

MSBA Probate & Trust Law Section Newsletter

Summer 2007

A Publication of the Probate & Trust Law Section of the Minnesota State Bar Association

A Word From the Chair

This summer's issue of the *Probate & Trust Law Section Newsletter* would be incomplete without mention of the Section Conference, which took place on June 11 and 12. Once again, the faculty and planners helped produce a tremendous conference and for that they deserve our thanks.

This newsletter highlights recent developments in state law and the new composition of the Probate & Trust Law Section Council. It also includes an article submitted by Todd D. Andrews and William J. Ferguson about the Section 754 election and an article submitted by Barbara Kristiansson regarding the IRS's family limited partnership valuation settlement guidelines.

The purpose of the newsletter is to serve as a medium through which the Probate & Trust Law Section and the Minnesota estate planning bar can communicate. The newsletter is published semi-annually, and consists of articles on legal developments and legislative updates, announcements of Section activities and events, and information regarding Section contacts. We welcome your comments and the submission of articles or announcements for future newsletters.

Important Numbers for 2007

<u>Federal Estate/GST Tax Exemption</u> \$2,000,000
<u>Federal Gift Tax Exemption</u> \$1,000,000
<u>Minnesota Estate Tax Exemption</u> \$1,000,000
<u>Annual Gift Tax Exclusion</u> \$12,000
<u>Maximum Federal Gift/Estate Tax Rate</u> 45%
<u>GST Tax Rate</u> 45%
<u>Maximum Minnesota Estate Tax Rate</u> 16%
<u>Maximum Federal Income Tax Rate</u> 35%

State Law Update

(Peter S. Hatinen)

I. Legislative Update

The legislative session closed with the legislature passing four bills of note, one making a technical correction, one replacing the Uniform Anatomical Gift Act, one amending Chapter 145C of the Minnesota Statutes, and another calling for a study of issues regarding guardianships and conservatorships. A summary of the principal provisions of each bill follows:

A. House File 1441 (approved by the Governor on March 30, 2007)

House File 1441 was the revisor's bill. It makes a technical correction to Minnesota Statute § 48A.03, subdivision 5 (regarding trust companies and limited purpose companies) by removing references to "executors" and "administrators" and replacing them with current terms, such as "guardian of the person," "conservator of the estate," and "personal representative."

B. Senate File 883 (approved by the Governor on May 24, 2007)

Senate File 883 removes the Uniform Anatomical Gift Act found in Minnesota Statute § 525.921 through Minnesota Statute § 525-9224 and replaces it with the "Darlene Luther Revised Uniform Anatomical Gift Act" (the "Revised Act"). The Revised Act is based upon a Uniform Act developed by the Commissioners on Uniform State Laws.

The Revised Act contains several provisions that liberalize the means by which organ donations may be effectuated, create presumptions that organ donation was intended, recognize new developments in organ harvesting and preservation, create an organ donor registry, and attempt to resolve conflicts between instructions contained in health care directives and other documents. While the Revised Act differs from the original Uniform Act in several regards, the following three provisions stand out as being particularly noteworthy.

Section 525A.05(a)(3) of the Revised Act provides that an anatomical gift may be made during a terminal illness or injury "by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness [a person who is not a family member or guardian of the donor, or another adult who exhibited special care and concern for the individual]."

Section 525A.20 of the Revised Act creates a donor registry to facilitate organ donation. The registry allows a person to file a statement regarding his or her intent to donate or not to donate his or her organs and is to be accessible

to individuals and procurement organizations at all times.

Section 525A.21 of the Revised Act addresses the fact that an individual's health care directive may contain a statement of intent that contradicts another document regarding his or her intention regarding organ donation. If there is such a conflict, the Revised Act directs the prospective donor's attending physician to resolve the conflict with the prospective donor. If the prospective donor is incapable of acting, his or her health care agent is to resolve the conflict with the attending physician, and if the agent is not reasonably available, another person authorized to make health care decisions on behalf of the prospective donor is to resolve the conflict with the attending physician.

