Vol. XXII No. 4 2014

THE SALVATION ARMY

Charitable Intent

DOING THE MOST GOOD

PLANNING NEWS AND IDEAS FOR THE PROFESSIONAL ADVISER

FAILURE TO FUND TRUSTS COSTLY TO ESTATE

Elwood Olsen was trustee of his wife's living trust at her death in 1998. Her trust directed him to create two marital trusts and a family trust from the assets. It wasn't until Olsen's death in 2008 that his family learned that the trusts had never been created. In the years following his wife's death, Olsen made several gifts of trust assets to a college, totaling just over $1 million. He claimed charitable deductions on his personal income tax returns for the years of the gifts. The year before his death, he amended his living trust to eliminate a bequest to the college, saying that he had satisfied the bequest with lifetime gifts.

The executor of Olsen's estate did not include the value of his wife's trust in the gross estate. The IRS issued a notice of deficiency, saying that Olsen's estate had to include the $1 million date-of-death value of his wife's trust in the gross estate.

Olsen's estate claimed that the lifetime gifts to the college came from the marital trust, leaving nothing in the trust at Olsen's death. The IRS argued that the charitable gifts came from the family trust.

The Tax Court agreed with the IRS that withdrawals for the gifts to the college came from the family trust. Olsen had the authority under his wife's trust to appoint principal from the family trust to one or more charities. As a result, ruled the court, the value of the assets remaining in his wife's trust at Olsen's death was considered to be marital trust assets and had to be included in his gross estate.

Est. of Olsen v. Comm'r., **T.C. Memo. 2014-58**

WILL COPY SATISFIES COURT

Because the original of Lonnie Michael's 2002 will could not be found at his death, his executor asked the probate court to admit a copy. The will left $50,000 to Michael's church and the residue to a foundation. Several of Michael's heirs-at-law objected, claiming that the original will could not be produced because Michael had destroyed it with the intent to revoke it.

The estate presented evidence that a 2003 living trust and 2006 amendment to the trust referenced the will, actions that would have had no purpose if Michael intended to revoke the will. His attorney testified that Michael said he wished to give the trustee more flexibility to fund charitable gifts from the trust and in 2004 told the pastor of his church that he was leaving money. Michael mentioned his "relatives' greed" and said he did not wish them to have his money.

The jury found that, by a preponderance of evidence, the estate had rebutted the presumption of a revocation of the will. The Supreme Court of Georgia affirmed, saying that the trial court was correct in allowing the introduction of prior wills to show a consistent charitable testamentary theme.

Johnson v. Fitzgerald, **S13A0762**

COURT RELUCTANTLY SAYS WILL COPY IS INSUFFICIENT

After her death at age 91 in 2011, Isabel Wilner's will could not be located. She had executed the will in 2007 and signed a codicil in 2010. The signed originals of both were kept in an unlocked box near the hospital bed on the first floor of Wilner's home. A copy of each was kept in a locked safe on the second floor of the home. Wilner's caretaker said that because Wilner was frail and blind, she would have had to ask for help to locate the documents.

The court was asked to admit copies of the will and codicil for probate. The bulk of Wilner's $250,000 estate was left to her church. Dana Wilner, Isabel's niece and an heir-at-law, objected, citing Pennsylvania's two-witness rule for lost wills. State law provides that to establish a lost will, two witnesses must attest to the execution and also the contents of the documents offered for probate. Although two witnesses saw Wilner sign the documents, neither read the provisions.

Wilner's attorney testified that Wilner's relationship with Dana was "strained" and that Dana had previously taken papers and other items from Wilner's home while she was in a rehabilitation center. Dana had been told that any contact with Wilner had to be made through the attorney. Dana came uninvited to Wilner's home in 2010 and identified various items she wished to receive at Wilner's death. She told Wilner that she should be in a nursing home. The court admitted the copy of the will and codicil to probate.

