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President's Message

It's hard to believe that summer is gone and we are headed into fall, which means that it will almost be time for the Plaza Lights Seminar.

The Plaza Lights Seminar is scheduled for Dec. 7 at the Country Club Plaza Marriott in Kansas City, Mo. Some of the topics that will be presented at the seminar include an update on Article 9, a summary of creditors' rights under the Bankruptcy Act, and electronic real estate recording. An announcement regarding the seminar will be sent shortly, but please plan on attending. A significant amount of work goes into this and all KBA seminars. Your attendance, and suggestions for topics and improvements, is greatly appreciated.

Section President

Robert M. Hughes
Bever Dye L.C., Wichita

One item you should be aware of (and will be a topic at the Plaza Lights Seminar) is the Uniform Real Property Electronic Recording Act (URPERA), which was promulgated by the National Conference of Commissioners for Uniform State Laws. The goal of the URPERA is to create homogeneous conditions across the United States for land records officials to accept records in electronic form, storing electronic records, and setting up systems for processing, searching, and retrieving these records. In response to URPERA the 2006 Kansas Legislature enacted the Uniform Real Property Electronic Recording Act (Senate Bill 336). This Act established the Kansas Electronic Recording Commission (Commission) to adopt uniform standards to implement this Act; their standards became effective on July 1, 2007. The decision to implement e-recording by a register of deeds in the state of Kansas, and to accept electronic documents for recording, is voluntary on a county-by-county basis. However, if a register of deeds determines to implement the Act, they must comply with the electronic standards established by the Commission, and must continue to accept paper documents as authorized by state law.

On a different matter, there has been a suggestion that Kansas consider enacting a "self-settled spendthrift trust" statute. There are currently 13 states that have self-settled spendthrift trust statutes, with Alaska being the first to enact such a statute. Several states have modeled their state law after Delaware, and the initial thought is for Kansas to consider a law similar to the Delaware statute, which is found at Delaware Code Ann. Tit. 12, Sec. 3570-3576. It would be beneficial to the members of the Real Estate, Probate, and Trust Law Section executive committee to receive comments and suggestions from committee members regarding a self-settled spendthrift trust statute. Assuming the executive committee believes that Kansas should have such a statute, the Probate Advisory Committee will have significant input.

I hope all of you had an enjoyable summer and look forward to seeing you at the Plaza Lights Seminar. ■

In This Issue ...

About the Author

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He is a member of the executive committee of the Real Estate, Probate, and Trust Section and serves as the committee's liaison to the KBA Continuing Legal Education Committee. He is a member and past director of the Wichita Estate Planning Council and the Wichita Estate Planning Forum. He is on the WSU Foundation Board of Directors, where he serves as chairman of the Foundation's Giving Committee, and is a member of the National Advisory Council for WSU. Peare is also a member and past chairman of WSU Foundation's Planned Giving Professional Advisory Committee.

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Estate Tax Notes:
Tax Cases and Rules Affecting the Estate and Business Succession Planner

VALUATION

1. P.L.R. 200728018 – Special valuation rules for qualified personal residence trust applied to sale of remainder interest

A husband and wife are the beneficiaries of a trust (Trust 1), for which the trustees are two individuals unrelated to the husband and wife. Trust 1 was formed for the purpose of acquiring fee simple title to a parcel of real property (property) for the benefit of the husband and wife. The property has been used exclusively by the husband and wife as their second residence. Neither the property nor any structure on the property is rented out for commercial purposes. Under the terms of Trust 1, either or both of the husband and wife may direct the trustees to terminate the trust. Such a termination becomes effective when the trustees file a certificate of termination with the register of deeds. Upon termination, the trustees must convey the property to the husband and wife as they direct. They plan to take fee simple title to the property as tenants by the entireties. Following termination, the husband and wife will subdivide the property into two parcels. One parcel (parcel) will consist of that portion of the property on which the main living quarters and appurtenant structures are located. In addition to the main living quarters, the following structures are located on the parcel: (i) pool house, (ii) guest cottage containing no bedrooms or kitchen, (iii) garage, and (iv) barn with two attached guest rooms that are used by guests in the summer and by the property's caretaker in the winter. After the subdivision, the husband and wife will execute a trust intended to meet the requirements of a personal residence trust (PRT). Under the terms of the PRT, the trustees will hold the parcel (or any replacement personal residence) as the sole asset of the PRT for the exclusive, rent-free use of the husband and wife as their personal residence during their joint lives and until the death of the survivor of them. During such time, all expenses of the parcel will be paid by the husband and wife and another trust (Purchasing Trust) in the same manner in which expenses are borne by the holders of legal life estates and remainder interests under the laws of the state in which the parcel is located. Upon the death of the survivor of the husband and wife, the trustees of the PRT will distribute the parcel to the Purchasing Trust, to be added to the principal of the Purchasing Trust. Following creation of the PRT, the husband and wife will transfer the parcel to the PRT in exchange for the transfer by the Purchasing Trust to the husband and wife of cash and marketable securities equal in amount to the value of the remainder interest in the PRT based on the fair market value of the parcel on the date of transfer and the general actuarial principles of Code Section 7520.

The IRS held that the parcel constituted a personal residence within the meaning of Code Section 2702 and the regulations thereunder because it satisfied the primary use requirements of Regulation Section 25.2702-5(b)(2)(ii), its size was comparable to that of properties in proximity to it used for residential purposes, and it included adjacent land not in excess of that which was reasonably appropriate for residential purposes, taking into account the size and location of the residence. The Internal Revenue Service (IRS) also held that the transaction would be treated as a transfer by the husband and wife of their respective remainder interests in the parcel coupled with the retention by each of a life interest in the parcel under the terms of the PRT. Finally, the IRS held that the transfer of the parcel to the PRT and sale of the remainder interest to the Purchasing Trust in exchange for cash or marketable securities having an aggregate fair market value equal to the value of the remainder interest as of the date of transfer determined in accordance with Code Section 7520 would not constitute a taxable gift by either the husband or wife for federal gift tax purposes.

2. *Negron v. United States*, 99 AFTR 2d 2007 – 3127 (DC OH. 6/4/2007) – Court holds annuity tables produce unrealistic and unreasonable value of lottery annuity payments

In 1991, two individuals (decedents) and a third individual jointly won the Ohio lottery, for which they were to receive 26 annual payments of more than $250,000. The lottery payments could not be assigned or used as collateral by the decedents. The decedents both died in 2001, within one month of each other. The same individual served as executor for both estates. On both estate tax returns, the executor disclosed the remaining 15 annual lottery payments to each decedent and valued the assets at more than $2.2 million, based upon the lump sum distribution amounts calculated by the Ohio Lottery Commission, which used a 9 percent discount rate in computing such amounts. After withholding for federal and Ohio income taxes, the estates received actual distribution of more than $1.5 million each. On audit, the IRS subsequently determined the value of the 15 remaining lottery payments to be more than $2.6 million with respect to the first decedent to die, and more than $2.7 million with respect to the second decedent to die, both based on the IRS annuity tables under Code Section 7520. As a result, the estates' tax liabilities were increased by more than $140,000 and $330,000, respectively. Both estates paid the additional tax liabilities and filed claims for refund, which were denied. This suit followed, in which the executor alleged improper tax assessment on lottery winnings after the deaths of the decedents.

The government filed a motion for summary judgment, and the executor filed a motion for partial summary judgment. At issue in the case was whether the annuity tables accounted for the fact that the estates' rights to receive the annual lottery payments were nonmarketable assets. The court recognized the circuit split on this issue, wherein the Second and Ninth circuits have concluded that the annuity tables do not accurately reflect the fair market value of future lottery payments because they fail to account for lack of marketability, while the Fifth Circuit has held that lottery annuity payments are properly valued by reference to the Code Section 7520 annuity tables. The court stated that it was more convinced by the reasoning of the Second and Ninth circuits and held that the executor successfully demonstrated that the value ascribed by the annuity tables for both estates was unrealistic and unreasonable. However, the court held that the executor failed to show there was a more reasonable and realistic means to determine the fair market value. Accordingly, the court denied the government's motion for summary judgment and granted the executor's motion with respect to the issue of whether the annuity table produced unrealistic and unreasonable results. The court instructed the parties to confer and submit a joint position statement regarding whether a more realistic and reasonable means was available to determine the value of the annuities.

3. Davis v. United States, 99 AFTR 2d 2007-3341 (DC NH 6/13/2007) – Court applies annuity tables to value lottery annuity payments

In 1989, the decedent won the Massachusetts lottery, for which he was to receive 20 annual payments of nearly $210,000. The lottery payments could not be sold, assigned, pledged as collateral, or otherwise transferred by the decedent. The decedent died with 10 annual payments remaining. On the decedent's estate tax return, the executor disclosed the remaining 10 annual lottery payments and valued the asset at more than $1.5 million, using the Code Section 7520 annuity tables. On audit, the IRS subsequently determined the value of the 10 remaining lottery payments to be more than $1.6 million, the discrepancy due to a minor computational error by the estate. As a result of other changes made by the IRS to the estate tax return, the estate's tax liability actually decreased by approximately $13,000. Nevertheless, the estate revisited the value of the lottery payments and determined that reference to the annuity tables was not appropriate due to the nontransferable nature of the payments. Therefore, the estate filed an informal claim for refund, asserting that the correct value of the 10 remaining lottery payments was approximately $800,000. The estate's claim for refund was denied, and this suit followed.

