



KBA REAL ESTATE, PROBATE & TRUST SECTION NEWSLETTER

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ASSOCIATION

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SECTION PRESIDENT'S MESSAGE

By D. Michael Dwyer
Dwyer Dykes & Thurston LC, Overland Park

Well, this will be my last opportunity to communicate to you as president of the section. My term expires at the KBA Annual Meeting June 17-19 in Topeka. I have enjoyed the opportunity of working as president on behalf of the section, and hopefully we have made some progress in terms of our communication with the members of the section and efforts on behalf of the section with regard



to legislative issues. I want to take this opportunity to thank all of the members of the executive committee for their time and contributions. Likewise, I extend thanks to my fellow officers for their contributions, with a special thanks to Cal Karlin and his editorial staff for their efforts in moving our newsletter along on a timely basis.

Fred Farmer has been nominated to serve as president, Bob Hughes to serve as president-elect, and Vern Jarboe to serve as secretary-treasurer. Elections will take place at the annual meeting held during the KBA Annual Meeting. In addition, Dan Peare agreed to continue as the CLE liaison and Bob Hughes will continue as legislative liaison.

As each of you are hopefully preparing for summer vacations and time to perhaps kick back, I leave you with this bit of Irish wisdom:

An Irishman arrived at JFK Airport and wandered around the terminal with tears streaming down his cheeks. An airline employee asked him if he was already homesick.

"No," replied the Irishman. "I've lost all me luggage!"

"How'd that happen?" asked the employee.

"The cork fell out!" said the Irishman.

Hopefully, your travels will not be this disastrous, and your luggage will stay with you.

Thanks for the opportunity to serve you.

PROBATE AND TRUST CASES

Submitted by Calvin J. Karlin
Barber Emerson LC, Lawrence

Nicholas v. Nicholas

83 P.3d 214

(Kansas Supreme Court, January 30, 2004)

This case involves the death of a husband in the middle of divorce proceedings. The Kansas Supreme Court reversed significant portions of the Kansas Court of Appeals decision previously reported in the Summer 2003 Section Newsletter.

Upon filing for divorce, the wife obtained an ex parte temporary restraining order prohibiting either party from disposing of any asset of the parties. The Court held that the husband's changing of beneficiary designations on life insurance, pay on death (POD) accounts, and transfer of death (TOD) accounts from his wife to children of a prior marriage did not "dispose" of marital property within the meaning of the restraining order.

Upon filing of a divorce action, "there is no automatic freezing of assets; rather, the specifics of the order control," according to the Court. The statute authorizing courts to prohibit disposition of property (K.S.A. 60-1607(a)(1)) is not intended to "freeze each party's estate plan as of the date of the filing" of the divorce action, rather it "is to forbid actions by either party that would dissipate the property of the marital estate or place it beyond the court's

adjudicatory power in the dissolution proceeding." The Court noted that the trial court still had power over the underlying property despite the life insurance, POD and TOD beneficiary changes, and that the wife as beneficiary had only an inchoate right to the death proceeds during the insured owner's lifetime. The beneficiary change affected the value that the wife would receive upon her husband's death, but did not change the value of the marital estate for divorce purposes. The beneficiary change had no impact until death, and at that time the divorce action abated, leaving no action for division of the marital estate.

The Court noted that the district court has the power under K.S.A. 60-1607(a)(1) to restrain spouses from changing beneficiary designations, but no such order was entered in the Nicholas case.

Another issue involved whether the husband's transfer of property into a revocable trust severed joint tenancies. By the trust's own terms, however, it excluded joint tenancy property. The Court stated that even if the husband had the intent as expressed in repeated oral statements and a motion to sever the joint tenancy, such intent alone is insufficient without action. Consequently the court did not have to reach the question whether severance of joint tenancy constituted a violation of the restraining order.

The Court also held that the husband's cause of action for invasion of privacy by his wife was not an "injury to the person" under K.S.A. 60-1801 that survived the husband's death.

Finally, the Court held that Supreme Court Rule 114 prohibits an attorney or attorney's spouse from acting as a surety on a bond in any case in which the attorney is counsel.

O'Keefe v. Merrill Lynch & Co.