The Revised Act becomes effective on April 1, 2008. The Section Council intends to use the time before the Revised Act takes effect to study it and to develop comments for the legislature. If you have any comments regarding the Revised Act, please forward them to a member of the Section Council.

C. House File 1078 (approved by the Governor on May 25, 2007)

House File 1078 addresses Health Care Directives and a health care agent's right to visit the principal while the principal is a patient in a health care facility.

House File 1078 amends paragraph (3) of subdivision 2 of Minnesota Statute § 145C.05 by adding a provision that authorizes a health care directive to contain limitations regarding the health care agent's right "to visit the principal when the principal is a patient in a health care facility."

House File 1078 also adds subdivision 5 to Minnesota Statute § 145C.07, which provides:

Subd. 5. Visitation. A health care agent may visit the principal when the principal is a patient in a health care facility regardless of whether the principal retains decision-making capacity, unless:

- (1) the principal has otherwise specified in the health care directive;
- (2) a principal who retains decision-making capacity indicates otherwise; or
- (3) a health care provider reasonably determines that the principal must be isolated from all visitors or that the presence of the health care agent would endanger the health or safety of the principal, other patients, or the facility in which the care is being provided.

D. House File 1396 (approved by the Governor on May 25, 2007)

House File 1396 addresses guardianships and conservatorships. It does not change the guardianship and conservatorship statutes, but rather directs the state court administrator to convene a study group to make recommendations regarding the rights of wards and protected persons; the powers and duties of guardians and conservators; the certification and registration of guardians and conservators; the prescreening and diversion of persons from guardianships or conservatorships; the complaint process; training; financial auditing; and the reimbursement of attorneys, guardians, and conservators. The study group is to report its findings to the legislature by March 15, 2008.

Death and the Section 754 Election

(Todd D. Andrews and William J. Ferguson)

Any good probate or estate tax lawyer knows that, upon the death of a client, the fair market value of all the assets owned or controlled by the decedent, as of the date of death, are potentially taxable under Internal Revenue Code (“IRC”) section 2031. As a corollary to that rule, any asset passing from a decedent to a transferee transfers at a basis equal to the fair market value of the asset on the date of the decedent’s death (IRC Section 1014). Most often that is referred to as the “step-up” in value because a good number of assets, over the years, do appreciate in value. The purpose of this article is to demonstrate that this provision applies to all the

assets owned, including units of ownership held by the decedent involving a partnership interest and/or an interest in a limited liability company (“LLC”) electing partnership status. This article will attempt to explain how the “step-up” rule works for assets within partnerships and electing LLCs.

Assume a decedent invests \$100,000 in a partnership that holds rental real estate. The basis of his interest in this partnership might actually go down over the years as losses are incurred by the partnership from the rental operations, *e.g.* depreciation deductions. There may be cash distributions that would further reduce his basis. *See* IRC Section 705.

Prior to his death, let’s assume the decedent’s basis had gone down to \$80,000 as a result of losses and/or distributions. However, we determine that, because the real estate held by the partnership has increased in value over the years, the value of his partnership interest is really \$200,000. As such, \$200,000 is the amount declared for estate tax purposes and \$200,000 is the basis in the hands of the transferee and is generally referred to as the “outside basis.” This is different than the “inside basis” which is the partner’s share of the assets on the books of the partnership using the partnership’s basis. The \$80,000 inside basis in the hands of the decedent disappears, buried with him, as it were, for eternity.

How does the transferee get the benefit of this new outside basis? Except for section 754 of the IRC, the new outside basis wouldn’t affect the transferee until, more than likely, when the transferee sells the partnership interest and that could be years down the road, if ever. Section 754 comes to the rescue, effectively, allowing the transferee more immediate benefit from the “stepped-up” basis of the partnership interest. Section 754 states that, if the partnership so elects, the basis of the underlying assets can be stepped up for the benefit of the transferee.

