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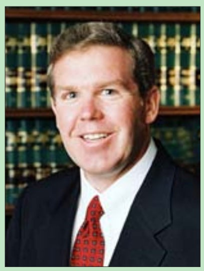
Preserving Family Harmony in Estate Planning

When we meet with a client to discuss the planning of his or her estate, a fair amount of emphasis is given to saving taxes, management of the property, and the ultimate disposition of the client's property after death. Often little consideration is given to family harmony. Yet, most clients, if asked, would state that asset preservation/disposition is second in importance to the preservation of family harmony after the client's death. We have all been confronted with the family where the surviving parent is the "glue" that holds the family together. When that person passes away, disagreements and feelings of not being treated fairly that have laid dormant for decades come bubbling to the surface, often to the long-term detriment of the relationship between the now deceased client's surviving family members. Yet, if we as lawyers spend a little more time probing into the family dynamics, I believe that we can better counsel our clients, allowing us to participate in preserving the family harmony.

Section President



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Although there are many estate planning decisions that impact family harmony, selection of the executor or successor trustee upon the death of the surviving parent likely has the most impact. However, little thought is often given to who should serve as fiduciary. I have had many clients almost automatically state that the oldest child should be the fiduciary, even though the oldest child is not always the best selection. When examining the matter a little closer, I may find that the client has suggested the oldest child simply because he or she is the oldest. To avoid favoritism, the client could name more than one child as a fiduciary, even though this in turn can raise issues if not all of the children are named or if the children do not get along. At the same time, whether one child, more than one child, or all of the children are named, the dynamics of the child's past relationships with other siblings, as well as the now deceased parent, impacts the child's judgment. Adding in-laws to the mix often further complicates the matter.

Another issue is what fee, if any, is the family member to receive for their efforts as a fiduciary? A child who serves for no fee may be resentful, especially when it does not appear that his or her siblings appreciate the time-consuming task or its complexity and responsibility. On the other hand, if the child takes a fee, other family members may feel that the family member receiving a fee is trying to receive a larger share of the estate.

If a child is serving as fiduciary and makes an unintended error in asset management, the child can be subjected to personal liability. Such potential personal liability can be both emotionally and financially devastating. The client can relieve the child from negligence in the will or trust, which the courts typically will honor; however, this does nothing for the family members that are left with no recourse for the harm caused by the negligence of the family member serving as fiduciary.

Another issue that may crop up is how to distribute tangible personal property equally among the family members, particularly if there are several items that more than one child desires and neither the will nor trust gives specific direction. Providing that the "executor shall distribute, as in their sole discretion" places the family member serving as fiduciary in a no-win situation.

Numerous other issues can arise, which the lawyer should discuss with the client, such as: is a formal accounting to be provided; how is the family farm or closely held business to be distributed between the "active" family member and "passive" family members; are gifts to children to be taken into account in distributing the client's estate; are loans to children to be forgiven or taken into consideration in distributing the estate; if a child has provided services or care to a parent, is there a concern that the child may make a claim for services provided after the parent has passed away, and should this be addressed in the testamentary document; if a parent intends to

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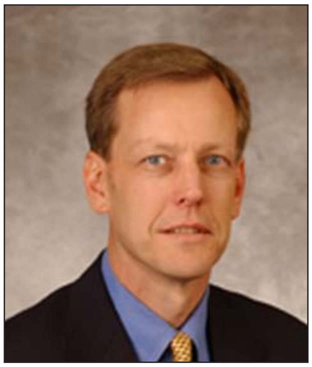
About the Author



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Estate Tax Notes:

Tax Cases and Rules Affecting the Estate and Business Succession Planner

VALUATION

1. *Dallas v. Comm.*, T.C. Memo 2006-212 (9/28/2006) – Value of S corporation stock determined without tax-affecting earnings; value of promissory note reduced for self-canceling feature

The taxpayer transferred about 55 percent of the nonvoting stock of the Dallas Group of America Inc. (Company), an S corporation the stock of which was not publicly traded, to trusts established for the benefit of his sons in exchange for cash and promissory notes signed by the sons. The transfers occurred in 1999 and 2000. The taxpayer and his sons agreed to be bound by a value for the Company's stock as estimated in a third-party appraisal. Each promissory note used to pay for the 1999 stock transfers contained a self-canceling feature that terminated the sons' obligations to pay if the taxpayer died before the notes were repaid in full. The IRS determined that the transactions were bargain sales for less than full and adequate consideration and, thus, were gifts. At issue was (1) whether the value of the Company stock on the 1999 valuation date was $907 per share as the Internal Revenue Service (IRS) determined or $620 per share as the taxpayer contended; (2) whether the value on the 2000 valuation date was $906 per share as the IRS determined or $650 per share as the taxpayer contended; and (3) whether the value of each 1999 note was $2,232,000, as the taxpayer contended or the lower amount of $1,687,704, as the IRS determined, due to the self-canceling feature.

The taxpayer argued that the price paid for the Company stock was set by a third-party appraisal and contended that the parties properly structured and documented the sales as arm's length transactions. The Tax Court disagreed, holding that intrafamily transfers were presumed to be gifts and concluding that the taxpayer had not overcome such presumption. The court stated that the transactions were designed by the taxpayer's counsel to serve his estate planning goals. It noted that the sons were not represented by their own counsel in the transactions and did not negotiate the terms of the agreements, suggesting the lack of arm's length transactions in these circumstances. The primary points of disagreement among the parties' expert witnesses were (1) whether to tax-affect the assumed S corporation income stream from the Company because of potential tax burdens imposed on the Company or its shareholders after a hypothetical sale; (2) whether to increase the Company's assumed income stream on the assumption that its executive compensation would decrease after the hypothetical sale; and (3) whether, and to what extent, to apply discounts for lack of control, voting power, and marketability.

With respect to the first issue, the taxpayer pointed out that the Company's S corporation election could be ended at any time. The court disagreed, stating that there was no evidence that the Company expected to cease to qualify as an S corporation. The Company had a history of distributing enough earnings for shareholders to pay their individual income tax liabilities on Company earnings, and there was no evidence that it intended to change such practice. Accordingly, the court concluded that there was not sufficient evidence to establish that a hypothetical buyer and seller would tax-affect the Company's earnings and held that tax-affecting the Company's earnings was not appropriate.

The IRS next argued that the Company's projected net income should be increased on the assumption that the family officers were receiving unreasonable compensation and that such amounts would be reduced voluntarily or as a result of litigation brought by a minority shareholder if a minority block of Company shares was sold to an unrelated investor. The court disagreed, stating there was nothing in the record that would allow it to analyze the reasonableness of the compensation or that would suggest that the Company was planning to change how it paid the taxpayer and his sons.

Finally, in determining the fair market value of the Company's stock on the valuation dates, the court upheld the following discounts used by the respective parties' experts: (1) 5 percent discount for lack of voting power, as applied by the taxpayer's expert; (2) 15 percent minority interest discount for nonoperating assets, as applied by both parties' experts; and (3) 20 percent minority interest discount for operating assets, as applied by the IRS' expert. The court also upheld the use of a 20 percent discount for lack of marketability by the IRS' expert, rather than the 40 percent discount used by the taxpayer's expert, resulting in a fair market value for the Company stock of $751 per share in 1999 and $801 per share in 2000.

In analyzing the value of the 1999 notes, the court agreed with the IRS that the values of the notes were less than their face value because of the lack of an adequate risk premium for the self-canceling clause and upheld the IRS' determination of value. In so holding, it rejected the taxpayer's attempt to have the notes reformed by disregarding the clauses as a result of a drafting mistake.