In support of its position, the estate submitted a valuation report, which the court disregarded as flawed. The court held that the valuer's opinion with respect to applicability of a 50 percent discount for lack of marketability was based on the incorrect assumption that a hypothetical buyer could not gain legal rights to the 10 remaining payments. Instead, the court held that the valuer should have determined the price that a hypothetical buyer would pay assuming he could gain full legal rights to the 10 payments but could not resell those rights.

The court held that the government's experts persuasively reasoned that a hypothetical purchaser of a virtually risk-free, but nonassignable, right to receive 10 annual payments would be willing to pay something very close to the present value of those payments. Accordingly, the court concluded that the nonassignable nature of the annuity had a minimal, if any, effect on its fair market value and would, at most, result in a 5 percent discount relative to comparable but freely transferable annuities. The court held that assuming the true fair market value of the annuity was five percent less than the value yielded by the annuity tables did not result in an unrealistic and unreasonable figure as required for departure from the tables. Therefore, the court held that the annuity was properly valued at more than $1.6 million using the Code Section 7520 tables, as determined by the IRS.

4. Stone v. United States, 99 AFTR 2d 2007-2992 (DC CA. 5/25/2007) – Value of partial interest in art collection should include discount for costs to partition

The decedent died in 1999. Her estate tax return valued her 50 percent undivided interest in 19 works of art at $1.42 million, calculated by taking 50 percent of the total estimated value of the collection ($5,085,000, as appraised by Sotheby's), applying an additional 44 percent fractional interest discount, and rounding to the nearest 10 thousand. The plaintiffs based their claimed fractional interest discount on an opinion obtained from FMV Opinions Inc. On audit, the IRS valued the estate's undivided 50 percent interest in the art collection at more than $2.7 million, after determining that two of the paintings were undervalued and that no fractional interest discount should apply.

At trial, the court held that the IRS values for the two paintings in dispute were more credible and unbiased. The IRS values were arrived at by the IRS art advisory panel, which is a collection of experts convened periodically by the IRS to determine the fair market value of works of art valued at $20,000 or more for tax purposes. The panelists are not paid except for cost reimbursements, and they are not told the specific purpose for which an item is being valued. Further, they are not told the identity of the taxpayer. The panel is comprised of experienced art experts, including art dealers, gallery owners, and museum curators, and their valuations are based on comparable sales of similar paintings near the date of valuation. The Sotheby's appraisal, on the other hand, contained no description for how its values were determined. Accordingly, the court rejected the plaintiffs' valuations of the two contested paintings in favor of those presented by the IRS panel.

With respect to discounts, the government contended that the fair market value of the estate's undivided 50 percent interest equaled 50 percent of the total fair market value of the 19 paintings, while the plaintiffs argued that an additional 44 percent fractional interest discount applied. The court concluded that a hypothetical seller under no compulsion to sell would not accept a 44 percent discount as proposed by the plaintiffs. The government's experts at trial testified that they were aware of sales of undivided interests in art occurring, but none had ever occurred at a discount. The court found this persuasive evidence given the experts' experience. Accordingly, the court concluded that a hypothetical willing seller of an undivided fractional interest in art would likely seek to sell the entire work of art and split the proceeds, rather than seeking to sell his or her fractional interest at a discount. Barring such consent from the co-owner, the hypothetical willing seller would bring a legal action to partition. Therefore, the court held that a small discount was appropriate to account for legal fees required to enforce the hypothetical seller's right to partition, a 2 percent discount was appropriate to account for the actual costs of selling the art by an auction house, and some discount was appropriate to account for the uncertainties involved in waiting to sell the art until after the partition action was resolved. Rather than determining the appropriate aggregate discount for the foregoing factors, the court instructed the parties to meet and confer to attempt to settle the case. The court stated that if the parties were unable to reach an agreement, the court would decide on an appropriate discount somewhere between the 2 percent discount proposed by the government and the 51 percent cost-to-partition discount proposed by the plaintiffs.

ESTATE INCLUSION

5. Reg-119097-05 (6/7/2007) – IRS issues proposed regulations regarding value of trust included in gross estate when the grantor retains an interest

The IRS issued proposed regulations providing guidance on the portion of a trust properly includible in a grantor's gross estate under Code Sections 2036 and 2039 if the grantor has retained the use of property in a trust or the right to an annuity, unitrust, or other income payment from such trust for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. These trusts include, without limitation, various charitable trusts, grantor retained trusts, and residence trusts.

The proposed regulations provide that if a decedent transfers property during life to a trust and retains the right to an annuity, unitrust, or other income payment from, or retains the use of an asset in, the trust for the decedent's life, for a period that does not in fact end before the decedent's death, or for a period not ascertainable without reference to the decedent's death, the decedent has retained the right to income from all or a specific portion of the property transferred as described in Code Section 2036. The portion of the trust corpus includible in the decedent's gross estate is that portion of the trust corpus, valued as of the decedent's death (or the alternate valuation date, if applicable) necessary to yield the annual payment (or use) retained by the decedent using the appropriate Code Section 7520 rate. In this regard, because the specific portion of corpus includible in the gross estate is properly determined as of the decedent's death, the appropriate Code Section 7520 rate is the rate in effect on the decedent's date of death (or on the alternate valuation date, if applicable). The proposed regulations provide both rules and examples for calculating the amount of trust corpus to be included in a deceased grantor's gross estate under Code Section 2036 in such a case. The proposed regulations further provide that where either Code Section 2036 or Code Section 2039 may apply to include such an interest in a grantor's gross estate, the IRS will apply Code Section 2036 in the future in order to ensure similar tax treatment for similarly situated taxpayers. However, the IRS noted that this guidance is not intended to foreclose the possibility that any applicable section of the Code may be properly applied in the future by the IRS in appropriate circumstances beyond those described in the proposed regulations.

The regulations would apply to estates of decedents for which the valuation date of the gross estate is on or after the date of publication of the Treasury decision adopting the rules as final regulations in the Federal Register. The IRS will hold a public hearing on the proposed regulations Sept. 26. Written and electronic comments on the proposed regulations and outlines of topics to be discussed at the public hearing and the time devoted to each topic must be received by Sept. 5.

PARTNERSHIPS

6. *Estate of Erickson v. Comm.*, T.C. Memo 2007-107 (4/30/2007) – Assets the decedent transferred to family limited partnership included in gross estate

The decedent died in 2001, at the age of 88 years. She had two daughters and five grandchildren. In 1998, the decedent's older daughter began handling the decedent's finances pursuant to a durable power of attorney. In 1999, the decedent was diagnosed with Alzheimer's disease, and by the middle of 2000, she no longer drove or cooked. Acting on behalf of the decedent as attorney-in-fact, the daughter had counsel draft a limited partnership agreement (Agreement) creating the Arthur and Hilde Erickson Family LLP (Partnership). The Partnership Agreement was executed in May 2001. The decedent's two daughters were general and limited partners, and the decedent and one son-in-law were limited partners. The decedent's older daughter signed the Agreement in multiple capacities: her individual capacity, as attorney-in-fact for the decedent, and as a co-trustee of a trust created for the benefit of the decedent. No transfers to the Partnership occurred upon execution of the Agreement, but rather, the first transfers began about two months after the Agreement was executed. The transfers to the Partnership were not finalized until two days prior to the decedent's death. On the same day as the transfers were finalized, the decedent's daughter, as attorney-in-fact, transferred a portion of the decedent's limited partnership interests to three trusts created for the benefit of her grandchildren, reducing her 86.25 percent interest in the Partnership to only 24.18 percent. Most of the decedent's retained personal assets, including the reduced Partnership interest, were illiquid. Following the decedent's death, the estate was unable to meet its liabilities for estate and gift taxes. To obtain the funds necessary to meet its obligations, the decedent's daughter engaged in two transactions. First, she sold the decedent's home to the Partnership for $123,500. Second, the Partnership gave the decedent's estate cash totaling $104,000, which the parties characterized as a redemption of some of the decedent's Partnership interests.

The IRS issued deficiency notices for more than $730,000 in federal gift tax and nearly $720,000 in federal estate tax for the decedent's estate. The issue at trial was whether the assets transferred by the decedent to the Partnership shortly before her death were included in her gross estate under Code Section 2036(a)(1). The commissioner argued that the decedent retained the possession or enjoyment of, or the right to income from, the transferred assets. It argued further that the assets were not transferred in a bona fide sale for adequate and full consideration. The estate argued that the decedent retained no rights to the assets once she transferred them to the Partnership and, alternatively, that the assets were transferred in a bona fide sale for adequate and full consideration.

The court first held that the facts and circumstances indicated that the decedent retained the right to possess or enjoy the assets transferred to the Partnership pursuant to an implied understanding or agreement among the parties to the transaction. It stated that the disbursement of funds to the estate was tantamount to making funds available to the decedent if needed. Further, although the estate designated the funds disbursed to the estate as a purchase of the decedent's home and redemption of a portion of the decedent's Partnership interests, the estate received disbursements at a time when no other partners did. Accordingly, the disbursements provided strong support that the decedent, or her estate, could use the assets if needed. In addition, the court recognized that the Partnership had little practical effect during the decedent's life since it was not fully funded until days before she died. It noted that the Partnership was primarily an alternate method through which the decedent could provide for her heirs. The court held that the foregoing facts, when taken together, showed that an implied agreement existed among the parties, and that the transaction represented the daughter's last minute efforts to reduce the decedent's estate tax liability while retaining for the decedent the ability to use the assets if she needed them.