The partnership must elect this treatment and most partnerships do. The election is made on the partnership’s income tax return, Form 1065. Once elected, the provisions of 754 are permanent for that partnership unless relief is

granted to the partnership by the Secretary of the Treasury. If the particular partnership does not so elect, the transferee has a basis step-up that does him no particular good, as stated above, until the partnership interest is sold. The reason is that, absent a 754 election, the higher amount of outside basis generally would not come into play in determining the partner's taxable income until there is a sale of the partnership interest.

Assume the partnership has made a 754 election. Here's how the mechanics work. Either the partnership provides an appraisal of what the interest is worth or the representative of the decedent gets that done with an appraisal. The next task is to select various assets inside the partnership to which the "step-up" can be assigned.

Normally, in a real estate rental operation, every asset except the realty will be worth precisely the same amount as its book value. That leaves the realty as the only target for allocation of the step-up in value.

In our example, the result is that the entire step-up from \$80,000 to \$200,000 is attributable to the realty. The next step is to decide how much of the \$120,000 step-up is attributable to the land and how much is attributable to building. We've selected only those two assets to receive the step-up because equipment and furnishings (the only other asset normally associated with rental realty) rarely go up in value. So, the \$120,000 will be split between land and building. How do we do that? It should be done on the basis of the relative fair market value of the two assets. In other words, the land, will get its proportional share of the \$120,000 by multiplying \$120,000 by a fraction, the numerator of which is the value of the land and the denominator of which is the total value of the land and building. Normally, this means getting a rough idea of what that parcel of land, with no building on it, would sell for in today's market. Assuming the land is worth 20% of the entire value of the property, the land would be stepped up 20% of \$120,000, or \$24,000. The remainder of the \$120,000 step-up, or \$96,000, would be allocated to the building.

What benefit is this step-up in basis going to provide the transferee? Not very much as it relates to the step-up involving the land, at least not until the land and building are sold. But the step-up on the building gives the transferee the immediate right to take depreciation deductions on that extra \$96,000 of basis. If it's residential realty (at 27 ½ years, straight-line), that would be just short of \$3,500 of additional depreciation, each year, over and above what he would otherwise get allocated. If it's commercial realty (at 39 years), that would amount to just under \$2,500 per year.

If the 754 election is made, the partnership will do the calculations for the transferee partner and will enter the "extra" depreciation on that transferee partner's Schedule K-1. In order for this information to be prepared timely, it is important that the personal representative of the decedent's estate inform the partnership of the death of the partner and get the information needed for the partnership's 754 election. Oftentimes, this information is not timely given to a large partnership with many partners and the 754 election and corresponding K-1 information is missed.

The above analysis would apply not just to those partnerships with rental property, but would apply to any partnership where assets have appreciated over the underlying tax basis in the hands of the partnership. This analysis would apply equally as well to any LLC that has appreciated property and has elected to be treated for tax purposes as a partnership. Unfortunately, there is no comparable step-up provision available to corporations and LLCs electing to be taxed as a corporation.

So, probate attorneys need to remember to deal effectively with this election when doing the probate inventory and estate tax return. Most of the time this means it might very well be beneficial to get the true value of an interest in a partnership or an LLC rather than simply putting down an arbitrary amount to speed up the process which might cost the heirs some valuable income tax deductions. However, placing too high a value on the partnership interest may cause the decedent's estate to creep

over the unified credit equivalent threshold and incur an estate tax. When this occurs, the probate lawyer has a real dilemma and it's best to work through the analysis in a thoughtful manner. The choices are (1) do I recognize the real value of the partnership interest and incur an estate tax offset by depreciation deductions and increased basis, or (2) do I argue that the partnership interest has a low value saving estate taxes and forgoing income tax deductions for the transferee/heir? Either way the attorney must consider the affect of the 754 election when valuing the partnership and LLC interests owned by the decedent and make the decision which most benefits the heirs.

To summarize, this article has tried to point out the importance of getting a real value for partnership assets that may ripen into a 754 election at the partnership level. The transferee will generally receive the benefit from what is usually a "step-up" in value. This is often overlooked but could be very beneficial in those small estates where estate tax is not a factor and the only reference to value is that placed on the probate inventory, using a nominal value that is considerably less than the real value. As such, a lower value than the real value deprives the heirs of certain benefits under Section 754.