2. *Koblich v. Memo*, T.C. Memo 2006-63 (4/3/2006) – Tax Court values charitable contribution of closely held stock

In 1994, the taxpayer transferred 11,247 shares of common stock, representing a 45 percent interest, in Sealodge International Inc. (Sealodge) to Maine Resources Development Foundation (Foundation), an Internal Revenue Code (Code) Section 501(c)(3) charity. Simultaneously with such transfer, the other two Sealodge shareholders (a 45 percent shareholder and a 10 percent shareholder) transferred their shares to the Foundation. The taxpayer received $90,000 from the Foundation in exchange for the 45 percent interest in Sealodge. On his 1994 individual income tax return, the taxpayer claimed that the fair market value of the stock in Sealodge donated to the Foundation was $810,000 and that the resulting net gift to the Foundation was $720,000. Attached to the return was a letter from the Foundation confirming the transfer of shares and valuing the shares based upon a report of a consulting engineer. Two different valuation reports were also attached to the return. The taxpayer claimed charitable contribution deductions on his federal income tax returns for the donation for the years 1994 through 1999. The IRS determined a deficiency for the years 1998 and 1999, resulting from a reduction of the claimed deduction from $720,000 to $360,000.

Sealodge was incorporated in Florida in 1987. Its stock was never publicly traded or listed on a public exchange. Prior to the 1994 transfers, there had been one prior transfer of Sealodge stock in 1990. Sealodge's bylaws restricted the transfer of its stock as follows: (1) the stock was nontransferable, through sale or otherwise, without the prior approval of Sealodge; (2) Sealodge reserved the right to deny a transfer of its stock; and (3) Sealodge reserved the right to purchase, or refuse to purchase, the stock of any shareholder who desired to transfer his or her stock. As of the valuation date, Sealodge's assets consisted of a submersible barge known as Jules Undersea Lodge (Jules), a command center, two diving bells, and other miscellaneous equipment whose value was not of significance. During the years prior to and following the charitable contribution, approximately 90 percent of Jules' usage was as an undersea hotel, and the remaining use had been as a research facility. The cost to build such a vessel in accordance with the standards of the American Board of Shipping (ABS) and to have the vessel certified by the ABS would be from 25 percent to 50 percent more than the cost to build the same vessel without ABS certification. Jules had never been certified by ABS. A plan of liquidation was in place on the valuation date in order that Sealodge's assets could be distributed to the Foundation. Sealodge was liquidated on Dec. 31, 2004.

Noting that the parties' experts differed in their evaluations of the replacement cost of Jules, the Tax Court stated that it was not bound by such experts' opinions and could reach a decision based on its own analysis of the evidence in the record. Accordingly, the court started with the replacement cost figure used by the Foundation's expert to substantiate the charitable gift because of his involvement with the construction of Jules and his background. Factoring in depreciation, the court analysis yielded a fair market value for Jules of $1.06 million. Regarding applicable discounts, the court held that what Sealodge actually received did not matter because the gift tax was based upon the transfer, rather than the subject of the transfer. The court noted, however, that consideration should be given to the prearranged plan to transfer a 100 percent controlling interest in Sealodge. It held that a 10 percent discount was applicable, but that only a 6 percent discount was necessary to sustain the adjustment in the notice of deficiency. Therefore, the court sustained the adjustments made by the IRS.

CHARITABLE GIVING

3. *Brownstone v. U.S.*, 98 AFTR 2d 2006-6889 – No income tax charitable deduction for distribution made pursuant to exercise of general power of appointment

The decedent's will provided for the creation of a testamentary trust at his death to benefit his wife. The terms of the trust permitted the trustee to pay principal and interest for the wife's benefit and gave the wife a general power to appoint any assets remaining at her death to whomever she appointed in her will. In the absence of appointment, the assets would pass to a private foundation created by the taxpayer. Upon the wife's subsequent death 20 years later, the wife exercised the power of appointment in favor of her estate. Her will provided for 48 cash bequests to specified family and friends, following payment of all debts and expenses of the estate, and provided for the residue to be distributed to eight charities. In the year of the wife's death, the decedent's trust made income tax payments totaling more than $300,000. It later sought a refund of the taxes, treating the distribution pursuant to the exercise of the wife's general power of appointment as a contribution for charitable purposes. The IRS granted a refund of nearly $75,000 but denied the remaining claimed refund. The decedent's trust later filed a formal written protest with the IRS, which again denied the refund.

At trial, the district court recognized that for the distribution to qualify for a charitable deduction under Code Section 642(c)(1), the distribution must have been given pursuant to the terms of the governing instrument. The district court granted the government's motion for summary judgment, holding that the governing instrument was the decedent's will, which did not provide for distribution of the remaining trust funds to charity at the wife's death. On appeal, the court rejected the trustee's argument that the governing instrument was the decedent's will combined with the wife's power of appointment and held that the governing instrument was the decedent's will alone. The appeals court noted that the power of appointment did not restrict the wife's exercise in favor of charity because to do so would have resulted in a loss of the marital deduction. Because the power of appointment did not compel the wife to give anything to charity, the wife did not make her charitable distribution pursuant to the terms of the governing instrument, or the decedent's will. Therefore, no income tax charitable deduction was allowable to the decedent's testamentary trust.

ESTATE INCLUSION

4. P.L.R. 200602031 – Assets disclaimed by surviving spouse included in her estate

The decedent died, survived by his wife. Prior to his death, the decedent created a trust, which became irrevocable at his death. Pursuant to the terms of the trust, upon the decedent's death, the property of the trust was to be held as a "Marital Trust" for the benefit of his wife. The wife was to receive all income of the Marital Trust at least quarterly. The wife had the unrestricted use and exclusive enjoyment during her lifetime of all real and personal tangible property held by the Marital Trust. Upon the death of the wife, the remaining Marital Trust assets are to be distributed to a foundation for its general charitable purposes. The wife was the trustee of the Marital Trust, the principal of which included certain tracts or parcels of improved and unimproved real property. The decedent's trust provided that the wife could disclaim any interest in the Marital Trust. If any such disclaimer was unqualified, then the disclaimed interest would be disposed of as if the wife died at the time the disclaimer was delivered to the trustee.

Prior to the decedent's death, he created the foundation, for which the wife was the president, chairman, and sole director. Subsequent to the decedent's death, the foundation created a Charitable Trust. The wife and nine other individuals were named as trustees of the Charitable Trust, with the wife having the right to make the final decision on all issues relating to the administration of the Charitable Trust, including its activities and programs, and its expenditures and distributions. The trustees of the Charitable Trust had the power to sell its property. Upon creation of the Charitable Trust, the foundation irrevocably assigned its remainder interest in the Marital Trust to the Charitable Trust. Consequently, upon the wife's death, the remaining assets of the Marital Trust would pass to the Charitable Trust.

The wife, as income beneficiary of the Marital Trust and as trustee of the Charitable Trust, proposed to file a petition with a court to enter an order to divide the Marital Trust into two separate trusts to be known as Trust 1 and Trust 2. Each new trust was to be administered in accordance with the terms and conditions of the Marital Trust. The court order would be conditioned upon a favorable ruling from the IRS. Upon division of the Marital Trust, an unimproved parcel of real property would be transferred to Trust 1. Trust 2 would continue to hold all other assets. After the division, the wife proposed to disclaim, more than nine months after the decedent's death, her entire interest in Trust 1. Accordingly, Trust 1 would terminate, and its assets would be distributed to the Charitable Trust.