The court next held that the transaction did not meet the bona fide sale exception of Code Section 2036 because a legitimate and significant nontax purpose did not exist for forming the Partnership. The estate first argued that forming the Partnership allowed the family to centralize management of the family assets and give the management responsibilities to the decedent's older daughter. The court noted, however, that the decedent's older daughter already had significant management responsibilities with respect to family assets before the Partnership was formed because she held the decedent's power of attorney for approximately 14 years prior to the decedent's death. The estate next argued that the Partnership afforded greater creditor protection. The court stated, however, that a creditor who sought funds from the Partnership would have a significant asset base from which to recover from the Partnership (more than $2 million). Finally, the estate argued that the Partnership facilitated the decedent's gift-giving plan, but the court stated that facilitation of a gift-giving plan was not a significant nontax purpose. Based on the foregoing, the court found that the Partnership was a mere collection of mostly passive assets intended to assist the decedent's tax planning and benefit the family. As further evidence that the transaction did not meet the bona fide sale exception, the court noted the following: (i) the decedent's older daughter stood on all sides of the transaction, acting as attorney-in-fact for the decedent, personal representative for the decedent's estate, general and limited partner in her individual capacity, and co-trustee of a trust that was also a partner; (ii) the same law firm represented all parties to the transaction; (iii) the delay in contributing assets to the Partnership; (iv) the financial dependence of the estate on the Partnership due to the insufficiency of personal assets retained outside the Partnership; and (v) the decedent's age and health at the time of the transaction. Accordingly, the court concluded that the assets transferred by the decedent to the Partnership were includible in the decedent's estate under Code Section 2036(a)(1).

CHARITABLE GIVING

7. P.L.R. 200720021 – Redemption of corporate stock from charitable remainder unitrust by disqualified person not self-dealing

A charitable remainder unitrust (trust) owns 62 percent of the shares of common stock of a for-profit corporation (corporation). The corporation is a disqualified person with respect to the trust. The balance of the corporation's common stock is owned 33 percent by an employee stock ownership plan and 5 percent by the trustee of the trust (in her individual capacity), who is also one of the two donors of the trust and sole recipient of the unitrust amount payable from the trust.

The corporation plans to offer to redeem for cash the common shares held by all of its shareholders (offer), which is limited to a maximum aggregate redemption amount. The offer will be the same for all shareholders, and the redemption price will be the fair market value of the stock as determined by an independent appraiser who is not a disqualified person with respect to the trust. Each shareholder will have the right to have any or all of their shares redeemed by the corporation. If the total value of all shares tendered by the shareholders exceeds the maximum redemption amount, the number of shares to be redeemed will be pro-rata among all tendering shareholders. The trust plans to tender as many of its shares as possible pursuant to the offer and subject to the maximum redemption amount. The individual shareholder (and trustee of the trust) will not tender her shares, and it is unknown whether the employee stock ownership plan will tender its shares.

Based on the foregoing information, the IRS held that the stock redemption would not be an act of self-dealing within the meaning of Code Section 4941 because the offer will be to all shareholders on a uniform basis, and the trust will receive no less than fair market value (as determined by an independent third party appraiser) for its shares.

8. P.L.R. 200727013 – Early termination of two charitable remainder unitrusts not self-dealing

A husband and wife (grantors) created two charitable remainder unitrusts, for which they were the sole contributors of trust property and the sole income beneficiaries. The grantors and the charitable beneficiary of both trusts have agreed to terminate the two trusts. Upon termination, the grantors will receive pro-rata distribution of the actuarial value of their unitrust interest using the rate in effect under Code Section 7520 on the date of termination and using the methodology under Regulation Section 1.664-4 for valuing interests in a charitable remainder unitrust. The charitable beneficiary will receive the balance of the assets from each trust.

The IRS held that the proposed transactions were, in substance, sales of the grantors' unitrust income interests in the trusts. Accordingly, the amounts received by the grantors as a result of the trust terminations are amounts received from the sale or exchange of property. The IRS held that the grantors have no basis in their interests in the two trusts, so the amount of gain recognized by them would be the amount realized from the disposition of their interests in the trusts. Because the grantors' holding periods in the interests exceed one year, the entire amount realized by them would be long-term capital gain. The IRS further held that early termination of the trusts would not constitute self-dealing and would not result in imposition of a termination tax under Code Section 507(c) because the distribution to the grantors equals the actuarial value of the income interest, thereby qualifying for the exception to self-dealing provided in Regulation Section 53.4947-1(c)(2)(i), and because the charitable beneficiary is a public charity to which Code Section 4941 does not apply.

9. Notice 2007-50, 2007-25 I.R.B. 1430 (6/4/2007) – IRS issues guidance on rules for qualified conservation contributions

Code Section 170(b)(1)(E) contains percentage limitations on qualified conservation contributions made by individuals. It was added to the Code by section 1206(a)(1) of the Pension Protection Act of 2006 (Act) and is effective for contributions made in taxable years beginning after Dec. 31, 2005, and before Jan. 1, 2008. In general, charitable contribution deductions are limited to 50 percent of a taxpayer's adjusted gross income, computed without regard to any net operating loss carryback (contribution base) for cash contributions (50 percent limitation), and 30 percent of a taxpayer's contribution base for contributions of capital gain property (30 percent limitation). Contributions made during the taxable year in excess of the applicable limitation are generally carried forward for up to five succeeding taxable years in order of time.

The Act makes the 50 percent limitation (rather than the 30 percent limitation) applicable to qualified conservation contributions and allows excess qualified conservation contributions to be carried forward for 15 succeeding years (rather than five succeeding years) in order of time. If the taxpayer is a qualified farmer or rancher (defined as a taxpayer whose gross income from the trade or business of farming is greater than 50 percent of the taxpayer's gross income for the taxable year), the 50 percent limitation is increased to 100 percent (100 percent limitation). However, for any contribution of property made after Aug. 17, 2006, that is used or available for use in agriculture or livestock production, the 100 percent limitation applies only if the contribution is subject to a restriction that the property remain available for agriculture or livestock production. Otherwise, the 50 percent limitation applies. The guidance walks through a number of questions and answers to illustrate application of the new rules.

GIFT TAX

10. Inf. Rel. 2007-127 – IRS to reconsider rulings regarding trusts with distribution committees

The IRS announced that it is reconsidering a series of private letter rulings (PLRs) that address, in part, the gift tax consequences of trusts that utilize a distribution committee consisting of trust beneficiaries who direct distributions of trust income and corpus. The PLRs will be reviewed for consistency with Rev. Rul. 76-503, 1976-2 C.B. 275, and Rev. Rul. 77-158, 1977-1 C.B. 285. Accordingly, the Office of Chief Counsel has requested comments as to whether the conclusions in the PLRs can be reconciled with the revenue rulings. Comments must be provided within 90 days of the date of the July 9 news release.

In the PLRs, the IRS concluded that the distribution committee members have substantial adverse interests to each other for purposes of Code Section 2514. Therefore, the IRS held that the distribution committee members did not possess general powers of appointment over the trust, and distributions from the trust were not subject to gift tax with respect to them. However, the holdings in the revenue rulings indicate that because the committee members are replaced if they resign or die, they would be treated as possessing general powers of appointment over the trust corpus.

RETIREMENT BENEFITS

11. P.L.R. 200702007 – No acceleration of IRD upon qualified profit sharing plan distribution to QTIP trust

The decedent was a participant in a qualified profit sharing plan (plan), for which a qualified terminable interest property (QTIP) trust under Code Section 2056(b)(7)(B)(i) was the named beneficiary. The IRS held that designation of the QTIP trust as the beneficiary of the decedent's account balance in the plan would not result in acceleration of income in respect of a decedent (IRD) at the time the assets from the plan pass into the QTIP trust. The IRS further held that the beneficiary of the QTIP trust would only include the amounts of IRD in the plan in gross income when the beneficiary receives a distribution from the QTIP trust.

12. P.L.R. 200717023 – IRS issues first ruling on rollover option for nonspouse use beneficiary

The decedent, who was born in 1937, died in 2005, not having attained age 70.5 years. The taxpayer was appointed as the sole personal representative of the decedent's estate and was also named the sole primary beneficiary of the decedent's interest in his qualified plan (plan). Sometime in 2005, the shareholders and directors of the company sponsoring the plan resolved to terminate the plan, and as of the date of the ruling request, all assets other than those related to the decedent's interest had been distributed to affected plan participants. Because of the planned termination, the decedent decided to roll over his interest in the plan into an individual retirement account (IRA). As of the decedent's date of death, the direct rollover had not yet been accomplished and had further not been accomplished by either the date of the ruling request or the date of the ruling.

Prior to completion of the rollover into the IRA, the plan will be amended to comply with section 829 of the Pension Protection Act of 2006 (Act). Both the plan amendment and the rollover will occur no later than Dec. 31, 2007. The company sponsoring the plan will directly transfer the decedent's interest in the plan into the IRA. The taxpayer will then begin to receive minimum required distributions from the IRA with respect to the amounts directly transferred from the plan calculated using her remaining single life expectancy beginning no later than Dec. 31, 2008. The IRA will be retitled in the name of the taxpayer, as beneficiary of the decedent (deceased).

Based on the foregoing, the IRS made the following rulings: (i) in accordance with Section 829 of the Act, the taxpayer, as the sole named beneficiary of the decedent's interest in the plan, may transfer, by means of a trustee-to-trustee transfer, the decedent's remaining interest in the plan into the retitled IRA, with the transfer occurring no later than Dec. 31, 2007; (ii) the taxpayer may receive minimum required distributions from the retitled IRA calculated using her remaining single life expectancy; (iii) the retitling of the IRA is consistent with section 829 of the Act; and (iv) the retitled IRA will constitute an inherited IRA as that term is used in section 829 of the Act.