FLP Settlement Guidelines (Barbara M. Kristiansson)

We have all heard the dire warnings of the almost certain fate awaiting estates with family limited partnership ("FLP") interests. In October 2006, the IRS issued an Appeals Coordinated Issue Settlement Guideline (ASG) report (the "Report"), which, although revealing no new information, gives an indication of the Service's focus. The report deals with four issues. The first issue addresses the million dollar question – what is the proper discount for transfers of FLP interests for purposes of the estate and gift tax? The second addresses the possibility of full inclusion under §§2036 and 2038 in cases where the facts suggest that a bona fide sale of the decedent's FLP interests never occurred. The third issue is whether there is an indirect gift of an asset transferred into an FLP after the FLP interests have been transferred by

the donor. The fourth is the peripheral issue of the assessment of penalties under §6662.

I. While the Service recognizes the FLP arena to be very fact intensive, there is also a sense that the rapidly expanding case law is creating a statistical bell curve for discounts. The emerging standard for discounts falls between 6% to 10% for minority interest control discounts, and 20% to 25% discounts for lack of marketability, resulting in overall discounts between 29% to 32%. (Perhaps to the disappointment of practitioners arguing for larger discounts, the report specifically dismisses the 35% discount claimed in *Estate of Webster E. Kelly v. Commissioner* as being an anomaly and should not be relied upon.)

The Report focuses on valuations and discounts of FLPs holding cash or marketable securities as the primary assets. It notes that the tax courts are becoming increasingly sophisticated in their examination of the valuation of the underlying assets, including scrutinizing the appraisals, the type of investments involved and the risk assumed with those investments.

II. The second section of the report focuses on the bona fide non-tax reasons for creating an FLP to prevent inclusion in the estate. These reasons are set forth in *Bongard* and then solidified in the *Bigelow* case. See generally, *Bongard*, 124 T.C. No. 8 (2005) and *Bigelow*, T.C. Memo. 2005-65. The non-tax reasons argued by the taxpayer in *Bongard*, such as creditor protection, ease of giving, and providing the children investment experience, were not substantial enough for the Service to overcome the tax reasons for creating the FLP. While the outcome in *Bongard* is distressing, because a true, active family business was in place, practitioners should be forewarned that FLPs consisting of marketable securities and cash (as discussed in the first section) may be unable to overcome the bona fide non-tax threshold and thoughtful consideration should be given before claiming even minor discounts, especially in light of the potential penalty assessments (discussed below).

III. The Report sets forth a brief discussion regarding whether the contribution of assets to an FLP after transferring FLP interests will result in indirect gifts. It seems that the Service, in such cases, will treat the transfers as gifts of the underlying asset and will not allow discounts for these later transfers.

IV. The fourth issue addressed in the Report regards penalties assessed under §6662. The discussion centers less around whether or not a penalty under §6662 is appropriate, but rather whether 20% or 40% is the appropriate penalty. Discussion of the case law in this area can be distilled to the following: A 20% penalty is appropriate in cases of simple negligence, while a 40% penalty is appropriate in cases where there is a “disregard of rules and regulations.” One can infer from the comparatively long discussion of the assessment of penalties that the Service is foreshadowing its intent to be more aggressive in assessing penalties.

The issuance of the Report, both as to its opinion and its timing, is not surprising considering that the IRS has made its increasing interest in auditing estates with FLP interests clear. While it is still important to obtain appraisals with defensible discounts, the growing case law in this area is fleshing out a standard range for acceptable discounts from which the Service will be hard pressed to deviate. In light of the potential penalties, taxpayers and preparers who venture outside the limits, should do so at their own peril. The IRS also seems to be interested in taking a more long-term watchdog approach. Not only will the IRS be scrutinizing donors anytime they transfer FLP interests, but it will also scrutinize any transfer of assets to an FLP following the transfer of FLP interests. Therefore, it seems reasonable to conclude that the Service will be more aggressively imposing penalties upon those estates insisting on taking discounts outside of the normal range.

