

Report #2 - Recent Developments

As we have done in January for the last six years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting to this list throughout the coming week highlights of the proceedings of the 37th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 6-10, 2003 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida.

Our on-site local reporters there in Miami this year will be identified as their reports are received and published:

We also will be posting the full text of this year's Reports on the ABA RPPT Section's Web site, as we have since the 2000 Institute. Those Reports can be found at URL http://www.abanet.org/rppt/meetings_cle/heckerling/home.html. In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive at URL <http://mail.abanet.org/archives/aba-ptl.html>.

A complete listing of the proceedings and speakers is available on the Institute's Web site.

The URL for that site is <http://www.law.miami.edu/heckerling>.

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REPORT NO. 2 - Monday, January 6, 2003 - Recent Developments

The following report has been filed by on-site reporter Eugene Zuspann II Esq. of Denver, Colorado regarding the following:

Recent Developments in Estate, Gift and Income Taxation – 2002

Parts One and Two

Carlyn S. McCaffrey

Dan T. Hastings

Howard M. Zaritsky

Materials by Richard B. Covey and Dan T. Hastings

Howard Zaritsky started with an analysis of the estate tax atmosphere in Washington (DC) and now feels that there is at least a 50% chance in the next few years that Congress will repeal the estate tax.

He discussed the regs on Split dollar arrangements. He feels that the final regs will adopt most of the proposed regs. They will affect any arrangement other than those with no equity component. He is not recommending any split dollar arrangements until the regs are finalized other than those without an equity component. Also, he discussed the corporate Responsibility Act of 2002 that states that a public company may

not extend credit to any executive officer or director and the penalties and fines associated with this Act.

Dan Hastings - revisited the revised Uniform Principal and Income Act and the states adopting unitrust alternatives. He indicated the hardest thing is to keep up with the different states. There currently seem to be 12 states that now have or are considering unitrust statutes.

He also discussed the proposed regs under §643 and the fact that they have not yet been adopted as final. The effective date will be the first year after the regs become effective. The main issue is whether a state's unitrust statute will be within the ambit of the proposed (or final) regs.

This causes a problem in the estate tax area. A trust which is grandfathered from GST tax will lose its protection if a modification proscribed by the GST modification regulations occurs. Income accumulated under a pre-existing power is grandfathered because the accumulation is not a constructive addition, but a modification that adds or enhances a power to accumulate income would be a proscribed modification because it could increase the property passing to a lower generation. Both the power to adjust from income to principal and the conversion to a unitrust could result in such an increase, unless the trustee already has the power to accumulate income. He is recommending that no adjustments be made until after the regs become final.

Next discussed were CRT's

Atkinson case appeal. A CRT was adopted. The instrument was proper but the provisions of the trust were not followed. The payments as provided were not paid. The court held that failure to comply mandated a complete denial of the charitable deduction.

Carlyn -

Final regs under §645 (election to treat trust as part of an estate) were issued. This is not in the materials because it was issued shortly before X-mas [PDF link to the same is in the ABA-PTL Archives). These include changes to the definitions of a QRT (qualified revocable trust), the election, TIN and filing requirements and others. Carlyn pointed out problems with the comments (but not with the regs) in the definition of a QRT where the grantor is incapacitated. She also discussed those trusts where the grantor is living abroad, and several other aspects of the comments. See T.D. 9032 in the Dec 24, 2002. Federal Register.

She discussed the Cottage Savings case and PLR 2002231011 and the realization of gain or loss on exchange of property interests under §1001. In this ruling a dispute arose to the administration of a trust. The trust provided that the grandson was to receive an annuity for life with the remainder to charities. The dispute was settled with the charities receiving an amount now with the remaining assets remaining in

trust. Payments will be made the grandson with the remainder pursuant to a general power of appointment in the grandson.. The issue in the ruling is whether any party would have taxable income. Anything not appointed would go to his descendants. The ruling held that this was a disposition of his interest in the trust because his entitlements are different than those he currently possesses. Also, any basis assigned to his interest is disregarded and the gain will be long term capital gain.

Dan Hastings - joint spousal revocable trusts. Two rulings denying the step-up in basis for the property of the surviving spouse were issued. The authority cited by the rulings is §1014(e). There are two articles on this topic in 2002 - one in Probate and Property by Howard Zaritsky and one in Estate Planning by Cason. Dan now feels that in certain circumstances, the use of this technique may have a chance of success with no downside potential.

Carlyn discussed the final regs on ESBTs issued this year. She discussed a number of provisions in the final regs. The regulations prevent the use of currently exercisable powers of appointment. There is not a lot that can be done. The regs require a permanent release of this power of appointment. Also, the final regs permit a grantor trust to elect to be an ESBT.

Dan Hastings - valuation cases.

Trusts owning stock will not be aggregated to determine control unless the decedent has a general power of appointment. A GPOA will be construed as ownership.

In the Estate of Dunn, the issue is the amount of the discount for built-in capital gains, or more precisely, how much of a discount should be allowed for the tax on such gains. The Tax Court held that some discount less than 100% rather than 100% of the tax is correct. The Fifth Circuit held that a discount of 100% of the tax on the built-in gains was appropriate.

Howard discussing FLP's.

Appeal of Strangi to the Fifth Circuit. The appeals court supported the Tax Court on all issues except 2036, which it remanded to the Tax Court to determine whether 2036 is applicable. Howard believes that this issue is the most relevant attack by the Service and that will be the only one that the Service may win in future cases.

To support the operation of an FLP, minimum documentation should be maintained. This includes Minute book.

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