The IRS held that the division of the Marital Trust into two separate trusts would neither adversely affect the availability of the estate tax marital deduction by the decedent's estate, pursuant to Code Section 2056(b)(7) with respect to the Marital Trust, both before and after its division into separate trusts. As a result of the disclaimer, the wife would be treated as making a transfer of her interest in Trust 1 under Code Section 2511, and a disposition of her qualifying income interest under Code Section 2519, such that she would also be treated as making a transfer of the remainder interest in the Trust 1 corpus. Because the wife had the right to make the final decision regarding all issues relating to the administration of the Charitable Trust, including the power to direct expenditures and distributions for charitable purposes, the wife's proposed disclaimer of her interest in Trust 1 would constitute an incomplete gift for purposes of Code Section 2511. Similarly, her transfer under Code Section 2519 would constitute an incomplete gift. Accordingly, the wife would not be treated as making a completed gift subject to gift tax under Code Section 2501 as a result of the disclaimer. The IRS further held that assuming the wife retained her powers over the transferred property until her death, the value of the property transferred from Trust 1 to the Charitable Trust as a result of the disclaimer would be included in her gross estate under Code Section 2036(a)(2). The wife's estate would be entitled to an estate tax charitable deduction under Code Section 2055(a) for the value of the property included in her gross estate as a result of the disclaimer.

5. *Estate of Davenport v. Comm.*, T.C. Memo 2006-215 (10/5/2006) – Value of annuities created by litigation settlement agreement included in gross estate

The decedent was born in 1988. Thereafter, in 1989, a lawsuit was filed alleging that the decedent sustained physical injuries as a result of negligence and/or malpractice, resulting in central nervous system damage, including cerebral palsy. The lawsuit was subsequently resolved by means of a Settlement Agreement and Release, resulting in certain annuity payments to be paid to the decedent's parents, as co-conservators for the decedent, for the decedent's life, guaranteed for 30 years. The decedent died in 2000. After application of the unified credit, no tax was reported as due on the decedent's estate tax return. The return reported the annuities at a value of zero and also claimed a deduction for funeral expenses, which included expenses incurred for a luncheon following the decedent's funeral. The IRS subsequently issued a notice of deficiency, determining that the annuities had a combined value of more than $1.5 million and disallowing the deduction for the funeral luncheon.

The Tax Court held that the annuities were payable to the decedent's estate at her death. Under the terms of the Settlement Agreement, in the absence of designation of a beneficiary by the decedent or her parents as co-conservators, the payments would be made to the estate. The estate neither alleged, nor did documentary evidence suggest, that any such designation had been effected as of the decedent's death. Accordingly, the court held that the annuities were includible in the decedent's gross estate under Code Section 2033. The court next disallowed the claimed deduction for expenses related to the luncheon following the decedent's funeral. It stated that the testimony at trial indicated that the focus of the luncheon was on recognizing and thanking third parties for their support both during the decedent's life and after her passing. However, the traditional focus of a funeral is in eulogizing and laying to rest the deceased. Therefore, the expenses for the funeral luncheon could not be considered necessary in connection with the decedent's funeral, and the deduction was disallowed.

GIFT TAX

6. P.L.R. 200637025 – Donor's retained right to change beneficiaries results in incomplete gift

During his lifetime, the taxpayer created a trust, naming a corporate trustee. Trust income and principal were distributable to a class of beneficiaries consisting of the taxpayer, his spouse (if and when he married), his parents, any descendants of his parents, and any qualified charity. Distributions were to be made in accordance with unanimous agreement of the distribution committee or by unanimous agreement of the taxpayer and one member of the distribution committee. The distribution committee consisted initially of the taxpayer's father and brother. The trust provided that during the taxpayer's lifetime, there would always be two members on the distribution committee, each of whom was an adult member of the class of permissible trust distributees. At the taxpayer's death, the trust residue would be distributed as appointed by the taxpayer pursuant to a limited testamentary power of appointment. In the absence of appointment, the trust residue would be distributed equally to the taxpayer's father and brother who survived the taxpayer. If neither survived, the trust residue would be distributed to the taxpayer's descendants, per stirpes, or if none, then to certain foundations or other qualifying charities.

The IRS first concluded that it found no circumstances that would cause the taxpayer to be treated as the owner of any portion of the trust under Code Sections 673, 674, 676, or 677. It next held that the taxpayer's transfer of property to the trust would not be a completed gift because of the taxpayer's retained limited testamentary power of appointment. Further, because the taxpayer's father's and brother's powers to distribute trust property to themselves were exercisable only with the consent of the other or of the taxpayer, the father and brother would not be treated as having a general power of appointment, and they would not be treated as making a taxable gift if trust property was distributed to the taxpayer.

7. P.L.R. 200603002 – Assignment of policy to reflect true owner not a taxable gift

A husband and wife each owned separate life insurance policies insuring their respective lives. The husband and wife, their four children, and one of the children signing as trustee of a revocable trust created on the same date (Trust) each executed an instrument titled, "Transfer by Gift" (Instrument). The Trust was a revocable trust created by the four children, under which any child, at any time, could revoke his or her participation in the Trust and withdraw his or her share of the Trust assets. The Instrument provided that the husband and wife would each transfer and assign their individual policies to the trustee of the Trust in exchange for a deferred obligation from the Trust represented by a note in an amount equal to the combined value of the policies less the amount of the combined Code Section 2503(b) gift tax annual exclusion applicable to the Trust for the year. The Instrument also provided that the husband and wife each intended to exchange their policies for a survivorship policy that would be the property of the Trust in lieu of their respective separate policies. The Instrument further provided that each beneficiary of the Trust acknowledged the gift to the Trust and that each intended to contribute sufficient funds to the Trust to satisfy the deferred balance on the note and to pay ongoing premiums on the policy as needed to keep it in force. Finally, the Instrument provided that the husband and wife acknowledged that the transfer was a split gift to be considered as made one-half by each of them under Code Section 2513, in favor of each of their four children in an amount equal to the amount of the annual exclusion allowable under Code Section 2503(b). Neither the husband nor the wife filed a gift tax return for the year of the transfer. On Jan. 1 of the following year, the husband and wife executed a document forgiving the note from the Trust. No payments had been made on the note.

Shortly after execution of the Instrument, the husband and wife directed their insurance agent to exchange the two individual policies for a survivorship policy and to title the new policy in the name of the Trust. The insurance agent presented a number of documents for the husband and wife to sign, and they assumed the documents properly completed their requested transaction. However, the new policy continued to list the husband and wife as owners of the policy. Since the date of issuance of the new policy, premium notices on the policy had been sent by the insurance company to the child of the Trust, and the child, as trustee of the Trust, had paid all premiums due on the policy. The husband and wife, after discovering that the survivorship policy named them as owners, proposed to reform the policy to clarify that the Trust was the owner of the policy by executing a valid assignment of the policy in favor of the Trust.

The IRS noted that the provisions of an insurance policy (policy facts) govern the relationships between the insured, the insurer, the owner, and the beneficiary. Evidence to the effect that the policy facts do not conform to the intent of the parties (intent facts) must overcome the heavy presumption of the policy facts. The IRS recognized that in this case, the intent of the parties with respect to ownership of the policies was set forth in contemporaneous documents. The Instrument revealed that the husband and wife intended to transfer ownership of the insurance policies to the Trust, and the Trust document supported such conclusion. The IRS also recognized that the husband and wife instructed the insurance agent to title the new policy in the Trust's name, but the insurance agent failed to follow the instructions, and ownership of the new policy was not properly recorded. Accordingly, the IRS held that the assignment of the policy to show the Trust as its owner would not constitute a transfer subject to gift tax under Code Section 2512 and would not cause the proceeds of the policy to be includible in the gross estate of the husband or wife under Code Section 2035.

Although not part of the requested ruling, the IRS also held that the initial transfers of the policies, made subject to a deferred debt obligation, and the subsequent forgiveness of such debt obligation a few months later, in a different tax year, without any payments having been made on such debt obligation, was part of a prearranged plan to avoid owing gift tax with respect to the transfers of the policies. Accordingly, the IRS concluded for gift tax purposes that, as part of a prearranged plan, the husband and wife intended to forgive the note executed by the Trust in their favor. Thus, the husband and wife were treated as having made a gift in the year of the transfer equal to the face amount of the note. Because neither spouse had filed a gift tax return, the IRS stated they should expeditiously do so in order to report the gifts made by each spouse and to signify their consent to split gifts.