OTHER

13. Rev Rul. 2007-45, 2007-28 I.R.B. 49 – IRS releases interest rates to be used in valuing farmland in decedents' estates in 2007

The IRS issued interest rates to be used by estates of decedents dying in 2007 to compute the special use value of farm real property under Code Section 2032A, which permits an election to be made to value farm property that comprises the majority of assets in a decedent's estate and passes to a family member based on its use as a farm, rather than on its highest and best use. Certain requirements must be met to ensure continuing use of the property as a family farm. Included among the interest rates is 5.81 percent for U.S. Agbank, FCB, which includes property located in Kansas.

14. Rev. Rul. 2007-24, 2007-21 I.R.B. 1282 – Reinvestment of cash from one annuity contract into second annuity contract constitutes taxable event

A taxpayer owned a nonqualified annuity contract issued by a life insurance company (Company 1). The taxpayer requested that Company 1 issue directly to another life insurance company (Company 2) a check as consideration for a new annuity contract to be issued by Company 2. The taxpayer intended the transaction to be treated as a tax-free exchange under Code Section 1035. Company 1 refused to do so and, instead, issued a check to the taxpayer, who did not deposit the check, but instead endorsed it to Company 2 as consideration for the new annuity contract. The IRS held that the transaction did not qualify as a tax-free exchange under Code Section 1035, stating that there was no actual exchange of annuity contracts. The taxpayer did not assign the Company 1 contract to Company 2, and there was no direct transfer from Company 1 to Company 2 of the cash value of the old contract in exchange for the new contract. The IRS recognized that neither Code Section 1035 nor the regulations thereunder make any special provision for the purchase of an annuity contract with amounts distributed to the policyholder under another contract. Further, because the annuity contract was a nonqualified contract, no rollover provision applied to the amount the taxpayer received from Company 1. Accordingly, the amount that the taxpayer received from Company 1 under the first annuity contract was taxable to the extent set forth in Code Section 72(e).

15. *Estate of Zlotowski v. Comm.*, T.C. Memo 2007-203 (7/24/2007) – Untimely filed estate tax return not due to reasonable cause

The decedent died a U.S. citizen on Sept. 10, 1999; although, she was domiciled in Germany at the time. She had made two wills during her lifetime: a U.S. will, and later, a German will, which revoked the U.S. will. Apparently unaware of the German will, in May 2000, two individuals nominated as executors in the U.S. will presented the U.S. will for probate in New York. Later that month, the New York court granted the two individuals preliminary letters testamentary. In early June 2000, the attorney for the estate learned about the German will. In 2003, the heirs under the German will began proceedings to take over the New York proceeding that had already been opened. Around June 4, 2004, the preliminary letters testamentary issued to the executors were revoked.

The decedent's estate tax return was due on June 12, 2000. The executors, through the estate's attorney, requested and received an extension of time to file the return until Dec. 10, 2000. The estate tax return was not filed until Sept. 19, 2001. At issue in the case was the IRS' addition to tax of more than $230,000 for failure to timely file the estate tax return, and specifically, whether the failure to timely file the estate tax return was due to reasonable cause and not due to willful neglect.

At trial, one of the executors testified, but the other was deceased at the time. The executor who testified stated that he knew nothing about the estate and relied fully on the estate's attorney in preparing and filing the estate tax return. He viewed his only responsibility in the matter as signing the return after it had been prepared by the attorney. He signed the return around Aug. 28, 2001.

The estate's attorney also testified at trial, stating that it was his duty to prepare the estate tax return. He further stated that in late September or early October 2000, he advised the executors to suspend their administration of the estate because he had received correspondence from Europe that if they meddled in the estate, it would be at their own risk. He further advised the executors to not then file an estate tax return and suspended preparation of it. He testified that he later returned to preparation of the return in late January or early February 2001 because it was taking a long time for the heirs under the German will to take over the New York proceeding.

The parties in the case agreed that the two individuals to whom preliminary letters testamentary were issued were "executors" within the meaning of Code Section 2203, and that they, and only they, were responsible for filing the estate tax return at the time when it became due. Code Section 6651(a)(1) provides for an addition to tax in the event a taxpayer fails to file a timely return unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The court noted that "willful neglect" denotes a conscious, intentional failure or reckless indifference, and that reasonable cause is established where, despite the exercise of ordinary business care and prudence, a taxpayer is unable to file timely. The respondent argued that the executors' reliance on the estate's attorney to file the estate tax return was an impermissible delegation of their responsibility as executors, adding that if the executor is unable to obtain complete information about the decedent's assets, the executor still must file a timely return based on the information available at the time. The estate argued that the executors had reasonable cause because it was abundantly clear they relied on the advice of the attorney not to file at the time the return was due.

In its analysis, the court concluded that the executor who testified was almost completely disengaged from administration of the estate, relying on the attorney to do virtually all that was required of the executors. Although the attorney testified that in late September or early October 2000, he advised the executors to suspend their administration of the estate and advised them not to file an estate tax return, there was no testimony at trial that the executors ever received or understood that advice. Even considering such advice, the court noted that it was not advice that, as a matter of law, the executors had no obligation to file an estate tax return by Dec. 10, 2000. Rather, it was simply advice that there was some unspecified risk with continuing their administration of the estate, including filing the estate tax return. Accordingly, the court held that the estate failed to show that the failure to timely file the estate tax return was on account of reasonable cause and not due to willful neglect and upheld the addition to tax.

16. P.L.R. 200721006 – Request for extension to file Code Section 6166 election denied

The personal representative of an estate requested an extension of time under Regulation Section 301.9100-3 to file an election under Code Section 6166 to pay the estate tax in installments. Alternatively, the personal representative requested that the Code Section 6166 election be considered a procedural directive and granted on the basis of the "substantial compliance" doctrine. The IRS held that Regulation Section 301.9100-3, which provides extensions of time for making regulatory elections, does not apply to the election under Code Section 6166 because such an election is a statutory election, not a regulatory election. The IRS further held that the substantial compliance doctrine does not apply in the context of making an election under Code Section 6166 because the U.S. Tax Court, considering statutory and regulatory provisions nearly identical to the current Code Section 6166 provisions, has previously stated that there are no reasonable cause exceptions to the requirements for election, and a taxpayer is granted relief under the election only if the taxpayer complies with the statutory requirements. Accordingly, the IRS denied the request for extension to file an election under Code Section 6166.

17. Pub. L. 110-28, 110th Cong., 1st Sess. (5/25/2007) – Application of kiddie tax broadened

The Small Business and Work Opportunity Tax Act of 2007 contained provisions broadening the kiddie tax, among other items. Under prior law, a child was subject to the kiddie tax if he or she had not attained age 18 prior to the close of the tax year, either parent of the child was alive at the end of the tax year, and the child did not file a joint return for the tax year. The new law expands the kiddie tax for tax years beginning after May 25, 2007, to also apply where (i) the child turns age 18 prior to the close of the tax year, or turns age 19-23 prior to the close of the tax year if the child is a full-time student; (ii) the child's earned income for the tax year does not exceed one-half of his or her support; (iii) the child has more than the inflation-adjusted prescribed amount of unearned income ($1,700 for 2007); (iv) the child has at least one living parent at the close of the tax year; and (v) the child does not file a joint return for the tax year.

18. Reg-128224-06 (7/26/2007) – Unique costs of estates and trusts not subject to 2 percent floor under proposed regulations

In response to a lack of consistency in the case law, the IRS issued proposed regulations providing that costs incurred by estates or non-grantor trusts that are unique to an estate or trust are not subject to the two percent floor for miscellaneous itemized deductions under Code Section 67(a). For this purpose, a cost is unique to an estate or trust if an individual could not have incurred that cost in connection with property not held in an estate or trust. If a single fee paid by an estate or trust includes both costs that were unique to estates and trusts and costs that were not, then the estate or trust must use a reasonable method to allocate the single fee between the two types of costs. The regulations would apply to payments made after the date the regulations are finalized. The IRS will hold a public hearing on the proposed regulations Nov. 14. Written and electronic comments on the proposed regulations must be received by Oct. 25, and outlines of topics to be discussed at the public hearing must be received by Oct. 24. ■

About the Author

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He received his J.D. from the University of Kansas School of Law and his B.A. from Bethany College.

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Real Estate Update

KANSAS SUPREME COURT

DILLON REAL ESTATE ET AL. V. THE CITY OF TOPEKA
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 95,162 – JULY 27, 2007
Annexation; Improvement Districts

ATTORNEYS: David E. Watson and John R. Hamilton, of Hamilton, Laughlin, Barker, Johnson & Watson, Topeka; and David Davies, assistant attorney general, for appellants/cross-appellees. Edward L. Bailey and Susan L. Mauch, of Cosgrove, Webb & Oman, Topeka, for appellee/cross-appellant.

FACTS: In December 2003, the City Council of Topeka announced by ordinance the unilateral annexation of approximately 10 acres at the intersection of 29th and Urish Road in Topeka. The property is within both the Mission Township and the Sherwood Improvement District. Dillon owns part of the annexed property. The city relied upon consents filed by Dillon's predecessors approximately eight years earlier in order to eliminate the prerequisites to annexation, i.e., the city's resolution of annexation, public notice, and public hearing. Dillon did not consent, and contested the annexation. The district court ruled that K.S.A. 12-520(c) was constitutional in barring annexation of improvement districts, but that Dillon's predecessors in title consented to annexation. Because the consent was recorded with the register of deeds, Dillon took the property with notice and could not object to annexation. The district court also ruled that the improvement district, the township, and the state (as intervenor) lacked standing to challenge the city's actions. The district court revised its ruling, holding that the improvement district and the state, but not the township, had standing. It further ruled that K.S.A. 12-520(c) only precluded annexation of the entire district, and that the city was not prohibited from annexing a part of it.

