfaction of a general claim for an ascertainable value and therefore no gain or loss was recognized by the trust as a result of the distribution.

Service rules that termination of CLAT does not result in termination tax under Section 507(a).

In PLR 201930017 (July 26, 2019), the Service ruled that the termination of a charitable lead annuity trust (“CLAT”) on a stated date in accordance with the governing instrument and not discretionary with trustee would not result in imposition of termination tax under Section 507(a). The CLAT was created and funded upon the death of the grantor and a charity was given a guaranteed annuity interest of the grantor and a charity was given a guaranteed annuity interest with a prescribed formula and, upon expiration of that period, the CLAT ceased to exist. The parties proposed to terminate the CLAT to distribute the charitable remainder unit to a foundation as a result of a state court order was not a distribution in satisfaction of a general claim for an ascertainable value, so no gain or loss was recognized by the CLAT as a result of the distribution. The trust required annual annuity payments to a state law non-profit corporation (the “foundation”). Reg. Section 1.661(a)-2(f)(1) provides that if property is paid, credited or required to be distributed in kind by a trust or estate, no gain or loss is realized by the trust or estate by reason of the distribution, unless the distribution is in satisfaction of a right to receive a distribution in a specific dollar amount or in specific property other than that distributed. Rev. Rul. 83-75 further holds that a distribution by a trust of appreciated securities in satisfaction of its obligation to pay a fixed annuity to a charitable organization results in taxable gain to the trust. However, the Service ruled that the Trust's distribution of its assets to the foundation as a result of the termination was not a distribution in satisfaction of a right to receive a distribution of a specific dollar amount or in specific property other than that distribution, nor was it a distribution in satisfaction of a general claim for an ascertainable value and therefore no gain or loss was recognized by the trust as a result of the distribution.
otherwise scheduled payment dates. The Service determined the termination date and found that the trust would terminate on the required termination date. The Service then explained that Section 507 did not apply to split-interest trusts if they terminated by reason of any payment to a beneficiary that is directed by the terms of the governing instrument and is not discretionary with the trustee, which was the case with the CLAT in this case.

**CLAT formula clause satisfies guaranteed annuity requirement for term of years.**

In PLR 201933007 (Aug. 16, 2019) the taxpayer requested rulings that (i) a trust’s formula provision for establishing and funding a CLAT satisfied the requirements for a guaranteed annuity for a specified term of years under Section 2055(e)(2)(B) and (ii) that the estate of the surviving spouse would be entitled to a federal estate tax deduction for the present value of the annuity interest payable to charity. The grantor’s trust provided that upon grantor’s death and after payment of debts and expenses, a portion of the assets of the trust were to be distributed to a GST exempt credit shelter trust. The remainder of the assets were to be distributed to a QTIP trust if grantor’s spouse survived, and if not, to a CLAT. The QTIP trust provided that upon the death of grantor’s spouse, grantor’s spouse possessed a special power of appointment to appoint the QTIP trust assets among various individuals and charities. If grantor’s spouse failed to exercise that power, the assets passed to a CLAT. The terms of the CLAT provided that the charitable interest would be an annuity amount equal to five percent of the fair market value of the initial trust estate (as finally determined for federal estate tax purposes in the estate of the survivor of the grantor and grantor’s spouse). A second formula determined the specific term of years for which the annuity payments would be made. That computation was based in part on the amount of the net fair market value of the assets passing to the CLAT on the later of the grantor or the grantor’s spouse date of death. The Service ruled that the term of the CLAT was therefore ascertainable on the spouse’s date of death and satisfied the “specified term” requirement of 20.255-2(e)(2)(iv). The Service further ruled that if the surviving spouse would receive a charitable deduction for the present value of the amount passing to the CLAT from the QTIP to the extent the spouse’s special power of appointment was not exercised.

**Service rules on income and GST tax implications of trust termination.**

In PLRs 201932001-201932009 (Aug. 9, 2019), the taxpayers requested that the Service rule on the income and generation-skipping transfer tax (“GSTT”) consequences of a trust termination. The subject trust was a grandfathered GST exempt trust created for the benefit of the settlor’s son. The trust provided that all income was to be distributed to son for his lifetime but no principal distributions could be made to son. Upon son’s death, the trust property was to be distributed to son’s issue, per stirpes. Son had four living adult children and eight living grandchildren. The beneficiaries entered into an agreement for termination of the trust with each beneficiary receiving his or her actuarial interests in the trust calculated as of the termination date. The Service ruled that the proposed termination would not cause the distributions to be subject to GSTT as long as the actuarial interests were properly calculated. Likewise, the beneficiaries will not be treated as making a taxable gift as long as the actuarial interest were properly calculated. For income tax purposes, the Service ruled that son and his children would recognize long-term capital gain on account of the proposed distribution of their interests. The proposed distribution takes the form of a distribution of the present values of the respective interests of the beneficiaries. The Service determined that the termination was, in substance, a sale of the son’s and his children’s interest to the grandchildren under Rev. Rul. 69-486 and 72-243.

**Service rules individual substantially complied in allocation of GST tax exemption.**

In PLR 201936001 (Sept. 6, 2019), the Service concluded that, for purposes of Section 2642(g)(2), the taxpayer substantially complied with the requirements of Section 2632(a) to timely allocate his GST exemption to the transfer to a trust. Taxpayer created an irrevocable trust that had GST tax potential. Taxpayer’s law firm timely filed a Form 709 in which Taxpayer elected out of the automatic allocation rules with respect to the transfer to Trust and instead allocated GST exemption to the transfer on Schedule C, Part 2, Line and attached a copy of the trust to the return. However, the law firm failed to attach a Notice of Allocation with the Form 709 for the transfer. The Service found that for purposes of Section 2642(g)(2), the information provided on the Form 709 in combination with the terms of the trust substantially complied with the requirements of Section 2632(a) for Taxpayer to timely allocate his GST exemption to the transfer to the trust.

**Failure of trustee to make ESBT election constitutes inadvertent termination of S-corporation status.**

In PLR 201933001 (Aug. 16, 2019), the Service held that transfers by individual of S corporation stock to five (5) separate trusts that each met the requirements to make an election to be treated as an Electing Small Business Trust (ESBT), but no such elections were actually made due to the inadvertence of the Trustee, caused an inadvertent termination of the corporation’s S election under Section 1362(f) of the Code. Additionally, the Service held that where the trustee of a grantor trust shareholder which ceased to be a grantor trust upon the death of the grantor, also failed to timely make an ESBT election, such failure also resulted in an inadvertent termination. The Service ruled that the corporation would continue to be treated as an S corporation despite such inadvertent termination provided the trusts made the appropriate ESBT elections for the periods at issue.