GENERATION SKIPPING TRANSFER (GST) TAX

8. P.L.R. 200607015 – Transfer of trust assets to new trusts would not affect GST-exempt status

On a date prior to Sept. 25, 1985, the grantor created an irrevocable trust (Trust A), which was divided into five equal shares (Trusts 1 through 5), one each for the grantor's daughter and her four children. On a different date prior to Sept. 25, 1985, the daughter created an irrevocable trust (Trust B), which was divided into four equal shares (Trusts 6 through 9), one each for her four children. No additions were made to the trusts after Sept. 25, 1985.

The trustees of the nine trusts proposed to transfer the corpus of each trust to a new trust, the dispositive terms of which would be identical to the dispositive terms of Trusts 1 through 9. The nine new trust instruments would provide for a different governing law than that of the current trusts. Administrative modifications would be made to the new trusts with respect to the corporate and individual trustees, and a new corporate trustee would be appointed. A provision would be added to permit the early termination of a trust if it was too small to make continuance economical. With respect to Trusts 1 through 5, a provision would be added such that no beneficiary trustee would be able to participate in any decision to make discretionary distributions, terminate the trust, or exercise any incidents of ownership over any policies of insurance held by the trust insuring the life of the individual trustee.

The IRS first recognized that Trust A, Trust B, and Trusts 1 through 9 were not subject to the generation skipping transfer tax. The IRS noted that the new trusts would not shift any beneficial interest to a beneficiary who occupied a lower generation than the person who held the beneficial interest prior to the modification, and administration under the new state law would not extend the time for vesting of any beneficial interest. Accordingly, it concluded that the appointment of the corpus of Trusts 1 through 9 into nine new trusts and the change in situs of the new trusts would not cause any of the existing or new trusts to lose the status of grandfathered trusts from the GST tax. The IRS next applied the rationale in *Cottage Savings Association v. Comm.*, 499 U.S. 554 (1991), in recognizing that the proposed reformation would not cause the interests of the trust beneficiaries to differ materially and, thus, concluded that neither the trusts nor the beneficiaries would be required to recognize gain or loss from a sale or other disposition of property under Code Sections 61 and 1001. The IRS further held that the tax basis of the new trusts in property received would be the same as the tax basis of the transferring trusts in such property. Accordingly, the holding period of the new trusts would include the holding period of the predecessor trusts in such property. The IRS also held that the transfers would not result in the realization of any income, gain, or loss under Code Sections 661 and 662. The IRS next concluded that the transactions would not constitute a transfer by any beneficiary within the meaning of Code Sections 2035 through 2038. Finally, the IRS held the transfers would not be subject to the gift tax under Code Section 2501.

OTHER

9. P.L.R. 200636086 – Sale of life insurance policy to irrevocable grantor trust not a transfer for value

During his lifetime, the taxpayer created an irrevocable grantor trust, naming his spouse as trustee. The trust was created for the benefit of the taxpayer's issue. The taxpayer proposed to sell a variable universal life insurance policy insuring his life to the trust for valuable consideration. The taxpayer was the original purchaser of the policy and had paid all policy premiums. Relying on the taxpayer's representation that the irrevocable trust was a grantor trust for federal income tax purposes, the IRS held that the transfer of the policy by the taxpayer to the irrevocable trust for valuable consideration would be disregarded for federal income tax purposes and, thus, would not constitute a transfer for valuable consideration within the meaning of Code Section 101(a)(2).

10. *Rudkin Testament Trust v. Comm.*, 98 AFTR 2d 2006-7368 (2d CIR.), *aff'g* 124 T.C. 304 (2005) – Trust's deduction for investment expenses subject to 2 percent floor

In 1967, Henry Rudkin established a trust (Trust) for the benefit of his son and his son's wife, descendants, and their spouses. In its 2000 tax return, the Trust claimed a deduction of more than $22,000 for investment management fees. In 2003, the IRS sent the Trust a notice of deficiency, rejecting the itemized deduction for investment advice fees and permitting such a deduction only in the amount as exceeded 2 percent of the Trust's adjusted gross income for the tax year. As a result, the IRS asserted an income tax deficiency of nearly $4,500. At trial, the Trust argued that the trustee's fiduciary duty required investment advisory services for the proper administration of the Trust's sizable stock portfolio and that the investment advice fees were therefore fully deductible under Code Section 67(e)(1). The Tax Court disagreed, holding that the investment advisory fees paid by the Trust were deductible only to the extent they exceeded 2 percent of the Trust's adjusted gross income pursuant to Code Section 67(a).

On appeal, the 2nd Circuit affirmed the holding of the Tax Court. It noted that trusts were generally subject to the same rules for calculating adjusted gross income that apply to individuals, with one exception. A trust's costs were fully deductible, rather than subject to the two percent floor, if they (1) were paid or incurred in connection with the administration of the trust; and (2) would not have been incurred if the property were not held in such trust. The 2nd Circuit noted the circuit split in these rulings. The 6th Circuit had held that investment advisor fees were costs incurred because the property was held in trust, thereby making them eligible for the Code Section 67(e) exception and not subject to the 2 percent floor. It reasoned that because a trustee has a fiduciary duty to manage trust assets as a prudent investor, investment advisory fees are necessary to a trust's administration and caused by the fiduciary duty of the trustee. The Federal Circuit rejected such reasoning and held that because investment advice and management fees are commonly incurred outside of trusts, such costs are not exempt under Code Section 67(e)(1) and are required to meet the 2 percent floor of Code Section 67(a). The 4th Circuit subsequently joined the Federal Circuit in holding that investment advice fees incurred by a trust are subject to the 2 percent floor of Code Section 67(a). The 2nd Circuit in the present case agreed with the Federal and 4th circuits in holding that Code Section 67(e)(1) does not exempt investment advice fees incurred by trusts from the 2 percent floor, but on different reasoning that individual property owners obviously can incur such expenses. It, therefore, affirmed the judgment of the Tax Court.

11. Prop. Reg. §§ 1.72-6(E)(1), 1.1001-1(J)(1), 71 FR 61441 (10/18/06) – Proposed regulations would end income tax deferral on exchange of property for annuity

The IRS and the Treasury have issued proposed regulations that would end the income tax deferral of the gain on the exchange of appreciated property for a private annuity. Under the proposed regulations, such exchanges would now result in the immediate recognition of gain equal to the excess of the present value of the annuity, determined in accordance with the regulations issued under Code Section 7520, and the transferor's adjusted basis in the property so exchanged. The prior rule generally postponed tax on the exchange of appreciated property for a private annuity, a result inconsistent with the tax treatment of exchanges for commercial annuities or other kinds of property. The proposed regulations, which do not affect charitable gift annuities, apply generally to exchanges of property for an annuity contact after Oct. 18, 2006.

12. Statutory tax rates, exemptions, and deductions for 2007

The following changes affect estate planners for transfers made, and estates of decedents dying, in 2007:

(a) The gift tax annual exclusion under Section 2503 of the Internal Revenue Code (Code) of 1986, as amended the Code remains at $12,000 per donee.

(b) The annual exclusion for gifts to a noncitizen spouse under Code Section 2523(i)(2) increases to $125,000.

(c) The GST tax exemption under Code Section 2631 will be $2 million.

(d) The aggregate amount that special use valuation of farm or business real estate may reduce an estate under Code Section 2032(A) increases to $940,000.