ISSUES: Annexation and improvement districts

HELD: Court held the Kansas statutes are clear that cities are prohibited from unilateral annexation under K.S.A. 12-520 in situations involving certain improvement districts. Court also held that K.S.A. 12-520(c) barred the city's efforts to unilaterally annex part of the improvement district through K.S.A. 12-520. Court held that K.S.A. 12-536 does not limit the application of K.S.A. 12-520(c) to those annexation cases without landowner consent and consequently does not bar Dillon's suit contesting the city's annexation of part of the improvement district. Court concluded that because K.S.A. 12-520(c) bars the city's unilateral annexation efforts, and because the city failed to otherwise proceed in a legislatively authorized way, e.g., K.S.A. 12-521, its annexation is a nullity. Court vacated judgment for the city and remanded for judgment in favor of plaintiffs.

STATUTES: K.S.A. 12-520(c), -520a(f), -521, -529, -534, -536; K.S.A. 19-2753; and K.S.A. 20-3018(c)

THE CITY OF MISSION HILLS V. SEXTON
JOHNSON DISTRICT COURT
AFFIRMED
NO. 97,151 – JUNE 22, 2007
Condemnation; Rental Value; Admission of Evidence

ATTORNEYS: Frederick K. Starrett, of Lathrop & Gage L.C., Overland Park, for appellants. Neil R. Shortlidge, of Stinson Morrison Hecker LLP, Overland Park, for appellee.

FACTS: The city of Mission Hills began rehabilitation of its sanitary sewer system so that it could ultimately be transferred to the Johnson County waste system. As part of the project, the city condemned two temporary easements on the Sexton's property so that the existing pipe and an existing manhole could be replaced. In condemnation proceedings, two experts testified regarding the valuation of the Sextons' property. The Sextons' expert estimated damages after the taking were $480,000. The city's expert estimated damages at $10,900. A jury ultimately returned a verdict of $10,900 as just compensation to the Sextons for the city's taking of the two easements on their property.

ISSUES: Condemnation, rental value, and admission of evidence

HELD: Court held that although the valuation testimony of the city's expert was presented in its entirety on direct examination without objection by the Sexton's attorney, the expert did undergo vigorous cross-examination regarding his valuation methodology. The weight of the two experts' opinions was left in the hands of the jury. There was no error in the use of the rental value methodology. Court stated the Sextons cite no authority to support the contention that the city's expert was obligated to perform a comparable rental analysis in establishing values. Court held the evidence pertaining to the city's limited use of the two temporary easements was improper, but the Court found the error was harmless. Court also held the trial court did not abuse its discretion by allowing testimony pertaining to portions of the amended petition concerning the Sextons' use and access to the easements actually described a "conditional taking." Court held there was no reversible error concerning the trial court's erroneous admission of evidence and arguments regarding matters previously ruled inadmissible, namely whether the Sextons' expert had assigned $100,000 in damages for lack of access or whether the evidence concerning the number of landowners impacted by the project implied to the jury that the city already had to pay a large number of residents for easements. Court found no err in the city's attorney making a "speaking objection."

STATUTES: K.S.A. 26-505, -506, -513(a)-(e); and K.S.A. 60-259(a), -261, -401(b), -407(f)

JEREMIAH 29:11 INC. V. SEIFERT ET AL.
MONTGOMERY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,224 – JULY 13, 2007
Deed Restriction

ATTORNEYS: Daryl D. Ahlquist, of Hines & Ahlquist P.A., Erie, for appellants. Kenneth G. Gale, of Adams & Jones Chtd., Wichita; and Jeffrey A. Chubb, of Scovel, Emert, Heasty & Chubb, Independence, for appellee.

FACTS: The Jordans sold property to the Dallingas in 1978 for $25,000. The warranty deed had a restrictive covenant that no commercial enterprise was allowed on the property. Although the deed included lines for the signatures of both grantors and both grantees, only the Jordans signed the warranty deed. The Dallingas never signed the deed, leaving the signature lines blank. Several transfers of the property occurred. Jeremiah 29:11 purchased the property in question by general warranty deed in 1999. The Seiferts now own the property surrounding the property in question as previously owned by the Jordans. The case started as a boundary line dispute, but then turned into one to enforce the restrictive covenant against Jeremiah's use of the property as a leadership-training center for pastors and leaders of nonprofit corporations and a Boy Scouts camp. Jeremiah claimed the restrictive covenant was void and unenforceable because the Dallingas had not signed the warranty deed in 1978. The trial court agreed with Jeremiah and held that the 1978 transfer was a mutual or indentured deed requiring both signatures and since the Dallingas did not sign the deed, then they did not accept the restrictive covenants. The Court of Appeals reversed and remanded finding all deeds were property filed and that Jeremiah had constructive notice of the restrictive covenants. The Court of Appeals remanded for the trial court's consideration of the effect of the "Release of Covenants" signed by the Jordans to release the restrictive covenant after Jeremiah had purchased the property.

ISSUES: Real property and restrictive covenants

HELD: Court stated the controlling issue in this case is whether there was constructive notice of the restrictive covenant on commercial enterprises. Court held that the absence of the Dallingas' signatures on the 1978 deed made it insufficient to provide the necessary constructive notice to subsequent purchaser Jeremiah. Notice was not merely key; it was indispensable. Persons who take real property without actual or constructive notice of restrictive covenants will not be bound by them.

STATUTES: K.S.A. 33-106; and K.S.A. 58-2003, -2203, -2221, -2222, -2223

MILLER V. GLACIER DEVELOPMENT CO. LLC
WYANDOTTE DISTRICT COURT AFFIRMED
NO. 94,999 – JULY 13, 2007
Eminent Domain

ATTORNEYS: Reid F. Holbrook and Judd L. Herbster, of Holbrook & Osborn P.A., Overland Park; and Joy D. Hays, of Polsonelli Shalton Flanigan Suelthaus P.C., Kansas City, Mo., for appellants. Timothy P. Orrick and Renee M. Gurney, of Foth & Orrick LLP, Overland Park, for appellee.

FACTS: Glacier Development Co. owned real property in Kansas City, Kan., that was subject to Kansas Department of Transportation's (KDOT) efforts to reconstruct I-35 at the Kansas-Missouri state line. KDOT filed eminent domain proceedings against Glacier. Expert evidence of the fair market value of the property ranged from $463,000 to $4.6 million. The jury ultimately determined the fair market value of the property was $800,000, and Glacier appealed.

ISSUE: Eminent domain

HELD: Court held it was error for the district court to allow admission of the amount Glacier paid in purchasing the property. However, Court concluded the error was not reversible because the jury's verdict was within the range of values offered by the experts. Court held Glacier failed to demonstrate any prejudice from the district court's denial of its motion for a continuance. Court held the district court's exclusion of the value engineering study was not erroneous because it was conducted to evaluate the engineering alternatives rather than determine the value of Glacier's property. Court found no abuse of discretion in the district court's decision allowing KDOT to take a videotaped deposition to preserve testimony. Court also found no error in the district court's order of trial proceedings and the presentation of evidence and arguments to the jury.
CONCURRENCE: J. Luckert concurred in the outcome, but held the amount Glacier paid to purchase the property was admissible evidence. J. McFarland and J. Nuss joined in the concurring opinion.

DISSENT: J. Beier dissented in part finding the admission of the amount Glacier paid to purchase the property was unduly prejudicial and reversible error. J. Davis joined in the dissenting opinion.

STATUTES: K.S.A. 26-504, -507, -508, -513(e); K.S.A. 60-202, -216(e), -226(b)(1), -240(b), -241, -261, -401(b), -407(f); and K.S.A. 79-1437c

OWEN LUMBER CO. V. CHARTRAND ET AL.
JOHNSON DISTRICT COURT – AFFIRMED AND REMANDED WITH DIRECTIONS
NO. 96,391 – MAY 4, 2007
Mechanic's Lien; Prejudgment Interest

ATTORNEYS: Mark S. Gunnison, Payne & Jones Chtd., Overland Park, argued the cause; and Arthur J. Chartrand, Chartrand Law Office, Olathe, was with him on the briefs for appellant. Michael P. Bandre, Couch, Pierce, King & Hoffmeister, Overland Park, argued the cause and was on the brief for appellee.

FACTS: Design Build Group constructed a home for the Chartrands. Owen Lumber supplied some of the building materials. Design had problems paying subcontractors. Owen filed a mechanic's lien. Owen gave notice of the lien to Design Build as legal owner but did not give notice to the Chartrands. The district court granted summary judgment to the Chartrands finding Owen failed to give notice. The Court of Appeals reversed finding Owen gave notice to "any owner." Before the Supreme Court could review the issue the Legislature amended the notice statutes to require notice to the holder of the equitable interest. The district court found the amendments applied retrospectively and because Owen failed to serve notice to the Chartrands, it was precluded from foreclosing its lien. The Supreme Court later reversed and remanded to the district court. The district court granted Owen a lien in the amount of $12,980.61.

ISSUES: (1) Mechanic's lien, (2) prejudgment interest, and (3) fair trial

HELD: Court found that although Owen served notice of the mechanic's lien on the Chartrands by first-class mail, Court held that the presumptive receipt of legal service does not apply in this case because the relevant statutes require service by restricted mail. However, Court found the savings statute applied, and Court held the district court correctly applied the savings provisions because the Chartrands obtained actual receipt of the mechanic's lien statement and the statutory notice requirements were satisfied. Court held the district court properly determined the amount of the mechanic's lien. Court held the district court correctly determined that the claim became fixed and liquidated as of the date the Chartrands became owners of the property and the district court did not abuse its discretion in awarding prejudgment interest. Court rejected the Chartrand's argument that they were prejudiced by the fact that the same attorneys represented Owen Lumber and other defendants in the case. Court stated the Chartrands failed to prove the district court arbitrarily disregarded undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice was present.

