THE SALVATION ARMY

Charitable Intent

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PLANNING NEWS AND IDEAS FOR THE PROFESSIONAL ADVISER

All is not lost with missing will

The original of Salvatore Esposito's 2009 will could not be found at his death in 2015. A copy of the will, which left the residue of his estate to two charities, was presented for probate before the Surrogate's Court of New York. Esposito was survived by five distant nieces and nephews, but no one objected to probate of the lost will.

The court noted that where a will was known to have been in the testator's possession but cannot be located after death, the presumption is that the testator destroyed the will with the intent to revoke it. A copy may be admitted to probate only if (1) it has been established that the will has not been revoked, (2) execution of the will is proven in the manner required for the probate of an existing will and (3) all the provisions are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and correct.

The drafting attorney and two of Esposito's close friends who had been named executors of the will testified that they had met with Esposito on numerous occasions between the execution of the will and his death and he never indicated he was revoking the will. The court found that the will was accidently lost, not revoked. The will contained an attestation clause, creating a presumption that the statutory requirements have been met. As a result, the court said the will had been executed in accordance with statutory formalities and a copy would be admitted to probate. ***In re Esposito*, 2017 NY Slip Op 31994(U)**

Hunter misses deduction

Paul Gardner, a hunter, downsized his trophy collection by contributing 177 specimens to the Dallas Ecological Foundation. He claimed a 2006 charitable deduction of $1,425,900, based on an appraisal using the replacement cost method – including the out-of-pocket expenses for travel, preserving and shipping the trophies home. The IRS, relying on the comparable sales method, put the deduction at $163,045.

The Tax Court said the proper valuation method depends on whether the specimens are commodities or collectibles. If collectibles, the provenance – the name of the hunter, precisely where it was shot and which collectors had owed it previously – would be relevant. If the specimens were commodities, these factors would be irrelevant and the prices for comparable items in the marketplace would be the value. Given the quality of the collection, the court said it had no difficulty concluding the specimens were commodities.

Replacement cost might be the proper measure of value if the gift items were unique, the market was limited and there were no comparable sales, the court noted. However, the IRS's appraiser demonstrated an active internet trade in these taxidermied products. Because Gardner showed no evidence that the items were world-class trophies, the court accepted the IRS's valuation. ***Gardner v. Commissioner*, T.C. Memo. 2017-165**

▲ Tax Planning Pointer

Since the Pension Protection Act of 2006, the deduction for gifts of "prepared, stuffed or mounted" animal products is limited to the lower of fair market value or the cost of "preparing, stuffing or mounting" [Code §§170(e)(1)(B)(iv) and (f)(15)].

Bequest directed to specific school

Three charities in Oneonta, NY, were named to share the residue of Margaret Gurney's trust, in various percentages. One of these, St. Mary's Roman Catholic School, had closed several years prior to Gurney's death. Gurney's trustee asked the Surrogate's Court to allow the school's 20% share to be distributed in equal shares to the two remaining charities. St. Mary's Roman Catholic Church of New York and the Roman Catholic Diocese of Albany, NY, opposed the distribution, arguing that the court should apply the cy pres doctrine and distribute the 20% share to ministry and scholarship funds. The court granted the trustee's motion.

The Appellate Division of the Supreme Court of New York agreed that cy pres was not applicable, finding the bequest did not show a general charitable intent. The court held that Gurney's trust was to benefit specifically named charities in her hometown and therefore did not demonstrate a general intent to benefit charity. Strict compliance with the trust was impossible, due to the closing of the school. The court said its decision might have been different had the school merged into another in the area. ***In re Gurney*, 2017 NY Slip Op 5902**

PARTIALLY INTESTATE, DESPITE WILL

The residue of Evelyn Shakir's will directed that "any monies remaining" in her estate were to pass to her life partner, George Ellenbogen, and at his death, to charity. Evelyn and her brother, Philip, were tenants in common of the family home they inherited at their mother's death in 1990. Evelyn died in 2010, followed by Philip in 2012.

Philip's executor brought a quiet title action, claiming that because Evelyn's will did not address her half interest in the home, it passed by intestacy to Philip, her only heir. The executor of Evelyn's estate said her interest was included in "any monies" and passed to Ellenbogen as part of the residue of her estate.

The Probate and Family Court determined that Evelyn died intestate as to the interest in the home, giving Philip sole legal title to the property.

The Appeals Court of Massachusetts noted that there is a presumption against intestacy when a decedent has a will. However, the court said it could find no cases where the word "monies" included real estate. Instead, money should be construed as commonly understood, unless the will as a whole shows that the decedent intended a broader meaning. The court, which found nothing in the will to indicate Evelyn's intent with regard to her interest in the home, affirmed that the interest passed by intestacy. ***Roth v. Newpol*, No. 16-P-715**

ANNUITY EXCEEDED AUTHORITY UNDER POWER OF APPOINTMENT

William Colon named Anthony Marenghi as his attorney-in-fact under a durable general power of attorney in 2001. Marenghi appointed Catherine Fletcher as an adjunct attorney-in-fact for the purpose of executing an annuity contract on behalf of Colon in 2005, on the same day the application for the annuity was dated. Marenghi and his wife were the designated and contingent beneficiaries of the annuity. The annuity policy was signed by Fletcher, but not Colon.

Colon's 2000 will, which left his entire estate to charities, was admitted to probate. The executor of the estate asked the court to require the nearly $250,000 annuity be turned over to the estate. The estate argued that the annuity contract was unenforceable because Marenghi acted for his own benefit. Marenghi claimed the annuity was purchased pursuant to the power of appointment.

The Surrogate's Court of New York found that under the provisions of the power of appointment, the class of persons to which gifts could be made was limited to Colon's parents, spouse, children and more remote descendants. The Marenghis were not members of that class.

Marenghi did not possess the authority to purchase the annuity and therefore could not grant power he did not have to Fletcher. The court found that although annuities can be purchased as part of a financial plan, the designation of the attorney-in-fact and his wife as beneficiaries involved an unauthorized gift that was void. Because Marenghi and his wife provided no consideration for the annuity, the beneficiary designation was invalid and the funds were to pass to the estate. ***In re Marenghi*. 2017 NY Slip Op 31993(U)**

TAX SAVINGS WITH HOME SWEET HOME

Real estate made up about 20% of the gross estates for which estate tax returns were filed in 2015, according to IRS statistics. Personal residences probably made up an even larger share for those whose estates fall below the current $5.49 million estate tax threshold, particularly with real estate recovering some of the value lost in 2008. Many clients may find that even with the $250,000 or $500,000 exclusion from capital gains on principal residences, they may be facing tax on the sale of a home purchased several decades ago for a modest price. In addition, clients who sell vacation homes face capital gains tax on the entire appreciation in the property. For philanthropic clients, real estate offers many opportunities, including options that will reduce or eliminate capital gains tax or even allow them to continue using the property for life or to receive income from their gifts. The Salvation Army's planned giving office has information on these techniques and would be pleased to work with you and your clients to achieve their charitable goals with real estate.