(e) If an estate elects to defer payment of estate taxes under Code Section 6166, the amount of the business interest of an estate, the taxes of which are subject to a 2 percent interest rate under Code Section 6601(j), will be $1.25 million.

(f) The income tax rates for taxable income of an estate or trust will be 15 percent for taxable income not more than $2,150; 25 percent for taxable income more than $2,150 but not more than $5,000; 28 percent for taxable income more than $5,000 but not more than $7,650; 33 percent for taxable income more than $7,650 but not more than $10,450; and 35 percent for taxable income more than $10,450.

(g) The estate tax rate under the Code is a flat 45 percent for all taxable estates. ■

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Newsletter

To be successful and informative, a section newsletter needs articles or ideas that reflect the needs of its membership. If you would like to contribute to the newsletter, contact Calvin J. Karlin at ckarlin@barberemerson.com.

Real Estate Update

About the Author

Mark A. Andersen, Lawrence, is a member of Barber Emerson L.C. He received his B.A. from Bethany College and his J.D. from the University of Kansas School of Law, where he was a member of the Kansas Law Review.

Andersen is admitted to the bar in Kansas and Missouri. Andersen is a fellow of the American College of Real Estate Lawyers and a member of the Kansas Society of Farm Managers and Rural Appraisers. His practice includes real estate, like-kind exchanges, and construction. Andersen can be reached via e-mail at mandersen@barberemerson.com.

KANSAS SUPREME COURT

DECISION POINT INC. V. REECE & NICHOLS REALTORS INC.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 95,543 – OCTOBER 27, 2006
Assignment of Real Estate Commissions

ATTORNEYS: W. Joseph Hatley and Rebecca J. King, Lathrop & Gage L.C., Overland Park, for appellant. Loren W. Moll, Caldwell & Moll L.C., Overland Park, for appellee. Vernon L. Jarboe and Martha A. Peterson, Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC, Topeka, amicus curiae for Kansas Association of Realtors. Mark Ovington, Shook, Hardy & Bacon LLP, Kansas City, Mo., amicus curiae for Individual Real Estate Agents. Arthur E. Palmer, Goodell, Stratton, Edmonds & Palmer LLP, Topeka, amicus curiae for International Factoring Association.

FACTS: Decision Point Inc., d/b/a Commission Express, advanced money to two real estate agents who worked for Reece & Nichols Realtors Inc., in return for the assignment of their commissions. Commission Express filed the necessary documents to perfect its security interests. Commission Express also notified Reece & Nichols of the assignments. Reece & Nichols paid the assigned commissions directly to the real estate agents, rather than directly paying Commission Express. When the real estate agents defaulted on the agreement with Commission Express by failing to tender payment, Commission Express sued Reece & Nichols for payment of the commissions. The district court granted summary judgment to Reece & Nichols finding that the Uniform Code for Consumer Credit (UCCC) precluded the assignment of real estate agents' earnings, and Commission Express appealed.

ISSUE: Assignment of real estate commissions.

HELD: Court affirmed. Court held that advancing cash to a real estate agent for personal, family, or household purposes in return for the assignment of an anticipated commission and a percentage of the anticipated commission is a consumer loan subject to the UCCC. Court held that the real estate agents assigned their earnings in violation of the UCCC and that Commission Express could not enforce the assignment against Reece & Nichols.

STATUTES: K.S.A. 16a-1-101 *et seq.*, K.S.A. 2005 Supp. 16a-1-107, -1-201, -1-301(13), (15), (17), (21), (27), -3-305; K.S.A. 20-3017; and K.S.A. 84-9-102, -9-406

KANSAS COURT OF APPEALS

TOWN CENTER SHOPPING CENTER V. PREMIER MORTGAGE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,917 – DECEMBER 22, 2006
Contract, Apparent Authority, and Attorney Fees

ATTORNEYS: J. Michael Kennalley, Martin & Churchill Chtd., Wichita, for appellant. James R. Gilhousen, Crockett & Gilhousen, Wichita, for appellee.

FACTS: Town Center owns a shopping center in Derby. Premier Mortgage is a mortgage broker that never leases property itself; rather it subleases space from an existing tenant that then becomes the branch manager. Town Center leased property to Empire Lending Co. LLC, for residential mortgage brokerage services. The lease provided that Empire could not assign or sublet without the prior written consent of Town Center. Without permission from Town Center, Premier Mortgage leased the property from Empire Financial & Mortgage Co. LLC, an independent entity with independent ownership. Later, Premier, through the branch manager Nancy Bayer, signed a lease with Town Center encompassing the property previously leased to Empire and included a letter indicating the branch was in good standing, but did not explicitly state that Bayer had authority to act on Premier's behalf or sign the lease. Premier terminated its business and vacated the premises in 2005. Town Center sued for possession of the premises and $5,998.10 in rent, taxes, insurance, and common-area maintenance expenses, and later amended damages for a total amount due of $13,493.18. The district court granted judgment to Town Center for $13,493.18 plus attorney fees.

ISSUES: (1) Contract, (2) apparent authority, and (3) attorneys fees.

HELD: Court affirmed. Court held that based on the facts and circumstances of this case, Town Center established by clear and satisfactory evidence that Premier's letter induced Town Center to believe Bayer had apparent authority to act on behalf of Premier and the district court properly concluded that Premier was bound to the lease executed by Bayer. Court held that although the district court found that Premier ratified the lease by not repudiating it, this argument was not supported by clear and satisfactory evidence. Court held that pursuant to the terms of the lease, the district court properly ordered Premier to pay Town Center's attorney fees. Court stated the record did not indicate where Premier contested the adequacy of the trial court's findings.

Court held the problem with Premier's argument started with the district court's adoption of all of Town Center's findings of fact and conclusions of law, including the conclusion that Premier ratified Bayer's action of signing the lease. Court stated that because a trial court's findings and conclusions are the very essence of the judicial function, they should not be surrendered to counsel.

STATUTE: K.S.A. 16a-5-110

OFFICE OF THE ATTORNEY GENERAL
STATE OF KANSAS

OPINION 2006-27

Personal and Real Property – Land and Water Recreational Areas – Recreational Trails; Duties of Responsible Party; Authority of County.

Counties and County Officers – County Commissioners; Powers and Duties – Powers of Board of Commissioners; Funding Repair of Privately Owned Bridges; Public Purpose Doctrine; Duties and Powers to Enforce Conditions involved in Rails-to-Trail Program. Delton M. Gilliland, Osage County Counselor, Lyndon, Oct. 17, 2006.

SYNOPSIS: Pursuant to the authority granted in K.S.A. 2005 Supp. 19-101a, as amended, and K.S.A. 19-212, analyzed in light of "the public purpose doctrine," the Osage County Commissioners may expend county funds that are lawfully available for that purpose to construct bridges on rails-to-trails property not owned or operated by the county. K.S.A. 58-3215, as amended, allows aggrieved adjacent property owners to enforce the provisions of the Rails-to-Trails Act. Cities and counties in which trails are located also have that ability. However, though it may appear appropriate for a city or county to enforce requirements, the statute, as written, clearly makes that decision discretionary with the city and county.

STATUTES: K.S.A. 2005 Supp. 19-101a, as amended by L. 2006, Ch. 207, § 4 and Ch. 192, § 4; K.S.A. 19-212; 58-3211; 58-3212; 58-3215, as amended by L. 2006, Ch.178 § 2; and 16 U.S.C. § 1247

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JONES ET AL. V. WILDGEN ET AL.
CASE NO. 03-2369
OCTOBER 5, 2006

Zoning Ordinance, Rental Property, and Administrative Searches

ATTORNEYS: Christopher R.P. Miller, Little & Miller Chtd., Lawrence, for plaintiffs. Gerald L. Cooley and Randall F. Larkin, Gilliland & Hayes P.A., Lawrence, for defendants.