The Superior Court of Pennsylvania noted that the two-witness rule is designed to prevent "intriguing and designing persons" from diverting the estate. However, in this case, the court found that application of the rigid rule perversely allowed that to happen. The court reversed the probate court, but strongly urged the state

Supreme Court to revisit the two-witness rule where the proponents of a will copy stand to receive nothing and the estate will pass to charity, lamenting its own inability to craft an exception.

***In re Wilner,* 2014 PA Super 94**

ONLY ONE BITE OF THE APPLE ALLOWED

In a 1990 antenuptial agreement, Walter Rich promised to leave one-third of his adjusted gross estate in trust for the benefit of his wife, Katherine. In 2007, Rich established a revocable living trust, directing that a trust for Katherine receive the greater of 50% of the residue of the living trust estate or $6 million. The living trust made no mention of the antenuptial agreement. Rich's estate plan also called for the creation of a charitable foundation.

Following his death in 2007, Katherine claimed she was entitled to separate benefits under the antenuptial agreement and Rich's living trust. The trust for her benefit received $6 million, which was more than 50% of the residuary trust and more than one-third of Rich's adjusted gross estate.

The Appellate Division of the Supreme Court of New York found that while the antenuptial agreement was a valid contract, Rich complied with his obligations under that agreement, providing Katherine with more through the revocable living trust than what was required. Rich's "dual major intent" in his revocable living trust was to provide for Katherine and fund the foundation, said the court. If Katherine were to receive one-third of Rich's estate under the antenuptial agreement plus $6 million from the remaining two-thirds, the adjusted gross estate would be exhausted, leaving no residue to fund the foundation. The court found this "inconsistent with the overall scheme" of Rich's estate.

***In re Rich Revocable Living Trust,* 2014 NY Slip Op 2982**

EXECUTOR LACKS STANDING TO CHALLENGE OUSTER

The bulk of Sonia Sobol's $22 million estate was to be used to establish a charitable foundation in the name of her deceased son. Her goal was to support education and the building and development of a hospital in Israel. Jay Rose, an attorney, was the successor trustee of Sobol's living trust and the executor of her pour-over will.

In 2012, Sobol amended the trust, removing Rose as the successor trustee and naming instead three others: a long-time friend and business associate, a friend and colleague of her late son and an attorney who had assisted Sobol with a business matter. A month later, Sobol named the three as co-executors of her will in place of Rose. No other changes were made to the dispositive provisions of the trust or will.

Following Sobol's death in late 2012, Rose challenged the admission of the 2012 will to probate, claiming that Sobol lacked testamentary capacity and that the trust amendment and codicil were the direct result of undue influence by one of the co-trustees. The probate court agreed with the estate that Rose lacked standing to object, saying he was not an "interested party" under state law.

Rose appealed, claiming that the change to the executor "would thwart Ms. Sobol's wishes." The Court of Appeal of the State of California affirmed that Rose lacked standing. Rose's interest in receiving fees under the original will does not make him an interested party, the court said. The court found no evidence that the co-executors "have any intention of contravening Ms. Sobol's testamentary intentions." Further, added the court, because Sobol's trust is charitable, the state's attorney general has primary supervisory responsibility and is obligated to protect the interests of the charitable beneficiaries.

***In re Estate of Sobol,* B250306**

AGE IS NO BARRIER TO CHARITABLE GIVING

Mention "philanthropy" and many advisers envision clients in their 70s or 80s. But there also are opportunities for younger clients to support charity while planning for their futures. The deferred payment charitable gift annuity, whether structured as a single, large gift annuity or a series of annuities arranged over a number of years, can be used to augment retirement savings for high-income taxpayers whose participation in qualified retirement plans may be subject to contribution limits. Flip charitable remainder unitrusts provide another avenue for sheltering growth today while shifting income to a later date. Charitable gift annuities and charitable remainder trusts can be established to pay income to parents for life, replacing support that children may be providing to elderly mothers and fathers. The child receives the charitable deduction and substitutes payments made with after-tax dollars with payments made from a tax-sheltered entity. For more about how younger clients can benefit from these and other charitable options, please call our office.