

MINUTES

MSBA PROBATE & TRUST LAW SECTION COUNCIL MEETING

October 21, 2010

Meeting held at MSBA Offices
Minneapolis, Minnesota

Section Council Meeting

Members Present: Andrew Baese, Andrea Breckner, JoEllen Campbell, Sonny Miller, Sheryl Morrison, Scott Nelson, Thomas Rauenhorst, Ivory Umanah, and Thomas Woessner; and via telephone: Michael Cowles, JoEllen Doebbert, and Joseph Thiags,

Others Present: Andrea Bischoff, Derrick Doerr, Richard Hawke, Ted Olson, Tamara Patterson, Katie Perleburg, and Jennifer Santini

1. **Meeting called to order:** 3:30 p.m.
2. **Treasurer's Report:** Balance as of 09/30/2010 of \$40,817.92. Dues are still being received. Will look at a C.D. at US Bank for \$15,000 to improve interest rate on our balance. The financial report was approved.
3. **Education Committee:** The 2011 Probate & Trust Law Section Conference is set for June 6 and 7 at the St. Paul River Centre. A planning meeting was held on October 13th to discuss speakers and the conference. Ron Aucutt is one of the national speakers that will be speaking at the conference.

The MSBA will be presenting a CLE titled "A View from the Probate Bench" on November 19, 2010 with Judge Jay M. Quam, Referee George Borer, and Referee Dean M. Maas.

4. **Legislation Committee:** Andrew Baese met with Uniform Law Commissioners. The Commissioners want to introduce the Uniform Power of Attorney Act. The Legislation Committee will look at this and comment.

Proposed Legislation. There are three bills the Committee wants to recommend:

- A. Andrew Baese discussed proposed minor fixes on Conservatorship/Guardianship laws. These changes were approved.
- B. Scott Nelson proposed an amendment to the Uniform Disclaimer Act; primarily to address problems with not allowing a disclaimer. These changes will make it clear that this is the sole way to make a disclaimer under Minnesota law. These changes were approved.

- C. Scott Nelson presented the Uniform Disposition of Community Property Rights at Death Act. It is a road map for some practitioners that will help in identifying issues with property that turns out to be community property instead of common law property. This has been passed by many states adjacent to those states that have community property laws. The final version is not yet available. The council will vote on the final version when available.
5. **Federal Taxation Committee:** Richard Hawke reported that he would like to have additional participants for his committee. A copy of Richard's report is attached.
 6. **Consumer Protection/Publications Committee:** No report.
 7. **Ethics and Professional Responsibility Committee:** Jane Kiker is stepping down from this committee. Susan Link will be appointing a successor.
 8. **Greater Minnesota Involvement Committee:** JoEllen Doebbert noted that the last telephone conference did not take place do to technical difficulties with the conference call.
 9. **Technology Committee:** Derrick Doerr reported that new links have been added to the website.
 10. **Litigation Committee:** No report; just a reminder of the November 19, 2010 CLE.
 11. **Wills for Heroes Committee:** 3,978 wills completed to date. We are now scheduled out to February 2, 2014.
 12. **Newsletter Committee:** Continuing to work on the format. The newsletter should be out in November.
 13. **Old Business:** None.
 14. **New Business:** Discussed correspondence received by Susan Link from the Substitute Decision-Making Network. The Network is a group of organizations that have come together in the last year out of mutual concern for the future of persons needing assistance with personal decision-making, including those who need the assistance of guardians and conservators, powers of attorney, and health care agents. Their overall goal is to help Minnesota become more responsive to those persons needing this assistance, while protecting their right to self-determination as much as possible. Over the next 30 years, growth in the population over age 60 is projected to far exceed growth in other age groups.
 15. **General Meeting adjourned:** 4:42 p.m.

October 2010 Federal Tax Update
Probate and Trust Section
Practicelaw.org

2011 Gift Tax Exemption Remains at \$13,000

Commerce Clearing House released its estimates of various federal tax figures for 2011 after adjusting for inflation. Among those is the annual gift tax exclusion which will remain at \$13,000, foreign gifts exceeding \$14,375 will require the filing of an information return, the gift tax exclusion for a non-citizen spouse will increase to \$136,000. Many other thresholds and the 2001 income tax brackets were unofficially projected and announced on September 20, 2010.