FACTS: Plaintiffs filed suit against the city of Lawrence and various city officials under 42 U.S.C. § 1983, alleging that defendants violated plaintiffs' constitutional rights under the Fourth and 14th amendments when they enforced a city ordinance that requires rental properties in certain residential areas be licensed and inspected. The city adopted ordinances that impose occupancy limits on residential rental property located in areas zoned for single family residences and requires that every owner of a single-family dwelling in an RS (single family) zoning district obtain an annual rental licensing permit before leasing it to an unrelated person. The ordinances provide that except for owner-occupied property, no single-family dwelling in an RS zoning district shall be leased for occupancy by more than three unrelated persons who do not constitute a family, as defined by the zoning code. The property must be inspected at least once every three years to ensure compliance. Violations are municipal offenses and owners are subject to fines and the owner's rental license may be revoked.

ISSUES: (1) Did the defendants violate the Fourth Amendment rights of plaintiffs – Jones, Kirby, and Turner – by unlawfully conducting searches and inspections of their property "with no proper legal basis"? (2) Did the defendants violate plaintiff Lawrenz's 14th Amendment right to due process by not allowing him to appeal the notice to appear for failure to register his property?

HELD: (1) The court sustained the defendants' motion for summary judgment as to Jones and Turner because they did not produce any evidence that any defendant searched, or caused a search of, their homes without consent or a valid warrant. The court held that the record contained evidence that the searches conducted were based on administrative warrants and such administrative searches do not require the same kind of "probable cause" required for criminal searches. As to plaintiff Kirby, the court sustained the defendants' motion for summary judgment because defendants never conducted a search of his home. (2) The court sustained the defendants' motion for summary judgment as to Lawrenz's 14th Amendment claim. The court noted that the ordinance does not provide a right to appeal the registration process and that the municipal court provides a legally sufficient process for a landlord that fails to register.

STATUTES: 42 U.S.C. § 1983; City of Lawrence Code Section 6-1302, 1304-1309

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

IN RE HERRMAN
CASE NO. 05-15429-7
NOVEMBER 28, 2006

Fraudulent Transfer of Property, Debtor's Intent

ATTORNEYS: Shon D. Qualseth, Thompson, Ramsdell & Qualseth P.A., Lawrence, for plaintiff. Jeffrey L. Willis, Johnson, Kennedy, Dahl & Willis, Wichita, for defendant-debtor.

FACTS: The plaintiff, a creditor of the debtor, moved for summary judgment contending that the debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) because, within one year before filing bankruptcy, he transferred property with the intent to hinder, delay, or defraud the plaintiff. The debtor concedes that he made the transfers of property, but denies he made them with the requisite intent to hinder, delay, or defraud the plaintiff.

ISSUE: Debtor's denial of intent to hinder, delay, or defraud.

HELD: The court held that plaintiff is not entitled to summary judgment because debtor's denial of intent to hinder, delay, or defraud is not so utterly implausible in light of conceded or irrefutable evidence that no person could believe it. The court compared the alleged facts to the badges of fraud that the 10th Circuit identified in *In re Carey* and found that the plaintiff's evidence fell short of establishing as a matter or law that the debtor's transfer of the property was made with the intent to hinder, delay, or defraud the plaintiff.

STATUTE: 11 U.S.C. § 727(a)(2)(A)

IN RE AGNEW
CASE NO. 05-17361
OCTOBER 31, 2006
Homestead Exemption and Conversion of Nonexempt Property

ATTORNEYS: Carl B. Davis, Davis & Jack LLC, Wichita, for the trustee. Dennis E. Shay, Smith, Shay, Farmer & Wetta LLC, Wichita, for debtors.

FACTS: Trustee objected to debtor's homestead exemption, claiming that the debtor was converting nonexempt property into exempt property with the intent to hinder, delay, or defraud a creditor. Debtor acquired the homestead by an exchange of property with his mother five days before he filed for bankruptcy.

ISSUE: Whether the language "with the intent to hinder, delay, or defraud a creditor" in section 522(o)(4) requires the same standard of actual intent to defraud as do sections 727(a)(2)(A) and 548(a)(1).

HELD: The court holds that the language in section 522(o)(4) requires the party objecting to establish actual intent to defraud. Here, the court found that the debtor had a legitimate estate planning purpose behind the transfer, discussed with his mother months before bankruptcy was contemplated, and that only the timing of the transfer was affected by the decision to file for bankruptcy.

STATUTES: 11 U.S.C. §§ 522(o)(4), 548(a)(1), 727(a)(2)(A); K.S.A. 60-2301

IN RE COOVER ET AL.
CASE NO. 06-40176 *ET AL.*
SEPTEMBER 28, 2006
Chapter 13 Form Plan and Post-Petition Mortgage Payments

FACTS: In each of the 10 bankruptcy cases before the court a home mortgage creditor has objected to language contained in the Chapter 13 Trustee's recommended form plan. The language is ambiguous about whether creditors can charge fees that come due pursuant to the pre-petition contractual agreement of the parties but are not specified in the creditors Proof of Claim.

ISSUE: The creditors want the language of the form plan to include a statement that allows them to charge certain reasonable fees that come due pursuant to the pre-petition contractual agreement of the parties that are not specified in the creditors Proof of Claim.

HELD: The court held that the form plan would be acceptable if it included, inter alia, the following language regarding post-petition payments: "... including any other reasonable amounts that properly come due pursuant to the pre-petition contractual agreement of the parties and of which the creditor gives such timely and appropriate notice as the parties' pre-petition agreement requires ... ."

STATUTES: 11 U.S.C. 1322(b)(2) and 1327(a); D. Kan. LBR 3015(b).1; Fed. R. Civ. P. 60(b)

IN RE DILLER
CASE NO. 05-42116
SEPTEMBER 11, 2006
Child Support Payments and Homestead Exemption

ATTORNEYS: Patricia E. Hamilton, Wright, Henson, Clark, Hutton, Mudrick, & Gragson LLP, Topeka, for the trustee. Brenda Bell, Manhattan, for the debtor.

FACTS: The matter before the court is the Trustee's Motion for Turnover. A property settlement entered into by debtors, ex-husband and ex-wife, contains a contract right to payment of $7,000 for equity in real property of homestead maintained by ex-wife. Debtors are setting-off this $7,000 against child support owed by ex-husband.

ISSUES: (1) Are payments made relating to child support exempt from inclusion in debtor's bankruptcy estate? (2) Is debtor's contract right to payment of 50 percent of accrued equity entitled to the homestead exemption?

HELD: (1) The court held that payments made for child support are not exempt from inclusion in debtor's bankruptcy estate. The court noted that in Kansas, child support is a property interest belonging to the child and that the custodial parent merely has the right to enforce the child's property interest. (2) Debtor is not entitled to the homestead exemption under K.S.A. 60-2301 because he was neither occupying the property at the date of filing nor is he intending to reinvest the equity in a new homestead.

STATUTE: K.S.A. 60-2301

IN RE FAIR
CASE NO. 05-43450
AUGUST 24, 2006
Inadvertent Release of Mortgage

FACTS: When debtors paid the balance of their second mortgage, their lender inadvertently released their first mortgage. Debtor continued to make the monthly payments on the first mortgage for 18 months. Debtors then learned of the release and stopped paying on the first mortgage. After payment ceased, lender filed suit to foreclose on the first mortgage, and debtors filed bankruptcy to stop the foreclosure.

ISSUE: Whether lender holds a valid security interest in debtors' real property, even though lender inadvertently filed a release of the mortgage.