**Service allows estate extension of time to make alternate valuation date election.**

In PLR 201938002 (Sept. 20, 2019), the IRS concluded that the personal representative of decedent’s estate is granted an extension of time to the date the supplemental Form 706 was filed to make the alternate valuation election under Section 2032. The personal representative of Decedent’s estate had retained a law firm to prepare Form 706, which return was timely filed. The law firm did not advise the personal representative to elect alternate valuation under Section 2032 on the Form 706 and thus such an election was not made. In preparing the account for Decedent’s estate, the law firm determined that such an election should have been made and thereafter the personal representative filed a supplemental Form 706 making the alternate valuation election under Section 2032. The Service concluded that the standards of Sec. 301.9100-1 and 301.9100-3 had been satisfied because the personal representative acted reasonably and in good faith by reasonably relying on a qualified tax professional and that such tax professional failed to make, or advise the taxpayer to make, the election.
Service rules that judicial modification of trust does not affect GST tax exempt status.

In PLRs 201938004-201938006 (Sept. 20, 2019), the Service ruled that the judicial modification of a grandfathered generation-skipping transfer tax exempt trust would not cause the trust to become subject to GSTT. Prior to Sept. 25, 1985, decedent created a trust for the benefit of son during his lifetime. Son was entitled to income distributions but not principal distributions. Upon son’s death, the principal of the trust was to be distributed to son’s issue, per stirpes. The trust was judicially modified to provide that upon son’s death the assets in the trust would not be distributed outright to son’s child but would instead be held in further trust for the benefit of son’s child. No general power of appointment was given to son’s child. Later, the trust was again judicially modified to provide that son’s child had a testamentary general power of appointment over the trust property and further provided that no accounts or final accounts would be required to be filed with the court. The Service ruled that it was clear that the decedent intended son’s child to have a general power of appointment over the assets and that the elimination of the accounting requirement was administrative in nature. Accordingly, there was no shift of a beneficial interest in the trust to a lower generation and the trust remained exempt.

Office of Chief Counsel advises on impact of pending merger on gift tax valuation.

In Chief Counsel Advice 201939002 (Sept. 27, 2019), the Office of Chief Counsel stated that, under the fair market value standard as articulated in Reg. Section 25.2512-1, a hypothetical willing buyer and seller of a publicly-traded company would consider a pending merger when valuing stock for gift tax purposes. This holding is discussed in Philosophy 101 – What is Reasonable Knowledge by Elie J. Foy in this issue of The Will & The Way.

Federal Cases

Tenth Circuit confirms that Service may assert additional penalties in answers to taxpayer-initiated Tax Court actions.

In Roth v. Comm’r, 10th Cir. No. 18-9006 (April 29, 2019), the Tenth Circuit affirmed a 2017 Tax Court case ruling that (i) the Service may assert additional penalties against a taxpayer in an answer to a taxpayer-initiated Tax Court proceeding and (ii) the repayment of previously collected sale proceeds by a taxpayer entitles the taxpayer to an income tax deduction with respect to the year of repayment but not with respect to the year of the original sale. The taxpayers here had overstated the value of a conservation easement for charitable income tax deduction purposes, and the Service’s initial notice of deficiency had asserted a 40% gross valuation misstatement penalty. The Service’s Appeals Office later purported to affirm the first notice of deficiency but recited only a 20% accuracy-related penalty. When the taxpayers contested the Service’s finding in Tax Court, the Service asserted the 40% penalty in its answer, which assertion was found to be permissible. The taxpayers had also acquired and sold state tax credits in connection with the contribution of the conservation easement and had to repay some of the sale proceeds pursuant to the valuation overstatement. The taxpayers had wanted to deduct the repayment amounts with respect to the year of the sale but were denied.

Federal government not constrained by state statute of limitations when collecting taxes.

In U.S. v. Johnson et al, 2019 WL 1414049 (10th Cir. March 29, 2019), a class of estate beneficiaries agreed to collectively assume the burden of the estate’s unpaid but properly deferred estate taxes in order to facilitate the distribution of the estate assets to the beneficiaries. The beneficiaries later defaulted on their obligation under the agreement to pay the estate taxes, and the federal government sued them in the capacity of a third-party beneficiary of their agreement. Though the federal district court ruled that the government’s claim was time-barred by a six-year statute of limitations, the Tenth Circuit here found that, in accordance with U.S. Supreme Court and Tenth Circuit precedent, the United States government was not subject to state statutes of limitations when proceeding in its sovereign capacity to collect taxes. The Tenth Circuit found that the ten-year statute of limitations prescribed by the Code did apply, but the taxpayers did not plead the Code’s statute of limitations as an affirmative defense to the government’s claims and therefore were not protected by it.

Common law “mailbox rule” inapplicable in determining timely filing of tax returns.

In Baldwin v. U.S., 9th Cir. No. 17-55115 (April 16, 2019), the Ninth Circuit ruled that the common law “mailbox rule” used to determine when legal documents are deemed to be delivered does not supersede the requirements of Code Section 7502 that a federal tax return is only timely delivered if (i) the Service actually receives the return under a timely postmark or (ii) the taxpayer proves that the taxpayer timely deposited the return with the United States Postal Service as registered mail or with a qualified private delivery service that maintains adequate transmission records. In contrast to Code Section 7502, the common law mailbox rule allows circumstantial and testimonial evidence as to whether a document was properly deposited with the United States Postal Service or another delivery service.

Ninth Circuit confirms that estate undervalued dirty but rare paintings.

In Kollsman v. Comm’r, 123 AFTR 2d 2019-2296 (June 21, 2019), the Ninth Circuit confirmed a Tax Court ruling that an estate undervalued rare paintings for estate tax purposes by overstating discounts to the paintings’ values based on dirtiness. The Ninth Circuit agreed with the Tax Court that cleaning the paintings would have been “a well-advised and low-risk undertaking” and that a hypothetical buyer would have understood the low impact of the dirty state of the paintings.