Consumer Protection

In recent months, numerous anecdotes (including a discussion on the Probate & Trust Law Section listserve) have been circulating about “trust mills” targeting senior citizens in

Minnesota. Bob McLeod, Secretary of the Probate & Trust Law Section Council, has monitored the news for any developments regarding locally operated trust mills. He also contacted the Attorney General’s office to discuss his concerns and to offer the Probate & Trust Law Section’s services.

In March, Attorney General Lori Swanson announced that she had filed a lawsuit against American Family Legal Plan and Heritage Marketing and Insurance Services, two California businesses operating in Minnesota. Swanson reported that American Family Legal Plan operated a trust mill that marketed itself through direct mailings to senior citizens. It sent agents posing as estate planning attorneys to the homes of individuals who responded to the direct mailings. The agents would misrepresent the costs of estate taxes and probate fees to intimidate clients into purchasing boilerplate “living trusts.” The trusts were sold without regard for the individual’s specific needs. *After* a trust was sold, the client would receive a brief telephone call from an attorney who would approve of the use of the living trust. The trust instrument would then be delivered to the client by an agent from Heritage Marketing and Insurance Services. The agent would pose as a representative of the estate planning firm and would attempt to sell annuities to the client based upon a cursory review of the client’s trust and financial records.

Swanson stated that American Family Legal Plan and Heritage Marketing and Insurance Services are the subject of lawsuits by Attorneys General in at least two other states. She believes that the companies may have sold trusts to as many as 2,000 Minnesota citizens and may have sold up to \$50,000,000 in annuities. The suit was filed in Hennepin County District Court and alleges, among other things, consumer fraud, false advertising, and deceptive trade practices and seeks injunctive relief, civil penalties, and restitution. If you have complaints against these companies or other trust mills, contact the Attorney General’s office at 1-800-657-3787.

Wills for Heroes

Thanks to months of work and tireless advocacy spearheaded by Susan J. Link, a former member of the Probate & Trust Law Section Council, Section members have a new opportunity to provide *pro bono* services to first responders, including police officers, firefighters, paramedics, EMTs and corrections officers. The Wills for Heroes program was recently kicked off and will be overseen by a committee of the Probate & Trust Law Section Council chaired by Susan J. Link and Kip Steincross.

Legal professionals who volunteer on behalf of the Wills for Heroes program will draft wills, powers of attorney and health care directives for first responders and their spouses (or their surviving spouses) who have a collective net worth of less than \$500,000. Teams of volunteers will conduct clinics for first responders at which the volunteers will meet with their clients, review previously completed questionnaires, and produce appropriate estate planning documents. It is anticipated that clients will be able to consult with volunteers and leave with executed estate planning documents in a single meeting. A series of Wills for Heroes clinics have been scheduled and can be viewed at www2.mnbar.org/willsforheroes/index.htm.

One hour training sessions have been scheduled for legal professionals who are interested in volunteering on behalf of the Wills for Heroes program. To register for a training session or to arrange to volunteer at an upcoming clinic, please contact Melissa Roberts Buekema at mbeukema@statebar.gen.mn.us; Susan J. Link at (612) 672-8349 or susan.link@maslon.com; or Kip Steincross at (612) 667-2334 or warren.steincross@wellsfargo.com.

We are proud to note that the members of the Wills for Heroes committee, Susan J. Link, Kip Steincross, Jennifer Anderson, Mike Ostrem, Jennifer Raykowski and Andrea Bischoff, were given the Minnesota State Bar Association President's Award in recognition of their efforts in establishing the Wills for Heroes program.

Greater Minnesota Probate & Trust Law Study Group

In 2005, the Probate & Trust Law Section began a new initiative to identify opportunities for its Greater Minnesota members to participate in study groups. While such study groups have existed in the Twin Cities for a number of years, many of our Greater Minnesota members have indicated that it can be difficult to identify study groups.