STATUTES: K.S.A. 16-201; K.S.A. 20-3018(c); and K.S.A. 60-103, -304, -1103(c), (d)

YOUNG PARTNERS LLC V. USD NO. 214
GRANT DISTRICT COURT – REVERSED
NO. 97,087 – JUNE 22, 2007
Reversionary Interest; Eminent Domain

ATTORNEYS: K. Mike Kimball, of Kimball Law Firm LLP, Ulysses, for appellant. James D. Oliver, of Foulston Siefkin LLP, Overland Park; and Randall D. Grisell, of Doering & Grisell P.A., Garden City, for appellee.

FACTS: In 1947, the Wilks transferred land by general warranty deed to U.S.D. 214. The deed contained a reversionary clause, providing that the transferred property was to be used for school purposes only and if abandoned at any time, to revert back to the owners. Many improvements were made on the real property, and it was used for school purposes. Today, the school district no longer conducted classroom activities on the property, but it continues to maintain all facilities in working order. The Youngs acquired the Wilks property in 1997, making them the successor in interest to the grantors in the original warranty deed. The school district filed a condemnation proceeding. The Youngs filed an independent action to enjoin the eminent domain proceedings. The Youngs obtained an injunction against the school district to stop the school district's eminent domain action against the Youngs' reversionary interest. The district court held that the school district's eminent domain action impaired prior contractual obligations and thus violated the Contracts Clause of the U.S. Constitution.

ISSUES: Condemnation, real property, reversionary interest, and eminent domain

HELD: Court held under the facts of this case, the Legislature has deemed that it is in the public interest for the school district to protect its public investment against a reversionary interest by authorizing condemnation of the reversionary interest. The requirement that a taking be made for a "public purpose" is fulfilled by the two conditions set forth in K.S.A. 72-8212a(b). Court concluded that the provisions of K.S.A. 72-8212a are not unconstitutional and that a public purpose exists for the condemnation action filed by the school district. Court reversed the district court's injunction.

STATUTES: K.S.A. 26-504 and K.S.A. 72-8212a(b)

STEFFES V. CITY OF LAWRENCE
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 96,838 – JUNE 22, 2007
Smoking Ordinance

ATTORNEYS: William K. Rork and Wendie C. Bryan, of Rork Law Office, Topeka, for appellant. Toni Ramirez Wheeler and Scott J. Miller, Lawrence, for appellee. Sandra Jacquot, general counsel, and Donald L. Moler, executive director, were on the brief for amicus curiae League of Kansas Municipalities, Topeka.

FACTS: The city of Lawrence passed an ordinance regulating smoking with the stated purpose to improve and protect the public's health by eliminating smoking in public places of employment, to guarantee the right of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the choice to smoke. Steffes, the owner of several Lawrence bars, was cited for violations of the ordinance and he challenged the constitutionality of the ordinance.

ISSUE: Smoking ordinance

HELD: Court stated that the Legislature has invited cites to regulate smoking in public places to the maximum extent possible. Court stated that "stringent regulation" can certainly include "absolute prohibition." Court held that the district court did not err in concluding that the city's ordinance regulating smoking is not pre-empted by state law and is not unconstitutionally vague and that Steffes was not entitled to injunctive relief.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 21-4010, -4013

KANSAS COURT OF APPEALS

IN RE TAX APPEAL OF K.S.U. SE AGRICULTURAL RESEARCH CENTER
BOARD OF TAX APPEALS – REVERSED AND REMANDED WITH DIRECTIONS
NO. 96,519 – MAY 4, 2007
Ad Valorem Property Tax Exemption

ATTORNEYS: Richard H. Seaton, university attorney, and Jacqueline R. Butler, assistant university attorney, of Kansas State University, Manhattan, for appellant. No appearance by appellee.

FACTS: Kansas State University Southeast Agricultural Research Center (KSU) appeals the decision of the Kansas Board of Tax Appeals (BOTA) denying its application for an exemption for ad valorem taxation of a home provided for a caretaker of its research farm in Labette County. BOTA found KSU's use of the property as a living quarters for an employee to be used for a residential purpose took it outside of the tax exemption statutes.

ISSUES: (1) Taxation and (2) educational and scientific exemption

HELD: Court concluded that the subject property was owned and operated by a state educational institution for a residential use minimal in scope and incidental to the educational and scientific purposes for the property. The occupancy was clearly for the benefit of KSU rather than the occupant — it was part of the machinery by which the education and research affairs of KSU were administered. Court remanded to BOTA with directions to grant KSU's application for exemption.

STATUTES: K.S.A. 74-2426(c); K.S.A. 76-711, -712; K.S.A. 77-601 *et seq.*, -621(c)(4); and K.S.A. 2006 Supp. 79-201, -201 *Sixth*, -201a *Second*

SOUTHERN STAR CENTRAL GAS PIPELINE CO. V. CUNNING ET AL.
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 96,103 – MAY 18, 2007
Blanket Easement; Encroachment

ATTORNEYS: Teresa J. James and Teresa L. Mah, of Martin, Pringle, Oliver, Wallace & Bauer LLP, Overland Park, for appellant. James P. Colgan, of Colgan Law Firm LLC, Kansas City, Kan.; and Gary A. Nelson, Leavenworth, for appellees.

FACTS: Southern Star Central Gas owns and operates interstate natural gas pipelines in Kansas. Southern Star had a recorded easement across property owned by the Cunnings and in 1959 or 1960 had installed an 8-inch natural gas pipeline across the property, buried 36 inches below the surface. Southern Star filed a petition against the Cummings for possession and ejectment to enforce the easement rights and to remove a garage because it was within 50 feet of the pipeline. The district court denied the petition finding Southern Star failed to prove it was more probably true than not that the garage constituted an unreasonable interference with the easement and that the encroachment was slight compared to the cost of removing the garage.

ISSUES: Easements and encroachment

HELD: Court held Southern Star's blanket easement did not expressly define the amount of space Southern Star needed to adequately maintain its pipeline. There was evidence that Southern Star could use means other than its standard practices in order to access and work on the pipeline. The district court weighed the evidence and found no material interference with the easement. This was judgment for the district court to make based upon the evidence presented, and in this case the district court's decision was supported by substantial competent evidence. This does not mean that a 41-inch clearance from a natural gas pipeline would be considered adequate in every case. Under the facts of this case, however, the court concluded the district court did not err in denying Southern Star's request for injunctive relief.

STATUTE: K.S.A. 60-1001

ANTRIM, PIPER, WENGER INC. V. LOWE ET AL.
CHATAUQUA DISTRICT COURT – AFFIRMED
NO. 97,308 – JUNE 8, 2007
Brokerage Contract; Real Estate Commission

ATTORNEYS: Richard D. Loffswold Jr., Girard, for appellants. Vernon L. Jarboe and Martha A. Peterson, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC, Topeka, for appellee.

FACTS: David Lowe signed a nonexclusive right-to-sell agreement with Einer Johnson, a real estate agent for Antrim, Piper, Wenger Inc., to sell the Lowe's ranch. This contract allowed Antrim to list and sell the property for $1.5 million during March 22, 2004, and Aug. 22, 2004. The commission was to be 5 percent. Lewis was interested in the property. Johnson claims Lewis told him that he just wanted to look at the property and to not come to the ranch. Deborah Lowe said that Johnson told Lewis that he had other arrangements that day and could not show the property. Lowe eventually wrote a contract with Lewis and the Lowes refused to pay Antrim a commission on the sale. Antrim sued the Lowes. The trial court granted summary judgment to Antrim.

ISSUES: (1) Summary judgment and (2) real estate

HELD: Court held that despite the fact that the Lowes found the buyers in Sedan, showed them the property, and wrote the contract for sale, the key undisputed fact remained that the Lowes knew that Lewis had been sent to them through the efforts of Johnson, Antrim's salesperson. Since the Lowes did not dispute that they sold the property to a purchaser whom they knew was sent to them by Antrim's salesperson, there was no genuine issue of material fact and summary judgment was appropriate. Court stated the parties contracted within the appropriate time set in the listing agreement and it was unreasonable to assume that Antrim would agree to go without a commission if the Lowes decided to use a 1031 IRS exchange to complete the sale of the property. Court held that the trial court did not abuse its discretion in denying the motion to alter or amend because Deborah's alleged lack of consent to the sale of the ranch was not before the trial court when it entered summary judgment.

STATUTE: K.S.A. 60-259(f)

NORTH COUNTRY VILLAS HOMEOWNERS ASS'N V. KOKENGE
SHAWNEE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART
NO. 97,018 – AUGUST 3, 2007
Contracts; Restrictive Covenants

ATTORNEYS: Vernon L. Jarboe and Martha A. Peterson, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC, Topeka, for appellants. Randall J. Forbes and Terry A. Iles, of Frieden & Forbes, Topeka, for appellees.