QDRO issued after plan participant’s death was effective to pass 401(k) to surviving former spouse.

In Miletello v. RMR Mechanical, Inc., 921 F3d 493 (5th Cir. 2019), the Fifth Circuit affirmed a trial court’s ruling that a qualified domestic relations order (“QDRO”) issued after a plan participant’s death was valid to transfer a portion of the plan participant’s 401(k) balance to his surviving former spouse. Pursuant to the divorce settlement between the plan participant and his former spouse, the former spouse was entitled to a portion of the plan participant’s 401(k) plan. After the divorce settlement, the plan participant remarried.
Several months later, the plan participant died in a plane crash. Two days after the plan participant's death, the state court entered a judgment of partition incorporating the divorce settlement into the divorce decree. Fifteen months after the judgment of partition was entered, the state court issued a domestic relations order (“DRO”) with respect to the plan participant's 401(k). Pursuant to 29 U.S.C. Section 1056(d)(3)(H)(i)–(v), if a DRO is issued within eighteen months of a divorce, the DRO may qualify as a QDRO, sufficient for purposes of ERISA to transfer a 401(k) from someone other than the plan participant's surviving spouse. 29 C.F.R. Section 2530.206(c)(2) provides further that a DRO can qualify as a QDRO even if it was not issued until after the plan participant's death, provided that it satisfies the other requirements necessary to qualify as a QDRO. Therefore, because the DRO was issued within eighteen months from the divorce, as required under ERISA, the surviving former spouse was entitled to receive the portion of the plan participant's 401(k) as set out in the divorce settlement, incorporated into the DRO.

Court of Appeals affirms denial of charitable deduction for failure to provide cost basis of property contributed.


Bankruptcy Court finds assets involved in an IRA rollover were exempt in Chapter 7 bankruptcy.

In In re: Richard L. Jones, Bankr. S.D. Ill. No. 18-31532 (April 15, 2019), the Bankruptcy Court for the Southern District of Illinois found that assets in a debtor's IRA were exempt assets for Chapter 7 bankruptcy proceedings even though the debtor had withdrawn funds from the IRA and contributed different assets fifty-nine days after the initial withdrawal. Relying heavily on Zaklama, et. al. v. C.I.R., T.C. Memo, 2012-346 (2012) and In re Chaudury, 581 B.R. 279 (Bankr. M.D. Tenn. 2018), the court found that because assets were re-contributed to the IRA within sixty days of the initial withdrawal, the withdrawal and re-contribution constituted an IRA rollover for purposes of Code Section 408 and thus the IRA remained a qualified retirement plan for purposes of Code Section 408. Because, under Illinois law, a debtor's interest in a "plan...intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code" is exempt from bankruptcy proceedings, the debtor's interest in his IRA was an exempt asset for purposes of his bankruptcy proceeding.

Finding of self-settled trust is unnecessary but specificity in pleadings is required under bankruptcy fraudulent transfer laws.

In In re Cyr, Bankr. W.D. Tx. No. 18-50102-CAG (April 1, 2019), a bankruptcy trustee brought an action claiming that assets held in an irrevocable trust for the benefit of a debtor and his wife should be includible in the debtor's bankruptcy estate under several theories of fraudulent transfer under federal bankruptcy law and Texas state law. The court did not grant the trustee of the irrevocable trust's motions to dismiss the fraudulent transfer claims alleged by the bankruptcy trustee under 11 U.S.C. Section 548(e)(1), finding that the focus of the trustee's argument was on whether the trust was self-settled as to the debtor under Texas law, which the court found was irrelevant as 11 U.S.C. Section 548(e)(1) grants a bankruptcy the power to void transfers to a "self-settled trust or similar device." Nevertheless, the court granted the trustee's motions to dismiss the fraudulent transfer claims alleged by the bankruptcy trustee under 11 U.S.C.S. Section 548(a)(1) because the bankruptcy trustee failed to plead with specificity whether it was bringing claims of actual or constructive fraud under 11 U.S.C.S. Section 548(a)(1) and failed to plead actual fraud with specificity as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Trust treated as nominee of debtor for purposes of federal tax lien.

In Saepoff v. North Cascade Trust Services, Inc., 2019 WL 1759836 (W.D. Wash. April 19, 2019), the court found that property that had been transferred to a trust by quitclaim deed by a taxpayer was subject to a federal tax lien for outstanding tax liabilities of the taxpayer. The taxpayer transferred the property to the trust for no consideration when the taxpayer had outstanding unpaid tax liabilities. Furthermore, the taxpayer continued to live on the property and pay expenses associated with the property. As such, the court found that the trust was merely the nominee for the taxpayer. Therefore, the taxpayer continued to own the property under Washington law, and a federal tax lien could attach.

Assets in a West Indies self-settled trust are not considered in calculating a taxpayer's ability to pay for purposes of an offer in compromise.

In John F. Campbell v. Comm'r, T.C. Memo 2019-4 (Feb. 4, 2019), the tax court found that the Service could not consider assets transferred to an off-shore trust in calculating the taxpayer's ability to pay for purposes of granting or denying offer in compromise based on doubt as to collectability. Under the Internal Revenue Manual, in determining a taxpayer's reasonable collection potential, the Service considers the taxpayer's (a) assets, including dissipated assets, (b) future income, (c) amounts collectible from third parties, and (d) assets available to the taxpayer but beyond the reach of the Service. The court found that the trust assets did not constitute assets available to the taxpayer because the taxpayer had not transferred them to avoid his payment of tax liability as, when the taxpayer transferred $5,000,000 to the trust, the taxpayer's remaining net worth was approximately $19,000,000, which was sufficient to pay any potential tax liability. Furthermore, the trust assets did not constitute amounts collectible from third parties or assets available to the taxpayer but beyond the reach of the Service. The court found that the trust assets did not constitute collectible amounts of tax liability.

Charitable deductions denied for everyday evangelizing.