Thus, the Greater Minnesota Involvement committee created a study group on a trial basis. The group consists of eight section members from various locations around the state, and it meets for a MSBA facilitated telephone conference from 9:00 to 10:00 AM on the third Wednesday of each month. Discussion topics have included (1) homestead real estate tax credit treatment for people with multiple residences, (2) protecting the family farm or cabin for the next generation, and (3) the use of beneficiary designations in estate planning. The group also recently had Rosalind Kepler as a guest speaker to discuss multi-state estate planning, with a focus on clients who own residences in Florida.

The flagship study group is chaired by past Probate & Trust Law Section Chair, Brad Hanson, of the Quinlivan & Hughes law firm in St. Cloud. If you are interested in joining a study group or would like more information about this initiative, please call Brad Hanson at (320) 251-1414 or email him at bhanson@quinlivan.com. It is anticipated that the www2.mnbar.org/sections/probate-trust/index.htm website will be used as a clearing house for information regarding study groups around the state.

Southern Minnesota Regional Legal Services

Southern Minnesota Regional Legal Services is looking for estate planners who are willing to speak to groups of senior citizens about the importance of powers of attorney and health care directives and what is involved in establishing and administering conservatorships and

guardianships. Bob McLeod, Secretary of the Probate & Trust Law Section Council, has been involved in this program and has prepared materials that could be used for these presentations. If you would like to become involved with these programs, please contact Bob at (612) 371-3272 or rmcleod@lindquist.com.

Probate & Trust Law Section CLEs

On April 23, 2007, the Litigation Committee of the Probate & Trust Law Section sponsored a luncheon during which probate litigation was discussed. The luncheon was well attended and the Section Council determined to schedule more such lunches.

The next Probate & Trust Law Section luncheon will address the legislative process and is scheduled for September 18, 2007 at Dorsey & Whitney, 50 South Sixth Street, Suite 1500, in Minneapolis. A pizza lunch will be served at 11:45 and the program will start at 12:15. This program is free and it is anticipated that it will be approved for one standard hour of CLE credit.

For more information on this program, visit www2.mnbar.org/sections/probate-trust/09-18-07.htm. Registration is open until September 14, 2007 and may be completed online or may be mailed or faxed to Meaghan Harper at the Minnesota State Bar Association, 600 Nicollet Mall, #380, Minneapolis, MN 55402, fax: (612) 333-4927. The program is also available for teleconferencing, free of charge. To arrange for teleconferencing, contact Meaghan Harper at mharper@mnbar.org.

If you have ideas for or are interested in developing future seminars, please contact Tom Woessner, chair of the Education Committee, at (612) 371-3517 or twoessner@lindquist.com.

The Gene Daly Award

The Gene Daly Award is periodically awarded to Section members who have made a strong,

positive impact on the estate planning practice in Minnesota.

Gary D. McDowell was given the award in 2007. Gary is a member of the American College of Trust and Estate Counsel and served as Chair of the Probate & Trust Law Section Council. He also served on several Section committees, including the Death Tax Reform Committee and the Byron Committee, which substantially revised Article 2 of the Uniform Probate Code. Gary also co-authored the Drafting Will and Trust Agreements book, previously edited the Probate and Trust Law Deskbook, and created the Section's living trusts video.

If you would like to nominate someone for the award, please contact Andrea Breckner at (612) 455-1002 or abreckner@olsonbreckner.com.

Probate & Trust Law Section Council Meeting Dates

The Council is scheduled to meet on the following days:

September 20, 2007	October 25, 2007
November 15, 2007	December 20, 2007
January 17, 2008	February 21, 2008
March 20, 2008	April 17, 2008
May 15, 2008	

All meetings begin at 3:30 and are held at the Minnesota State Bar Association Offices President's Room at 600 Nicollet Mall in Minneapolis.

Probate & Trust Law Section Committees

Several Committees develop and implement various programs of the Probate & Trust Law Section. Volunteers interested in becoming involved in a committee are encouraged to contact the chair of the committee on which they wish to serve. The Section committees and their chairs follow:

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