FACTS: Nations Development Corporation (NDC), original developer of North Country Villas subdivision of single family homes and duplexes, sold lots to Kokenges and Clampitt-Hersh Development LLC. NDC then assigned its rights as declarant to Kokenges and Clampitt-Hersh who revoked Declaration of Covenants, Restrictions, and Easements (declaration) as to their land and began building fourplex. Homeowners held a meeting, elected officers and board of directors, and filed petition for declaration that Kokenges and Clampitt-Hersh were subject to declaration's restrictions and for an injunction to prevent the fourplex. District court granted summary judgment to North Country and homeowners, and enjoined Kokenges and Clampitt-Hersh from building any structure contrary to the declaration. Kokenges and Clampitt-Hersh appealed, claiming district court erred in finding: (1) NDC could not assign it rights under the declaration, (2) Kokenges could not revoke or amend the declaration as to properties they owned, and (3) North Country's officers and directors were properly elected.

ISSUES: (1) Assignment of rights under the declaration, (2) revocation or amendment, and (3) election of officers and directors

HELD: No Kansas case specifically addresses the assignment of the declarant's rights under a homeowners association declaration. Because the rights under the declaration were not personal, NDC could freely assign its rights as the declarant and Class B member to other parties. District court erred in finding NDC could not assign its rights under the Declaration. Restatement (Third) of Property, Servitudes § 6:21 (1998), is adopted as the law of Kansas. A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the declaration fairly apprises purchasers that the power could be used for the kind of change proposed. Because the general power to amend the declaration in this case did not fairly apprise the purchasers of the drastic change attempted by the Kokenges and Clampitt-Hersh, district court properly found this particular amendment was unenforceable. District court did not err in finding North Country's officers and directors were properly elected. Under facts, district court properly found that for meeting at issue, Kokenges and Clampitt-Hersh had voluntarily surrendered their Class B memberships.

STATUTES: None

IN RE MARRIAGE OF REINHARDT
RUSSELL DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 97,114 – JULY 6, 2007

Divorce Settlement; Fraud; Statute of Limitations

ATTORNEYS: Jane M. Isern, Great Bend, for appellant. John T. Bird and Carol M. Park, of Glassman, Bird, Braun & Schwartz LLP, Hays, for appellee.

FACTS: Dilene and Scott Reinhardt were divorced in 1999. A divorce decree was filed in July 2000, with a later property settlement agreement filed by the trial court in December 2000. In March 2005, Dilene filed a motion to set aside or amend the final divorce judgment, claiming that Scott "committed fraud" by failing to reveal his ownership interest in the property he owned in Russell County, Kansas, at the time of the divorce. The grantors of the property retained a life estate in the property. Scott contended that he did not obtain a fee simple interest in the real estate until December 2001, and he did not pay taxes on the property until December 2003. The trial court granted Dilene's motion, without citing a subsection of K.S.A. 60-260(b).

ISSUES: (1) Divorce settlement, (2) fraud, and (3) statute of limitations

HELD: Court stated that in Dilene's original motion to set aside the judgment, she overtly accused Scott of committing fraud by failing to reveal his ownership interest in the real property. Court held that regardless of whether Dilene's contention is meritorious, the claim would place this action squarely within K.S.A. 60-260(b)(3) and its one-year time bar. Moreover, Scott did not receive his fee simple ownership interest until after the divorce was granted. Court concluded that the trial court did not have jurisdiction to reopen the divorce, redistribute property, or distribute Scott's real property. Court reversed and remanded to the trial court with instructions to reinstate the December 2000 property settlement agreement.

STATUTE: K.S.A. 60-260(b)

KIEKEL V. FOUR COLONIES HOMES ASS'N
JOHNSON DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 95,306 – JULY 13, 2007

Homeowner's Association; Restrictive Covenants

ATTORNEYS: Michael R. Ong and Michelle M. Burge, of Law Office of Michael Ong P.A., Leawood, for appellants/cross-appellees. Lawrence L. Ferree III and Kirk T. Ridgway, of Ferree, Bunn, O'Grady & Rundberg Chtd., Overland Park, for appellee/cross-appellant.

FACTS: Fifty-one percent of members in Four Colonies Homes Association, a not-for-profit corporation, approved a bylaw amendment, which placed renting restrictions on lot owners. When Four Colonies attempted to enforce bylaw amendment, Kiekels sought declaratory judgment that bylaw was unenforceable. Four Colonies filed counterclaim asking court to enjoin Kiekels from renting their properties. District court denied counterclaim for injunctive relief, and found the bylaw amendment was reasonable and enforceable, and found it did not conflict with Association's Declaration of Covenants, Conditions, and Restrictions.

ISSUES: (1) Declaratory judgment and (2) injunctive relief

HELD: Legal background on creation of homeowners associations is discussed. District court erred in finding Four Colonies could impose rental restrictions through amendment to bylaws. Declaration in this case intended any property use restrictions, including restrictions on renting, to be achieved through amendment to the declaration, which required approval by 75 percent of the members. Bylaw amendment is void and unenforceable. No error in denying Four Colonies' request for injunctive relief. Kiekels renting of their property did not violate the declaration's commercial use restriction or noxious activity restriction.

STATUTES: None

IN RE TAX APPEAL OF UNITED AG SERVICES INC.
RUSSELL DISTRICT COURT– REVERSED AND REMANDED WITH DIRECTIONS
NO. 95,947 – JUNE 1, 2007

Taxation of Elevators and Railroad Property

ATTORNEYS: Linda Terrill, of Neill, Terrill, & Embree, Leawood, for appellant. Mark Arthur Jr., of Russell, for appellee. William E. Waters, of Division of Property Valuation, of Kansas Department of Revenue, Topeka, for amicus curiae Mark S. Beck, director of property valuation. Gerald N. Capps, of Wichita, for amicus curiae Cowley County.

FACTS: The subject real property contained two grain elevators and two metal grain bins. The metal grain bins were destroyed by wind in 1996 and rebuilt in 2000. In 2000, Russell County reappraised the grain elevators and increased the valuation to more than $300,000 from only $85,000 in 1999. Russell County also issued escaped tax bills for 1998 and 1999 increasing the valuation substantially in those years. The Board of Tax Appeals (BOTA) found the subject elevators are located upon land leased from the railroad and said land was state assessed. Consequently, without recording of documentation indicating that the subject improvements are owned by an entity other than the railroad, the instant escaped tax assessments are improper and vacated. The district court reversed BOTA holding the application of K.S.A. 79-412 was erroneous because it "cannot be the intent of the legislature to allow improvements to not be assessed by the decision of the owners of the improvements of their own choosing if they choose to not record their leases."

ISSUES: Taxation, grain elevators, railroad property, and recording leases

HELD: Court held that the subject property was realty for purposes of the appeal, and the conclusion proved critical to the court's analysis in applying the various statutory schemes purportedly supporting the belated tax assessments under these circumstances. Court stated that because K.S.A. 79-1427a does not apply to real property, and the undervaluation of the real estate parcel qualified neither as "escaped" under K.S.A. 79-1475 nor as a clerical error subject to correction under K.S.A. 79-1701 *et seq.*, there is simply no statutory vehicle to support these assessments under these circumstances. Where the Legislature has not provided a remedy for a taxing district's undervaluation of a real estate parcel that is not detected prior to sending out tax notices, belated "escaped" tax assessments on the undervalued parcel must be set aside. Court stated the assessments are void, and they must be vacated as a matter of law. Court reversed the district court's conclusion that BOTA erred and the assessments were valid and enforceable. Court held BOTA's decision vacating the assessments is affirmed.

STATUTE: K.S.A. 77-621, 79-102, -304, -306, -408, -411, -412, -5a01, -5a04, -1427a, -1455, -1459(d), -1466, -1467, -1475, -1701(h), 79-328 (Weeks 1977)

OFFICE OF THE ATTORNEY GENERAL STATE OF KANSAS

OPINION NO. 2007-10

Counties and County Officers — General Provisions — Home Rule Powers; Limitations, Restrictions and Prohibitions; Authority of County to Offer Advance Tax Payment Option.

Taxation — Correction of Irregularities — Unlawful Release, Discharge, Remission or Commutation of Taxes; Interests and Penalties Owed.

SYNOPSIS: K.S.A. 79-2024 allows a county treasurer to discretionarily accept partial payments toward a tax debt. However, K.S.A. 79-2024 does not authorize the county treasurer to abate or forgive delinquent taxes or interest on tax debts, which remains prohibited by K.S.A. 79-1703.

STATUTES: K.S.A. 2006 Supp. 79-1701, 79-1701a; K.S.A. 79-1703; K.S.A. 2006 Supp. 79-2004; 79-2004a; and K.S.A. 79-2014, 79-2023, 79-2024, 79-2803, 79-2811; and L. 1994, Ch. 267

OPINION NO. 2007-11

Taxation — Property Exempt from Taxation; Initial Request for Exemption; Tax Not Required to be Paid During Pendency of Application.

Taxation — Sale of Real Estate For Taxes — Listing of Real Estate Subject to Sale; Application for Exemption.

Taxation — Sale of Personal Property for Taxes — Collection of Delinquent Taxes; Application for Exemption.

SYNOPSIS: If a property owner has properly requested a tax exemption, K.S.A. 2006 Supp. 79-213(i) provides that taxes otherwise due as of that filing are not considered delinquent until the expiration of 30 days after the Board of Tax Appeals issues an order denying the exemption. Thus, a county treasurer should not attempt to collect such taxes by utilizing the procedures in K.S.A. 79-2302 and K.S.A. 2006 Supp. 79-2101 unless and until this occurs. However, pursuant to K.S.A. 2006 Supp. 79-213, the application for exemption does not impact delinquent taxes from uses or years prior to the date the exemption request was filed, granted or became effective. Thus, any tax delinquency falling outside the parameters of K.S.A. 2006 Supp. 79-213 may be listed or handled in accordance with standard tax collection procedures.