In Robert A. Oliveri v. Comm'r, No. 6792-15, T.C. Memo 2019-57 (May 28, 2019), the tax court denied charitable deductions for the vast majority of expenses incurred in the daily activities of an evangelist. The evangelist claimed deductions for expenses such as travel...
expenses, meals, telephone and internet access, and flying lessons. The court noted that these expenses were largely incurred for the evangelist's personal activities and were not coordinated with the charitable organization that the evangelist formed or the Catholic Church, and that the evangelist did not receive contemporaneous written acknowledgment for expenses in excess of $250. The court also found that the evangelist was liable for the addition to tax under Code Section 6651(a)(1) because he did not file his tax return until ten months after the extended filing deadline. Nevertheless, the court found that the Service presented no evidence to suggest that the evangelist was liable for an accuracy related penalty under Code Section 6662. The court rejected the evangelist's arguments that the Service's audits violated his First Amendment rights to freely express his religion, finding that the Service was not contending that the evangelist's activities were not religious in nature but rather merely that they were not deductible as charitable contributions.

**Tax Court holds unreported income flowed to and from "sham" trust.**

In *Wegbreit v. Commissioner*, T.C. Memo 2019-82 (July 8, 2019), the Tax Court found in a memorandum opinion that taxpayers had unreported income after establishing 'trust' sham businesses and insurance policies to shield their income. The court found that the trust was a sham because the taxpayers maintained control of the assets and could not document any initial contribution to the trust. The taxpayers controlled the flow of funds to and from the trust, and none of the trustees, one of which was the taxpayers' law firm, were actual trustees or permissible trustees under the trust documents. Further, three versions of the trust instrument with differing dates were submitted to the Service from different sources. The taxpayers used the trust's funds to disguise the taxpayers' purchase investments and condominiums. The court determined that the trust lacked "any semblance of economic substance [and] was a mere alter ego" of the taxpayers.

**Rollover treatment allowed where late repayment of IRA distribution due to bookkeeping error.**

In *Burack v. Commissioner*, T.C. Memo 2019-83 (July 8, 2019), taxpayer, Nancy Burack, had an IRA held with Capital Guardian, LLC/ Pershing, LLC. Pershing was the custodian of the account, and she had a financial advisor at Capital Guardian. On June 25, 2014, the taxpayer received a $524,981.89 distribution from the IRA for the purchase of a new home, and she intended to the roll over the distribution back into her IRA within sixty days of her receipt of the funds from the sale of her former home. The sale of the taxpayer's home closed on Aug. 21, 2014, and based on assurances from her financial advisor, the taxpayer overnighted a check for the amount of the IRA distribution to Capital Guardian that same day. It was undisputed that the check arrived at Capital Guardian on Aug. 22, 2014, fifty-eight days after taxpayer received the IRA distribution. For unknown reasons, the check was not deposited at Pershing into the taxpayer's account until Aug. 26, 2014, sixty-two days after receipt of the distribution, and the Service determined that the taxpayer was required to include the distribution in her 2014 gross income. Citing *Wood v. Commissioner*, 93 T.C. 114 (1989), the Tax Court held that the late deposit was attributable to a bookkeeping error because the check was received by Capital Guardian during the rollover period, and thus the distribution and repayment qualified for rollover treatment.

**Payment of personal expenses of shareholder deemed constructive dividend.**

In *Combs v. Commissioner*, T.C. Memo 2019-96 (Aug. 5, 2019), the Tax Court held that the payment by a corporation of its sole shareholder's personal living expenses amounted to unreported, constructive dividends. The taxpayer at issue was a motivational speaker and performer and transferred payments for his performances into the account of Good Thinking, Inc., a corporation established by the taxpayer and of which the taxpayer was the sole shareholder and director and also was the president, chief executive officer, chief financial officer and treasury. The funds were then used to pay the taxpayer's personal expenses but were deducted as business expenses by the corporation. The taxpayer conceded the scheme was devised for tax avoidance purposes in accordance with the "Private Tax Exempted Self Supporting Ministry" concept, which was promoted by one, Robert Holcomb (who is now incarcerated for the commission of various financial crimes). The taxpayer offered into evidence hundreds of pages of unsorted ledgers and receipts documenting the payments which the Tax Court found were not linked in any meaningful way to the adjustments made by the Service and provided no reasonable means to determine which if any of the expenditures in question were ordinary and necessary business expenses. Further, the Petitioner did not identify any category of the challenged expenses that did not benefit him personally, and conceded that many of the expenses were for items that were not business related including child care.

**Decedent's tax refund claim denied because power of attorney failed to file taxes.**

In *Stauffer v. Internal Revenue Service*, 939 F.3d 1 (1st Cir. 2019), the Court of Appeals affirmed the District Court's judgment dismissing the Estate's tax refund complaint for lack of jurisdiction. Hoff Stauffer had filed suit on behalf of his father's estate against the IRS, alleging that the IRS had improperly denied his April 2013 claim for his father's 2006 tax refund as untimely. Stauffer had asserted that the applicable statute of limitations for the filing of the tax refund claim was tolled due to his father's financial disability. The District Court disagreed and dismissed the Estate's complaint for lack of jurisdiction because no tax refund claim had been timely filed. On appeal, Stauffer alleged that the "look back period" was tolled during his father's financial disability because although he had authority to file tax returns as his father's power of attorney, he had no duty to do so absent actual knowledge of the need to do so and because he had renounced his obligations under the power of attorney. The Court of Appeals held that (i) son was a person "authorized to act" on his father's behalf in financial matters under IRC Section 6511(h) (2)(B), such that his father's mental condition did not toll the time for him to file a tax refund claim, and (ii) the District Court did not clearly err in finding that son had not positively and unequivocally renounced durable power of attorney.

**Taxpayer's early IRA withdrawal is taxable; penalty tax applies.**

In *Rosenberg v. Commissioner*, T.C. Memo. 2019-124 (Sept. 19, 2019), the Tax Court held that a taxpayer's withdrawal of funds from an IRA, even funds that were only placed there temporarily, was a taxable withdrawal and would be subject to the 10% early withdrawal penalty pursuant to Section 72(t)(1) of the Internal Revenue Code. In this case, an order filed upon plaintiff's divorce required taxpayer's former spouse to pay taxpayer $10,000 from the proceeds of the
former spouse’s retirement account. Instead of taking $10,000 out of her IRA and paying the taxpayer cash, taxpayer’s former spouse deposited the property into taxpayer’s IRA. Within a week, taxpayer withdrew the funds and closed the account. Taxpayer did not report the withdrawal as income or pay the 10% early tax. The Tax Court noted that gross income generally includes distributions from an IRA under Sections 72 and 408(d). There is an exception for distributions made to an alternative payee under a qualified domestic relations order, but those were not the circumstances in this case. The taxpayer essentially argued that his former spouse was the one to put the funds in his IRA, that she did so over his objection, that the order indicated his former spouse needed to provide him with a cash payment and that he did not think the interim transaction would convert the payment to a taxable event. He argued that, accordingly, the Court should treat the transaction as a payment of cash. The Tax Court held that they could not create an equitable exception to the statutory scheme in Section 72. Consequently, the Court held that the taxpayer’s withdrawal was includable in the taxpayer’s gross income and was subject to the 10% additional tax.