HELD: There is no factual question that the release of the first mortgage was inadvertent. According to Kansas law, the mortgage remains valid and enforceable as between the parties. Thus, as between this creditor and these debtors, there is a valid security agreement under Kansas law. Accordingly, the court awarded to lender certain property inspection fees and attorneys fees for the foreclosure proceedings incurred by the lender, except that the allowed amount of such fees were reduced by the court. The issue of whether the trustee might have the ability to void the mortgage is not before the court.

STATUTES: None

IN RE GARSTECKI
CASE NO. 04-25005
AUGUST 16, 2006
Abandonment of Homestead and Conservatorship

ATTORNEYS: Joanne B. Stutz, Evans & Mullinix P.A., Shawnee, for Farm Credit Services. Eric C. Rajala, Shawnee Mission, for the debtor.

FACTS: Farm Credit Services (FCS) objected to the debtor's homestead and vehicle exemptions. As of the date of filing, the debtor was a 72-year-old single person residing in a nursing home. The debtor's chapter 7 bankruptcy petition was filed by the debtor's granddaughter and conservator. Prior to filing the bankruptcy petition, the conservator sought and obtained a court order authorizing the sale of the debtor's real and personal property, because the debtor could no longer physically reside at his homestead due to mental and physical incapacity, and to generate funds to pay debtor's ongoing living expenses. The farm property was under a sale contract, and the proceeds from the sale were not intended by the debtor's conservator to be used to purchase another home for debtor. The proposed sale of the real property could not be consummated because of the judgment lien of FCS. Debtor filed a motion to avoid the judicial lien of FCS on the homestead property. FCS contends the property was no longer debtor's homestead when he filed his bankruptcy petition because debtor did not reside on the farm and had no intention of returning to the property.

ISSUES: (1) Is conservator's and co-guardian's determination that debtor will not return to homestead imputed to the debtor and, thus, constitute abandonment of the homestead? (2) Is debtor entitled to avoid FCS's lien on the homestead pursuant to § 522(f)?

HELD: The court held that debtor did in fact have an intent to return and that under the conservatorship statute, the debtor retains personal rights; as long as the ward owns the homestead, the ward, not the conservator, retains the right to waive the protection afforded homesteads. Absence from the premises must be voluntary, and absence that is involuntary or compulsory does not constitute a relinquishment of homestead rights. The court held that the debtor's Osage County homestead is not subject to a judgment lien arising from the recording of the FCS judgment in Osage County.

STATUTES: K.S.A. 59-3078, K.S.A. 60-2301, K.S.A. 60-2304, 11 U.S.C. § 522(f)

IN RE SCHWARTZ
CASE NO. 03-16197
JULY 31, 2006
Improper and Untimely Invocation of § 1144

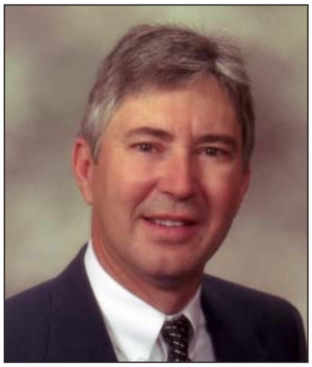
FACTS: Farm Credit Services (FCS) filed a motion for an order requiring the sale of debtor's undisclosed one-sixth interest in real property, and argues that the proceeds of such sale should be paid to the unsecured creditors. When debtor's mother conveyed her real property on April 18, 1992, by deed to debtor and his five siblings and reserved a life estate for herself, debtor received a one-sixth vested remainder interest. The property consisted of two quarter sections (with excepted tracts) and two town lots in Hanover. Debtor filed for bankruptcy on Nov. 12, 2003, and the court confirmed debtor's Joint Plan of Reorganization on Aug. 15, 2005. Debtor's mother died in October 2005. FCS filed its motion on Nov. 9, 2005.

ISSUES: (1) Is the one-sixth fee interest part of the debtor's bankruptcy estate, and (2) was the court's jurisdiction properly invoked?

HELD: Only the remainder interest, and not the fee, was a part of the debtor's bankruptcy estate at time of confirmation. The court held that debtor's bankruptcy estate did not include the one-sixth fee interest because such interest did not become a fee interest until after the effective date, which was 10 days after confirmation of the debtor's plan. The court also held that its jurisdiction was not properly invoked because FCS did not bring an adversary proceeding as required by federal rule of bankruptcy procedure 9024(3), it only filed a motion within the 180-day window allowed under § 1144 of the bankruptcy code.

STATUTES: 11 U.S.C. §§ 541(a)(5), 1129, 1144; Fed. R. Bank. P. 9024(3); Fed. R. Civ. P. 60 ■

About the Author



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He received his B.A. and J.D. from the University of Kansas, where he was Phi Beta Kappa, Order of the Coif, and Kansas Law Review *note and comment editor.*

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Probate and Trust Cases

KANSAS SUPREME COURT

IN RE KENT O. DOCKING
DECEMBER 8, 2006

ATTORNEYS: Alexander M. Walczak, Topeka, for Disciplinary Administrator Stanton A. Hazlett; and John J. Ambrosio, Topeka, for and with pro se respondent Kent O. Docking, Kansas City, Kan.

Docking accepted $1,500 in fees to establish a voluntary conservatorship. The district court refused to accept Docking's outdated pleading forms. Docking did not get new pleading forms to Ms. Rogg or her daughter and missed the "window of opportunity" for her voluntary consent to the conservatorship. She "began hiding her money, preventing her family from assisting her with financial decisions." Despite request, Docking refused to refund the $1,500 until two days before his disciplinary hearing. He was suspended from the practice of law for 90 days and ordered to refund the $65 filing fee and statutory interest on the refunded amount.

KANSAS COURT OF APPEALS

IN RE ESTATE OF ROLOFF
SEPTEMBER 29, 2006

ATTORNEYS: Cheryl L. Trenholm and Terence E. Leibold of Barber Emerson L.C., Lawrence, for appellant Charles Schletzbaum; and Christina A. Newland and Robert M. Beachy of Van Osdol, Magruder, Erickson & Redmond P.C., Kansas City, Mo., for appellee Commerce Trust Co., Administrator.

Schletzbaum was the beneficiary of a transfer-on-death (TOD) deed. The issue was who gets the growing crops absent a reservation in the deed. After wheat, corn, and soybeans were planted, Roloff executed and recorded the TOD deed. Roloff died less than a month later (July 24) and before any of the crops were harvested.

The administrator demanded an accounting by Schletzbaum. The net proceeds were $67,424.65. The district court ordered payment of this amount plus interest by Schletzbaum to the administrator. Schletzbaum appealed.

Although Commerce Trust Co. argued that the crops were personal property subject to K.S.A. 59-1206, the Court of Appeals relied upon K.S.A. 58-2202 and a long line of case law to the effect that "a conveyance of land by voluntary deed or judicial sale, without reservation, carries all growing crops with the title to the land." The court analogized the TOD provisions in K.S.A. 59-3504(b) to joint tenancy and noted that no Kansas court has ever applied K.S.A. 59-1206 to joint tenancy property. The court concluded that, "The survivorship attribute for both forms of deeds is a contractual relationship which causes title in such property to vest immediately upon either the record owner's or the joint tenant's death." *See* K.S.A. 59-3504; *In re Estate of Shields*, 1 Kan. App. 2d at 692.

IN RE CONSERVATORSHIP OF CHAPMAN
OCTOBER 20, 2006

ATTORNEYS: T. Michael Wilson, Douglas C. Cranmer & Jeffrey N. Lowe of Stinson, Lasswell & Wilson L.C., Wichita, for appellant Deborah Chapman; and Jon S. Womack, Wichita, for appellee Thomas Chapman.