STATUTES: K.S.A. 2006 Supp. 79-201a, 79-213, 29-2101; and K.S.A. 79-2302, 79-2303 ■

About the Author

Calvin J. Karlin, Lawrence, is a member of Barber Emerson L.C. His practice includes estate and trust planning and litigation.

He received his B.A. and J.D. from the University of Kansas, where he was Phi Beta Kappa, Order of the Coif, and Kansas Law Review *note and comment editor.*

He is a member of the American College of Trust and Estate Counsel.

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Probate and Trust Cases

KANSAS SUPREME COURT

REDMOND V. KESTER
KANSAS SUPREME COURT
JUNE 8, 2007

ATTORNEYS: Christopher J. Redmond, of Husch & Eppenberger LLC, Kansas City, Mo., for appellant. No appearance by appellee.

The Supreme Court unanimously rejected a bankruptcy trustee's attempt to deny a homestead exemption where the residence was transferred to a revocable trust. The debtors' home was transferred by quitclaim deed to a trust created by the wife, of which she was trustee, and she and her husband were beneficiaries. The Court held that the equitable interest of a trust beneficiary supports the homestead exemption, regardless of whether the beneficiary is also the settlor and trustee. The Court noted K.S.A. 58a-1107 (which applies retroactively by K.S.A. 58a-1106(a)(1)) as demonstrating legislative intent to include trust beneficiaries, even if a warranty deed was not used as provided by the statute. The Court also noted that K.S.A. 58a-505 prevents the fraudulent conveyance of property to self-settled trusts to avoid creditors, but that this does not defeat exemption claims.

The Kansas Supreme Court issued this opinion in response to a certified question of law from the 10th U.S. Circuit Court of Appeals. The 10th Circuit followed the Supreme Court's ruling in *In re Kester*, No. 06-3114, 06-3116 (July 11, 2007).

KANSAS COURT OF APPEALS

COMMERCE BANK N.A. V. BOLANDER
KANSAS COURT OF APPEALS
APRIL 6, 2007

ATTORNEYS: Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, Topeka, for appellant. William J. Kelly, Independence, for appellee.

This is an unpublished decision that holds that individual retirement account proceeds paid after death to the decedent's revocable trust are not exempt and are available to pay creditor's claims pursuant to K.S.A. 58a-505.

The court also upheld Kansas jurisdiction (even though the decedent died in Texas and the trustee was in Oklahoma) based upon the trust's origination in Kansas, language providing for Kansas administration, incorporation of Kansas trust powers statutes, and inclusion of Kansas real estate. The decedent's will was also probated in Kansas where her spouse resided. The trustee was also still residing in Kansas when the will was probated and when he was served with process.

ESTATE OF ETHEL F. DRAPER
KANSAS COURT OF APPEALS
JULY 27, 2007

ATTORNEYS: Kurt S. Brack, of Holbrook & Osborn P.A., Overland Park, for appellant. Michael R. Ong and Michelle M. Krambeck Burge, of Michael Ong P.A., Leawood, for appellees/cross-appellants. Barry D. Martin, of Speer & Holliday LLP, Olathe, for appellee, Estate.

The court reversed the district court and held that an antenuptial agreement that required the widow to execute and maintain a valid will that leaves "not less than one fourth" of her net estate to each of the deceased husband's three sons was satisfied, even though the widow had transferred all but less than $10,000 to two irrevocable trusts (worth in excess of $1 million) with other beneficiaries. The court held that the antenuptial agreement was unambiguous and did not restrict gifts, inter vivos transfers or creation of irrevocable trusts. The court held it was improper for the district court to find constructive fraud and impose an effective life estate on the widow.

The court split 2-1 on another issue as to whether the sons' claims were barred by failure to make demand against the estate within the K.S.A. 59-2239 four-month claim period. The majority held under the facts of this case that the statute was inapplicable, as the estate did not hold the assets since they were in trust. The court (including the dissenting judge, who was on both panels) made no mention of the *Nelson* case (above) decided three weeks earlier, which seemingly involved similar issues and the same statute.

This case and *Nelson* indicate that restricting the terms of a will may not sufficiently tie a decedent's hands, given the possibility of other estate planning documents being used. Second, it is important to be aware whether the claim is properly against the estate (in which case the nonclaim statute applies) or against someone else (whether by the estate or another) in which case the nonclaim statute should not apply.

LYONS V. HOLDER
KANSAS COURT OF APPEALS
JULY 20, 2007

ATTORNEYS: Jim Lawing, Wichita, for appellant. Larry D. Toomey, of Toomey Pilgreen LLC, Wichita, for appellee.

Holder served as trustee of Lyons' trust for 12 years, but took no trustee fees during the first 11 years. The trust grew from approximately $300,000 at its inception to approximately $600,000. After a falling out between Holder and Lyons, Holder paid himself $56,850 for trustee fees and $5,000 for attorney fees. Lyons conceded on appeal that the amount of the fees (equivalent to $4,166 per year) was reasonable and the court, therefore, found them "authorized" and "fair" under K.S.A. 58a-802(b). The court remanded to the district court to determine whether Holder waived his right to fees based upon his failure to seek them for 12 years or to address them in his accountings to the beneficiary. Since waiver is an affirmative defense, the burden of proving waiver will be on Lyons.

NELSON V. NELSON
KANSAS COURT OF APPEALS
JULY 6, 2007

ATTORNEYS: William P. Tretbar, of Fleeson, Gooing, Colson & Kitch LLC, for appellants. Coy M. Martin, of Moore Martin L.C.; Ted D. Ayres of Wichita State University Foundation; Robert W. Coykendall, of Morris, Laing, Evans, Brock & Kennedy Chtd.; and Scott D. Jensen and Eric Ireland, of Bever Dye L.C., for appellees. All attorneys are from Wichita.

Under the terms of a property settlement agreement, husband agreed to execute and maintain a will, creating a testamentary trust from the entire estate, with his children to receive over half of the trust income. Husband married another woman and established a revocable trust with his new wife as trustee. This trust provided for his children to receive one-half the income. Husband named his new wife as sole beneficiary of his profit sharing plan and as joint tenant on a brokerage account. Decedent subsequently made a will that equally divided the estate between a charitable remainder annuity trust that was to pay 5 percent of the net market value to his children annually, and a trust from which the new wife received all of the income. A different panel of the Court of Appeals than in *Draper* below held that the failure of the appellant children to timely open an estate or file a claim barred them under K.S.A. 59-2239, since the claim should have been brought against the estate rather than the new wife. The court also noted that the claims may be barred by the five-year statute of limitations for written contracts, since husband made absolute conveyances to the new wife more than five years before this action.

TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL

IN RE HILGERS
TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL
JULY 10, 2007

ATTORNEYS: Ross Wichman, of Anderson & Wichman, Hays, for debtor appellant. J. Michael Morris, of Klenda, Mitchell, Austerman & Zuercher LLC, Wichita, for appellee. D. Michael Case, Trustee, Wichita, pro se.

The Tenth Circuit Bankruptcy Appellate Panel affirmed Judge Nugent's decision reported in the Winter 2007 Reporter that the bankruptcy trustee was entitled to a debtor's remainder interest in each trust where trust administration had been completed, except for a final distribution to the bankrupt.

U.S. BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

IN RE CHRISTOPHER JOSEPH SEFERYN
U.S. BANKRUPTCY COURT FOR
THE DISTRICT OF KANSAS
AUGUST 13, 2007

ATTORNEYS: Cynthia F. Grimes, of Grimes & Rebein L.C., Lenexa, for debtor. Stuart E. Bodker and Louis J. Wade, of McDowell, Rice, Smith & Buchanan P.C., Overland Park, for creditor, Missouri Building LLC.

This case was filed a few days before the Oct. 17, 2005, effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). Debtor sought to exempt an individual retirement account (IRA) valued at $1,127,340 and creditor objected. It came before the court on cross motions for summary judgment. The funds were originally in an employee stock ownership plan (ESOP) for which the Internal Revenue Service had issued a favorable determination letter in 2002. The IRA held proceeds (rolled over before the end of 2004) from an ESOP that was liquidated due to potential negative tax ramifications, pursuant to Revenue Ruling 2004-4 that would occur after 2004. The court rejected creditor's position that the ESOP was not qualified due to noncompliance with the Revenue Ruling 2004-4 standards because creditor lacked proof. The court noted that expert testimony has been admitted and relied upon in other IRA exemption litigation, but the creditor here did not present any such proof. Judge Somers noted in this decision, pre-BAPCPA cases from other jurisdictions where other evidence of disqualification was considered, but held that creditor was lacking in such evidence in this case.

Practitioners should note that after BAPCPA's effective date, the IRA bankruptcy exemption, without regard to most (but not ESOPs) rollover contributions, is limited to $1 million under 11 U.S.C. 522 (n). It is difficult to imagine how an IRA without rollovers would exceed $1 million. BAPCPA also added provisions regarding presumptive exemption if an IRA favorable determination letter is in effect for a qualified plan. 11 U.S.C. 522 (b) (4). ■

CLE Docket

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NOVEMBER

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5 — **Employment Law Institute**
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9 — **Family Medical Leave Act Update**
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Richard Olmstead
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12 — **Advocacy Skills and Electronic Stored Information (ESI) in the Federal Courts (Federal – Morning Session)**
Ethics and Malpractice Risks for the New Millennium (Ethics – Afternoon Session)
Country Club Plaza Marriott, Kansas City, Mo.

16 — **Electronic Communications: Policies & Case Updates**
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Timothy Davis
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19 — **ABCs of LPM: What Law Practice Management has to Offer Kansas Attorneys**
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26 — **KBA/KIOGA Oil and Gas Conference**
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NOVEMBER

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