**District Court dismisses refund suit for lack of subject matter jurisdiction.**

In Carter v. U.S., 124 A.F.T.R.2d 2019-5467 (N.D. Ala. 2019), the Court dismissed the estate’s refund claim for lack of subject matter jurisdiction. On Sept. 21, 2007, the decedent died owning shares of stock valued at $17,604,767. Within six months from the decedent’s date of death, the value of the stock had declined to $8,548,947. On June 19, 2008, the estate filed a federal estate tax return and paid $6,261,530. On April 26, 2009, the estate filed an amended return reporting a slightly lower tax of $6,169,892. The Service issued a refund on the basis of the amended return. On Sept. 13, 2013, the estate filed a refund claim with the Service alleging overpayment of its estate tax by $3,731,616, due to a criminal fraud perpetrated against the company by one of its customers. The Service denied the claim. Thereafter, the estate commenced a federal district court action seeking a refund of the overpaid tax. That suit was voluntarily dismissed without prejudice. On Aug. 26, 2016, the estate refiled the refund claim on the same grounds except that the filing contained a medical opinion by a physician stating that the executor suffered from a medical impairment for over five years which prevented her from managing the affairs of the estate. The government claimed the district court lacked subject matter jurisdiction and that the estate’s claim lacked merit. In ruling for the government, the court found that the estate failed to file a timely claim for refund with the Service under Section 6511(a). The Court further found that the financial disability exception to Section 6511(h) did not apply. That exception applied only to “individuals” and an estate is not an individual within the meaning of that section. Finally, the Court found that the value of the company stock on the six month anniversary of the date of death controlled. While the criminal acts of the customer were present, a market existed and the price was set by the market value on the applicable date. The market for the stock did not collapse until more than one year after the estate’s valuation date.

**Tax Court approves tax-affecting valuation of partnership and S corporation interests.**

In Estate of Aaron U. Jones v. Commissioner, T.C. Memo 2019-101 (Aug. 19, 2019), the Tax Court approved tax-affecting the valuation of closely-held limited partnership and S corporation interests. On May 28, 2009, the taxpayer made gifts of voting and non-voting stock in Seneca Sawmill Co. (“SSC”), a closely-held S corporation, and limited partnership interests in Seneca Jones Timber Co. (“SJTC”). The Service determined a deficiency in gift tax of $44,986,416. At the time the gifts were made, the ownership and management of both companies was substantially similar. SCC engaged in the operation and manufacture of lumber. SJTC was formed to acquire, hold, and manage timberslands and real property. SCC held the sole 10% general partner interest in SJTC. SCC purchased 32% of the logs it milled directly from SJTC and an additional 24% of its logs indirectly through SJTC. SJTC sold 51% of its timber to SSC, which comprised all of the timber that SCC could manufacture. SJTC also borrowed against its assets and would transfer funds, in the form of a loan, to SSC to support its operations. This borrowing arrangement was particularly significant in 2009 due to the state of the housing market and the decreased demand for SCC’s lumber. The taxpayer timely filed Form 709 reporting values of $325 per share for SCC’s class A stock, $315 per share for SCC’s class B nonvoting stock, $350 per unit for SJTC limited partnership units. In response, the Service claimed the actual value was $1,395 per SCC class A share, $1,325 per SCC class B share, and $2,511 per SJTC limited partnership unit. Thereafter, the taxpayer asserted the fair market value of the interests was $390, $380, and $380 respectively based on a second valuation opinion.

The parties primarily disputed whether an income approach or an asset-based approach was appropriate for SJTC. Additionally, the parties disputed the use of certain interim financial projections used in 2009, the propriety of “tax-affecting” of the interests, the proper treatment of intercompany loans, the property treatment of SCC’s 10% general partner interest in SJTC, and the appropriate discount for lack of marketability.

**Income vs. Asset-based Approach.** The taxpayer argued that SJTC was an operating company that sold products (i.e, logs) and should be valued as a going concern. The Service argued that SJTC was a natural resource holding company and the value of its assets should be given primary consideration. The Court found that SJTC had aspects of both on operating company and an investment or holding company. The likelihood that SJTC would sell its timberlands was a significant factor in weighing an asset-based approach. The Court found that SSC control as general partner made it unlikely that SJTC would sell its assets. Moreover, SSC and SJTC, while separate legal entities, have an interdependent relationship that weighed in favor of a going concern value. The Court therefore found the taxpayer’s income-based approach more appropriate.

**Tax-Affecting.** The taxpayer’s expert “tax-affecting” SJTC’s earnings using 38% as a combined federal and state tax burden to the owners of SJTC. The expert then adjusted both the earnings used to calculate SJTC’s net cash flow and the cost of debt capital to determine the appropriate discount rate. Further, he computed the benefit of the dividend tax avoided by estimating the implied benefit for SJTC’s partners in prior years and considering an empirical study analyzing S corporation acquisitions. Finally, the expert applied a 22% premium to SJTC’s weighted business enterprise value to reflect that benefit. The Service argued that tax-affecting was inappropriate. After noting that the Service’s experts were “nota-
bly silent” on the issue of whether tax-affecting generally was appropriate and that the Service’s defense of its position was a “fight between lawyers” and not valuation experts, the Court noted that the tax-affecting rejected in the prior cases of Gross v. Comm., 1999 WL 549463 and Estate of Gallagher v. Comm., T.C. Memo 2011-148, 2011 WL 2559847, was not a rejection of the appropriateness of tax-affecting. Instead, those cases were a rejection of the methodology used by the experts in those cases. In this case, however, the Court found that the taxpayer’s expert’s methodology was more accurate. The expert’s adjustments included a reduction in the total tax burden by imputing the burden of the current tax that an owner might owe on the entity’s earnings and the benefit of a future dividend tax avoided that an owner might enjoy.