Thomas Chapman was conservator for his three children. He withdrew the Kansas Police and Fire disability payments payable to each of children in order to make his child support payments. His ex-wife and the children's mother complained. The divorce court indicated that Chapman could not use the disability payments for his child support, but the Sedgwick County probate court apparently analogized to offsetting child support for Social Security benefits and denied Deborah's requests to remove Chapman as conservator and require reimbursement to each of the conservatorships. Chapman resigned as conservator before the appeal was argued. The Court of Appeals rejected Chapman's argument that the probate court's sua sponte review and approving journal entries did not constitute real approval absent actual conservator petitions for court approval after notice and hearing. (The court also noted that Chapman was initially appointed without notice to Deborah or anyone, without a guardian ad litem and without bond.)

Based upon the probate court's indication that Chapman's actions were proper and a letter from his attorney to similar effect, the court held that Chapman innocently misused the funds and required repayment (but not double repayment as would be mandated by K.S.A. 59-3088(f) and 59-1704 for conversion or embezzlement). The court noted that the issue of any lost earnings from the misused conservatorship funds had not been raised.

IN RE MARRIAGE OF CRANE
SEPTEMBER 29, 2006

ATTORNEYS: James R. Orr, Westwood, for appellant John Crane; and Thomas Francis Sullivan, Overland Park, for appellee Lois Crane.

Divorce court could not retain jurisdiction to divide potential retirement plan benefits where no retirement plan yet exists. District court's attempt to do so was overruled.

IN RE ADOPTION OF X.J.A.
SEPTEMBER 15, 2006

ATTORNEYS: J. Scott Koksal of Lindner & Marquez, Garden City, for appellant natural mother; and Glenn I. Kerbs, Dodge City, for appellee.

Natural mother admitted that she signed a consent to adoption. It was subsequently taken to a notary by the adoptive mother who convinced the notary to acknowledge it without the natural mother's presence. While the district court approved the adoption based upon the mother's testimony that it was her signature, the Court of Appeals reversed and held that the K.S.A. 59-2114(a) presumption of proper consent could not be used to shift the burden to the natural mother to prove that her written consent was not freely given.

U.S. BANKRUPTCY COURT

IN RE HILGERS
CASE NO. 04-11019
JUDGE NUGENT, SEPTEMBER 25, 2006, ADV. NO. 04-5281

ATTORNEYS: D. Michael Case and Aaron R. Disney of Case, Moses, Zimmerman & Wilson P.A., Wichita, for bankruptcy trustee D. Michael Case; J. Michael Morris of Klenda, Mitchell, Austerman & Zucher, Wichita, for Turnbull Oil Inc.; and Ross J. Wichman of Anderson & Wichman, Hays, for debtor Phillip L. Hilgers.

Bankrupt was a remainder beneficiary of three separate revocable trusts created by his grandmother, father, and mother. They had life estates, but all had died several years before the chapter 7 bankruptcy was filed. The trusts had spendthrift provisions, but trust administration was complete except for final distribution to the bankrupt. Consequently, the bankruptcy trustee was entitled to receive the remainder interest from each revocable trust (that became irrevocable upon each respective settlor's death), subject to a pre-bankruptcy state court garnishment by a judgment creditor against the three trusts after the settlor's deaths (when the spendthrift provisions were no longer effective). ■

Preserving Family Harmony

Continued from Page 1

provide unequal shares of their estate to their children how should this be addressed to mitigate the perception that such treatment carries? These are only a few of many such issues that may arise and that should be considered by the lawyer in counseling clients.

Tim O'Sullivan has written a law journal article on the impact of family harmony, pointing out numerous issues, and offering solid suggestions to assure that such family harmony remains intact. I have read the article and it is excellent. I encourage each of you to do so as well. It is titled, "Family Harmony: An All Too Frequent Casualty of the Estate Planning Process," and it will be published in the spring 2007 issue of the Marquette University *Elder's Advisor*.

Finally, on an unrelated topic, I heard that rather than make a New Year's resolution, we should instead make a "goal." I encourage each of us that are members of this section to make it our goal to recruit one individual who is not a member of our section to become a member in 2007. ■

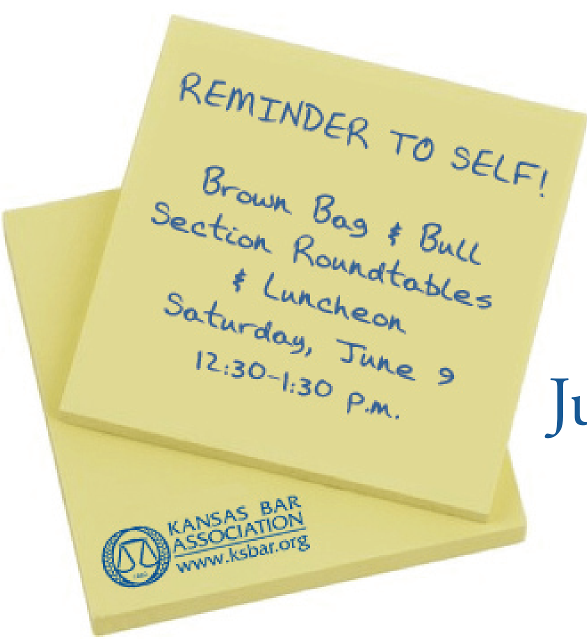
About the President

Robert M. Hughes *practices in the areas of taxation, trusts and estates, wills, probate, asset protection, succession planning, and business planning. Hughes also represents individuals in the preparation of pre- and post-marital agreements. He is admitted to practice in the U.S. Supreme Court, 10th U.S. Circuit Court of Appeals, U.S. Tax Court, U.S. District Court for the District of Kansas, and Kansas state courts.*

Hughes is a member of the National Academy of Elder Law Attorneys and the Wichita Estate Planning Council. He frequently lectures on estate planning, asset protection planning, charitable tax planning, and will and trust drafting to other professionals and organizations. He is a member of the American, Kansas, and Wichita bar associations.

He received his undergraduate degree from the University of Kansas in 1978, his J.D. from Washburn University School of Law in 1982, and his LL.M. in taxation from Southern Methodist University, Dallas, in 1983.

Hughes can be reached via e-mail at rmhughes@beverdye.com.



125th KBA Annual Meeting

"Just the Beginning"

June 7-9, Hyatt Regency Wichita

All section members and officers are encouraged to attend.

CLE Docket 2007

FEBRUARY

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25	26	**27**	**28**			

MARCH

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FEBRUARY

6 **An Overview of State Banking Regulations**
Frank Carella & Sonya Allen
Telephone CLE

7 **Kansas Mortgage Business Act**
Frank Carella & Sonya Allen
Telephone CLE

9 **Orientation to Kansas Practice**
DoubleTree, Overland Park

13 **Juvenile Offender Code**
Donald W. Hymer Jr.
Telephone CLE

Featured Seminars

19 & 20 **7th Annual CLE Slam-Dunk**
KSU Alumni Center, Manhattan

27 **Invading Your Castle: Warrantless Searches of Your Curtilage & Other "Private" Places**
David N. Harger
Telephone CLE

28 **"Your tag light is out." – A Primer on Car Stops**
David N. Harger
Telephone CLE

MARCH

Featured Seminars

2 **Under the Umbrella: A Lawyer's Response to the Storms (Ripoffs, Scams, and Frauds)**
Robert K. Weary Education Center (KTLA), Topeka

6 **Discovery in the ESI (Electronic Stored Information) Era**
Christopher V. Cotton
Telephone CLE

7 **The "Iron Triangle" Response to High-Profile Litigation**
Philip S. Goldberg
Telephone CLE

16 **Young Lawyers – Nuts & Bolts of the Law**
Topeka & Shawnee Co Public Library, Topeka

23 **A Survey of Legal Solutions to Issues Faced by Gay, Lesbian, Bisexual, and Transgender Clients**
Stinson Morrison Hecker LLP, Kansas City, Mo.

30 **Health Law Institute**
Hilton Garden, Overland Park