US Tax Court rejects IRS' attempt to Impute Trustee with Trust's Assets

On appeal from the IRS' rejection of individual taxpayer's offer in compromise and subsequent notice of levy, the Tax Court ruled that the IRS must respect the independent existence of the trust. In a fact-driven decision, the Court ruled that the individual trustee/taxpayer was not the equitable owner of the home in which they lived that was titled in the name of the trust because the taxpayers paid rent in the form of mortgage debt service and payment of property taxes, maintenance and other occupancy costs in addition to other factors. A. Dalton, Jr., 135 Tax Court _____, #20, Decision 58,341.

IRS Announces Penalties for Late Filing of Nonexistent Form; Carryover Basis

The IRS is going to require a tax return allocating the allowable basis adjustment to property acquired from a decedent if the fair market value of the property owned by the decedent exceeds \$1.3 Million or generally if the decedent acquired property by gift. Within 30 days after the filing of the tax return, the executor must give a written statement to each recipient of the property providing them the information contained in the return. This tax return will have to be submitted with the decedent's final income tax return with a due date of April 15 of the following calendar year. At this point, the IRS has not created the tax return that we must file for this purpose. Gifts trigger the return even for estates under \$1.3 Million where the gift was received by the decedent (except from his/her spouse) during the three years immediately prior to death if the gift exceeded or did not qualify for the annual gift tax exemption amount when it was given. (As a side note, the IRS apparently has already determined that the penalty to file this currently non-existent form by its due date could result in a penalty of up to \$10,000.00 plus a per beneficiary penalty of \$50 for each failure to provide said written information to the beneficiary within 30 days after filing the form.)

The IRS discusses several other specific items on its FAQ webpage found at www.irs.gov/businesses/small/article/0,,id=224519,00.html . Notable among those items are:

1. Property controlled by the decedent dying with a power of appointment does not receive a step-up in basis.
2. Property in a community property state owned by a resident decedent and spouse still gets a full step-up in tax basis.

Federal Tax Preparation License - Sign up for your PTIN

The program to apply for your PTIN is now up and running and can be found on the IRS' website, www.irs.gov. Go to their Tax Professionals' tab and you will see the button right on top to "Sign Up Now". You can do this online with a credit or debit card or you may do it by mail using Form W-12. New regulations were published in the September 30, 2010 Federal Register (Volume 75, No. 189, pages 60316-60321), 26 CFR part 300 (TD 9503).

An October 8th hearing on those regulations generated some criticism and disagreement over who should or might be exempted from this licensing requirement and its accompanying testing and continuing education requirements. At issue are staff, part-timers and interns working under the supervision of licensed professionals, with various professional associations arguing on different sides of the issue. The proposed regulations were also criticized for their prohibition of non-professionally licensed preparers from giving tax advice, the possible misimpression the licensee's designation might give to the public, and even the bureaucratic burden being assumed by the IRS in certification of tax courses that will satisfy the CE mandates.

Failed Disclaimer Results in Taxable Gift

In spite of the probate court's approval of taxpayer's understanding that his disclaimer under the decedent's will passed the asset to the grandchildren of decedent, the federal district court agreed with the IRS that under Mississippi's law the property would then pass according to the laws of intestacy back to the taxpayer. Since taxpayer did not also disclaim his intestacy interest, the transfer of the property to the grandchildren was subject to gift tax. *F. Tatum Estate, D.C. Miss., 2010-2USTC para. 60,607.*

Post Office Damage Does Not Defeat "Timely Mailed is Timely Filed" Rule

Almost 3 months after the 90 Day deadline to file a petition in Tax Court had passed, the post office returned what was left of taxpayer's petition to taxpayer's attorney undelivered. Based upon the attorney's affidavit and other evidence, the Tax Court accepted a new copy of the petition as timely filed under the "timely mailed is timely filed" rule. *M. W. VanBrunt, TC Memo 2010-220, Dec. 58,354(M).*

Watch List

H.F. 436 (Pomeroy) – nothing new reported. Referred to House Ways & Means Committee.

H.F. 498 (Mitchell) – nothing new reported. Referred to House Ways & Means Committee.

S.F. 722 (Baucus) – nothing new reported. Referred to Senate Finance Committee.

H.F. 96 (Conaway) – nothing new reported. Referred to House Ways & Means Committee.

H.F. 3905 (Berkley, et al) – nothing new reported. Referred to House Ways & Means Committee.

H.F. 4154 (Pomeroy) – passed the House on 12/3/2009. Placed on Senate legislative calendar under general orders (Calendar #253).

S.F. 3773 (McConnell) – By-passed committee hearings. Placed on Senate legislative calendar under general orders (Calendar #562).