**District Court holds donee and heir liable for unpaid gift and estate tax.**

In U.S. v. Widtfeldt, 124 A.F.T.R.2d 2019-xxxx (D. Neb. 2019), the District Court ruled that the heir of an estate and donee of a gift was personally liable for unpaid federal gift and estate taxes. In 2004, the defendant’s mother had gifted two parcels of real property valued at $1,041,987, to the defendant. The mother died in 2006 with a taxable estate and the defendant was named personal representative of the estate. The defendant was also the sole heir of the estate. No gift or estate tax return was filed. The Service notified the defendant, as personal representative, of the non-filing and assessed gift tax and estate tax. The defendant challenged the assessment in the United States Tax Court which ruled against him and upheld the gift and estate tax assessments. The United States subsequently filed suit requesting that the defendant be held personally liable for the unpaid taxes pursuant to Section 6342 and that it be permitted to enforce the judgment against real property owned by the defendant. The court found that there was no genuine issue of material fact as to whether the defendant was personally liable for the tax as the prior decision in the Tax Court precluded the re-litigation of the defendant’s claims in the present action. Further, the court found that Section 7403 granted the court the authority to order a sale of the defendant’s property to satisfy the unpaid tax.

**Sixth Circuit upholds lower court ruling regarding tax lien on estate’s unpaid taxes.**

In Bennett et al. v. Susan Bennett Bascom et al., 124 A.F.T.R.2d 2019-5914 (9th Cir. 2019), the Sixth Circuit Court of Appeals affirmed the U.S. District Court for the Eastern District of Kentucky finding that an IRS tax lien for an estate’s unpaid taxes takes precedence over a creditor’s unrecorded security interest. The Sixth Circuit found that the IRS was entitled to $2 million in proceeds held in escrow from the sale of the assets of two limited partnerships in which the Decedent held interests. In 2006, the Decedent died owing nearly $2.3 million in outstanding loans to two limited partnerships of which he was the general partner and majority owner. Upon his death, the Decedent’s estate owed approximately $2.8 million in federal estate taxes and the IRS filed notice of its tax lien in Aug. 2010. In 2015, the creditor, KER, purchased the partnerships’ assets from a state-court-appointed receiver and subsequently sought, over the objection of the limited partners, to collect the Estate’s share of the sales proceeds to satisfy those loans. The District Court held that KER had purchased the right to collect the loans as part of the partnerships’ assets, so the limited partners had no claim to the escrowed money. The IRS intervened claiming priority rights to the escrowed funds based on its tax lien. The Court agreed. In doing so, the Court rejected KER’s argument that it executed a “strict foreclosure” on the escrowed funds as the Estate had made an authenticated objection thereto within twenty days. The Court also rejected KER’s contention that its security interest was superior to the IRS’s lien under Section 6323(a) as the underlying security interest originally held by the limited partners was never perfected as they had never filed a financing statement. Thus, KER had purchased a loan that was not secured by a perfected security interest and thus was not “protected” for purposes of Section 6323(h)(1), and therefore, KER’s interest did not have priority of the IRS lien.

In Estate of Agnes R. Skeba v. U.S., 2019 WL 4885697 (D.C.N.J. 2019), the court held that the Service’s decision to impose a late filing penalty was arbitrary. On June 10, 2013, Agnes Skeba died. The due date for her federal estate tax return was March 10, 2014. On March 6, 2014, the estate, through counsel, filed IRS Form 4768 Application for Extension of Time to File a Return and/or Pay U.S. Estate Taxes and included a partial payment toward anticipated estate taxes of $725,000. The application was accompanied by a letter explaining that full payment could not be paid due to illiquidity in the estate and the failure of a pending refinancing to close prior to the payment deadline. In addition, the letter explained that pending litigation over the validity of the will prevented a return from being filed. On March 18, 2014, the estate paid the balance of $2,745,000 which was the estimated estate tax liability. On June 25, 2014, the Service granted an extension of time to file the estate tax return until Sept. 10, 2014. On July 8, 2014, the Service granted an extension of time to pay the estate taxes until Sept. 10, 2014. Neither correspondence granting the extension acknowledged the prior payments.

On June 30, 2015, the estate filed its federal estate tax return showing an overpayment of $941,162. In response, the Service assessed a late filing penalty of $450,949.50 and issued a refund of the balance. The late filing penalty comprised 25% of the “unpaid amount” of $1,803,838 on March 10, 2014. The estate requested a penalty abatement on the basis that the return could not be filed due to the pending litigation and that changes in counsel due to health matters delayed the filing. The estate further argued that a late filing penalty cannot be assessed if taxes are paid on time. The Service denied the penalty abatement request with a simple explanation that “pending litigation is not reasonable cause.”

On cross-motions for summary judgment, the estate argued that Sections 6651(a)(1) and 6651(b) prevent the assessment of a late filing penalty because the taxes were paid prior to the Sept. 10, 2014 payment date. In response, the Service argued that the filing deadline was March 10, 2014, and that consideration of the subsequent extension was not permissible under Section 6151.

The Court found that the language of 6651(a)(1) and 6651(b) was more specific regarding the due date of the tax and that the taxpayer’s argument should prevail. In addition, the Court found that the Service’s curt and simple response to the facts presented by the estate to demonstrate reasonable cause was arbitrary without any further investigation of the facts.
Offshore self-settled asset protection trust subject to Florida law and settlor’s creditors.

In In re Rensin, 600 B.R. 700 (S.D. Fla. 2019), a Florida bankruptcy court held that the assets of a Belize self-settled asset protection trust (“Belize Trust”) were available to satisfy the creditors of the settlor-beneficiary. The Chapter 7 Trustee filed an adversary proceeding requesting that the court find that the assets held in the Belize Trust were property of the bankruptcy estate. The Belize Trust was originally established under the law of the Cook Islands but the situs and governing law were changed to Belize. The Chapter 7 Trustee did not argue that the settlor’s transfers to the Belize Trust constituted fraudulent conveyances. Instead, the Chapter 7 Trustee argued that Florida law applied to determine the enforceability of the self-settled nature of the trust and, under Florida law, a self-settled trust violated public policy. The court found that Florida law applied to the enforceability of the trust and that Florida law had a strong public policy against self-settled spendthrift trusts. Accordingly, applying Florida’s version of the Uniform Trust Code, the Belize Trust was available to satisfy the creditors of the settlor-beneficiary.

North Carolina Cases

Intestate succession properly determined by clerk of special proceeding over estate administration and not trial court determining paternity of decedent.

In Swint v. Doe, N.C. Ct. App. No. 18-964 (April 16, 2019), decedent died with no will, and plaintiff who, at the time of decedent’s death was a minor, sought to (1) establish decedent’s paternity through a guardian ad litem during the administration of decedent’s estate, which involved a special proceeding among his relatives litigating the terms of administration, and (2) obtain a declaration that she was entitled to share as an intestate heir in decedent’s estate. The trial court granted summary judgment in favor of plaintiff for both items. The Court of Appeals found that granting summary judgment as to the order of paternity was correct, but summary judgment as to a declaration that plaintiff was to inherit as an intestate heir in decedent’s estate. The trial court involved in the special proceeding.

Court of Appeals holds affidavits by defendant beneficiaries disputing executrix’s claims preclude summary judgment.

In Voliva v. Dudley, 832 S.E.2d 479, (N.C. Ct. App. 2019), the North Carolina Court of Appeals reversed the lower court’s grant of summary judgment to plaintiff in a breach of contract claim. In this case, though the decedent’s will provided that certain real property should be sold, the Executrix and the beneficiaries filed a petition in Superior Court to allow them to divide a parcel of real property before the decedent’s death was a minor, sought to (1) establish decedent’s paternity through a guardian ad litem during the administration of decedent’s estate, which involved a special proceeding among his relatives litigating the terms of administration, and (2) obtain a declaration that she was entitled to share as an intestate heir in decedent’s estate. The trial court granted summary judgment in favor of plaintiff for both items. The Court of Appeals found that granting summary judgment as to the order of paternity was correct, but summary judgment as to a declaration that plaintiff was to inherit as an intestate heir in decedent’s estate. The trial court involved in the special proceeding.

Court of Appeals addresses the interpretation of will and per capita and per stirpes distribution.

In Brawley v. Sherrill, 833 S.E.2d 36 (N.C. Ct. App. 2019), the Court of Appeals was required to interpret the following provision of the will of Zoie Deaton:

ITEM I: I give devise and bequeath all of my estate and property . . . to my children, Billie Cress Sherrill Brawley and Bobby Ray Sherrill, if they are living at the time of my demise, to be theirs absolutely and in fee simple, share and share alike.

ITEM II: If either of my children shall predecease me, I direct that either his or her share shall go to my grandchildren, per stirpes.

At the time of the decedent’s death, Bobby Ray Sherrill, was not living but was survived by a child, Bobby Vance Sherrill. The decedent was also survived by two other grandchildren. The Executrix instituted a declaratory judgment action for construction of the will, specifically to determine if Bobby Ray Sherrill’s share vested solely in Bobby Vance Sherrill or in all three of the decedent’s grandchildren. The trial court found that the decedent’s intent was to create “two branches for distribution purposes” and consistent with that intent, Bobby Ray’s one-half share vested solely in Bobby Vance, to the exclusion of the other two grandchildren, Rebecca and Bradley Brawley.

Rebecca Brawley appealed on the grounds that the will unambiguously directs that Bobby Ray’s one-half share be divided equally among all of the grandchildren. The majority held that the language of Item II of the Will identified a specific class of comprised of the decedent’s grandchildren and not of the issue of a predeceased beneficiary. With the addition of the term “per stirpes”, the Court held that the share of Bobby Ray must be distributed amongst the grandchildren by representation “with the percentages varying based not
upon the total headcount of surviving grandchildren (per capita), but upon the root from which the particular grandchild descends (per stirpes).” Thus, Bobby Ray would receive one-fourth of the estate (one-half of his father’s share) and the other two grandchildren would receive one-eighth each.

Judge Inman dissented arguing that the majority’s interpretation of the term “per stirpes” to permit Rebecca and Bradley to take from their uncle when their mother was living, modifies the term in a manner “that has never before been contemplated”, and that conflicts with the historical interpretation of the term.

Remaindermen vs. life tenant; broker not liable for good faith acceptance of POA.

In Jackson v. Don Johnson Forestry, Inc., 830 S.E.2d 840 (N.C. 2019), the North Carolina Supreme Court denied discretionary review of the Court of Appeals decision (830 S.E.2d 659) which held that: (i) Decedent’s express grant to life tenant of right to remove trees with at least twelve-inch diameter severed trees from estate remaindermen were entitled to inherit; (ii) remaindermen were entitled to damages from harm caused by removal of smaller trees; (iii) fact issue regarding whether any tree timber buyer removed from property had diameter of fewer than twelve inches precluded summary judgment; (iv) statute entitling entities to be reimbursed for damages incurred in removing timber from property under contract obligated life tenant’s estate to indemnify buyer; (v) estate of life tenant’s spouse was obligated to indemnify buyer; and (vi) statute providing that person who accepts power of attorney in good faith is not responsible for misapplication of property shielded broker from liability.

Other State Developments

Connecticut and Illinois adopt Uniform Trust Code.

Connecticut enacted the Uniform Trust Code (“UTC”) on June 24, 2019 via Conn. Pub. Act 19-137, and Illinois followed suit on July 12, 2019 via Ill. Public Act 101-0048. The two states are the 33rd and 34th states to enact the UTC.

Connecticut’s UTC differs from North Carolina’s in certain ways; for example, an irrevocable trust modification as to which the settlor and beneficiaries agree will require court approval in Connecticut, whereas court approval is not necessary for such a modification in North Carolina. In the same act as the UTC, Connecticut also passed legislation enabling self-settled asset protection trusts and providing limited liability for Trustees in the context of a directed trust.

Illinois’ UTC also differs from North Carolina’s in certain ways; for example, under the Illinois UTC, the holder of a general power of appointment or a limited power of appointment exercisable in favor of anyone but the power-holder, the power-holder’s estate, the power-holder’s creditors, or the creditors of the power-holder’s estate may represent any beneficiary whose interests in the trust are subject to such power, regardless of any conflict of interest. North Carolina’s companion provision only permits representation by the holder of a general power of appointment. The Illinois provision also goes further to permit the holder of any other limited power of appointment to represent beneficiaries whose interests are subject to such power to the extent there is no conflict of interest between the power-holder and persons represented. North Carolina has no such provision. By contrast, Illinois has stricter provisions than North Carolina regarding non-judicial trust modifications. The trustee and beneficiaries of an Illinois trust may agree to modify the administrative terms of an irrevocable trust without court approval, but other modifications require court approval. The Illinois UTC also includes provisions limiting the liability of Trustees in the context of directed trusts, statutory trust decanting procedures, and an adoption of the Uniform Powers of Appointment Act (also adopted in North Carolina).

Indiana enacts legislation permitting the creation of self-settled asset protection trusts.

On May 5, 2019, the governor of Indiana signed S.B. 265, permitting the creation of “Legacy Trusts,” which are self-settled asset protection trusts. This legislation became effective on July 1, 2019. The law requires the appointment of a “qualified Trustee,” which is an individual residing in Indiana or an entity authorized by Indiana law to serve as a Trustee and which materially participates in the administration of the trust. In addition, the transferee of a Legacy Trust must sign a “qualified affidavit” essentially confirming that the transfer is not a fraudulent or voidable transfer, including that the transfer will not cause the transferee to become insolvent, the transferee does not intend to defraud creditors, and there are no threatened or pending court actions against the transferee. The assets of a Legacy Trust are only subject to fraudulent transfer claims, child support obligations, and, in certain circumstances, marital obligations under a divorce settlement, which claims are subject to a two-year statute of limitation. In addition, the transferee may be granted broad powers, including the power to withdraw principal pursuant to an ascertainable standard and the ability to remove a trustee and replace it with a trustee that is not related or subordinate to the transferee under Code Section 672(c).

Florida enacts electronic wills act.

On June 10, 2019, the governor of Florida signed House Bill 409, providing the requirements for the electronic signature, witnessing, and notarization of legal documents, which will go into effect on Jan. 1, 2020. Signatures to a will may be satisfied by electronic signatures. In addition, instead of requiring actual physical presence, the new law provides that witnesses may be present by audio-video communication technology meeting certain requirements.

New Maine law permits physician-assisted suicide for terminally ill patients.

Maine Public Law 2019, ch. 271 (June 12, 2019), titled the “Maine Death with Dignity Act,” enables physicians in Maine to prescribe lethal medication to Maine residents with terminal illnesses who are medically determined to have less than six months to live. Such patients are required to wait fifteen days after orally requesting such lethal medication before executing a written request for such lethal medication, and after another two-day waiting period can be permitted to obtain and self-administer the lethal medication. After the death of a patient by such lethal medication, “a person who has custody of or control over any unused medication” must dispose of such unused lethal medication either by personally delivering it to a qualified facility or, if such delivery is not practicable, dispose of it “by any lawful means.” In a bout of semantics, the law specifically declares that the actions it authorizes do not constitute “suicide” or “assisted suicide” but instead constitute “obtaining and self-administering life-ending medication.” Physicians are not required to comply with requests by patients for lethal medication.
South Carolina authorizes “Physician Orders for Scope of Treatment” (POST) forms.

The South Carolina “Physician Orders for Scope of Treatment (POST) Act,” S.C. 2019 Act. No. 89 (May 24, 2019), permits a person to carry a standardized form providing directions for such person’s treatment in the event of an illness or condition that is medically determined to be likely to be terminal within one year. POST forms constitute medical orders from the carrier’s physician, made after such physician’s consultation with the carrier, and must be executed by the carrier’s physician. Health care providers who act in good faith in accordance with the instructions of a valid POST form are not liable for such actions. The act directs the South Carolina Department of Health and Environmental Control to develop a standardized POST form “based on the standards recommended by the National Physician Order for Life-Sustaining Treatment (POLST) paradigm.”

New Jersey life insurance policy intended to benefit strangers to insured was void ab initio.

In Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A. (N.J. Sup. Ct. A-19-17 080669), the Supreme Court of New Jersey found that a life insurance policy obtained by the insured’s grandson as trustee of a trust was void ab initio when the policy was purchased with funds obtained by “investors” in the trust who were unrelated to the insured, the grandson resigned as trustee in favor of the investors five weeks after the policy was issued, and the trust later sold the policy and distributed nearly all the proceeds to the investors. The policy included an “incontestability” provision intended to prevent the insurer from challenging the policy on any basis other than non-payment of premiums once two years had passed since the policy’s issuance, and the sale of the policy and the action to void the policy took place after such two years had elapsed; however, the court found that such incontestability provisions do not bar actions based on lack of insurable interest and that the incontestability provision here had no bearing because the policy was void from onset. Wells Fargo Bank, N.A. (“Wells Fargo”) had obtained the policy in a bankruptcy proceeding and paid all premiums due during its ownership, but when the insured died and Wells Fargo attempted to collect the insurance proceeds, the insurer investigated the policy and refused to pay on account of the initial policyowner’s effective lack of insurable interest (deeming the policy “STOLI,” or “stranger-originated life insurance,” which is against public policy in New Jersey). As indicated above, the insurer was successful, but the court found that Wells Fargo, as an innocent purchaser of the policy, was entitled to a refund of the premiums it paid.

Florida court finds that assets in Belize self-settled trust are subject to Florida bankruptcy proceedings.

In In re Resin, Bankr. S.D. Fla. No. 17-11834-EPK (May 3, 2019), the bankruptcy court for the South District of Florida, West Palm Beach Division, found that a trust established by a Florida settlor of which the settlor was also the primary beneficiary and that was administered in Belize and, under the terms of the trust instrument, governed by the laws of Belize was subject to Florida law for the purposes of determining whether assets of the trust could be included in the bankruptcy estate of the Florida resident. The court noted that the choice of law in a contract or trust instrument is binding unless that choice of law offends Florida public policy. The court held that, because self-settled asset protection trusts are highly disfavored in Florida but permitted in Belize, the choice of law provision offends Florida public policy and thus the court would apply Florida, and not Belize law, in matters involving the trust. Furthermore, under Florida law, if a trustee has the discretion to distribute all of the income and principal to the settlor, as the trustee does in the trust instrument at issue, creditors of the settlor can reach the assets of the trust to the extent the trust had not been created. Therefore, all of the assets of the trust were includible in the settlor’s bankruptcy estate, unless otherwise exempt. The court went on to apply bankruptcy law in determining whether the assets of the trust were exempt.

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