84 P. 3d 613

(Kansas Court of Appeals, February 20, 2004)

In a case that explores principles of collateral estoppel and res judicata in the context of arbitration proceedings, the court affirmed a district court decision that an arbitration proceeding resolved in the administrator's favor for \$100,000 against Merrill Lynch precluded a separate action for interference with an expected inheritance by the decedent's grandchildren. The court found that the same transactions and financial advice by Merrill Lynch were the basis for both the arbitration proceeding and the grandchildren's subsequent case.

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**In re Estate of Steward
79 P.3d 791**

(Kansas Court of Appeals, November 26, 2003)

In a dispute between a beneficiary of POD accounts and the conservator of the ward's estate, the court held that the probate court had jurisdiction even though the statute provides that POD accounts are not testamentary. After the guardianship and conservatorship had been established and an examining doctor had written that Sandra Jo Steward was totally incompetent to manage her financial or personal affairs, Ms. Steward established POD accounts without the knowledge or consent of the conservator or court approval. The ward's guardian (and others) were named as beneficiaries on the ward's accounts. The conservator became aware of these accounts after Ms. Steward's death and filed a motion in the conser-

vatorship proceedings to determine ownership. The probate court found that the accounts should be part of the conservatorship estate and the same assets were then inventoried in the estate proceedings.

The court did note that only the guardian (and none of the other beneficiaries) had intervened or objected to the probate court's setting aside of the POD beneficiary designations and that the probate court had authority to remedy a fiduciary's misconduct or financial profit. The court acknowledged that the jurisdictional question would have been more difficult if any of the non-guardian POD beneficiaries had intervened or objected.

**In re Viola Carolyn Lucas
Bankruptcy Case No. 01-12092
Cousatte v. Lucas
Adversary No. 01-5116**

(Judge Robert E. Nugent, March 2, 2004)

The Bankruptcy Court in Wichita refused to impose a constructive trust upon a house and car purchased with estate assets by the decedent's neighbor who was named as executor, surviving trustee and sole beneficiary. The house and car were claimed exempt in the beneficiary's bankruptcy, and no one objected to the exemption in a timely manner. Although the state court proceedings directed Lucas to turn over property to Cousatte, the state court did not impose a constructive trust, and the court refused to do so based upon the record before it and the lack of timely objection to the exempt assets purchased with the proceeds of the decedent's estate.

ESTATE TAX NOTES

Submitted by Dan C. Peare,
Hinkle Elkouri Law Firm LLC, Wichita

1. STATUTORY TAX RATES EXEMPTIONS AND DEDUCTIONS FOR 2004

The following changes affect estate planners for transfers made, and estates of decedents dying, in 2004:

- (a) The gift tax annual exclusion under Section 2503 of the Internal Revenue Code of 1986, as amended (the "Code") remains at \$11,000 per donee.
- (b) The annual exclusion for gifts to a non-citizen spouse under Code Section 2523(i)(2) will be \$114,000.
- (c) The generation-skipping transfer tax exemption under Code Section 2631 will be \$1.5 million.
- (d) The aggregate amount that special use valuation of farm or business real estate may reduce an estate under Code Section 2032(A) will be \$850,000.
- (e) If an estate elects to defer payment of estate taxes under Code Section 6166, the amount, of the business interest of an estate, the taxes which are subject to a two percent interest rate under Code Section 6601(j), will be \$1,140,000.
- (f) The income tax rates for taxable income of an estate or trust will be 15 percent for taxable income not over \$1,900; 27 percent for taxable income over \$1,900 but not over \$4,500; 30 percent for taxable income over \$4,500 but not over \$6,850; 35 percent for taxable income over \$6,850 but not over \$9,350; and 38.6 percent for taxable income over \$9,350.
- (g) The highest marginal estate tax rate under the Code is 48 percent.
- (h) The state death tax credit under Code Section 2010 is reduced by 75 percent in 2004.

2. REVOCABLE GRANTOR TRUST A PERMITTED SHAREHOLDER OF S CORPORATION

The taxpayer owned stock in two companies. The taxpayer created a revocable grantor trust to which he transferred his stock in the companies. The trust agreement provides that the taxpayer has the right to all income during his lifetime from the stock. In addition, he has the right to sell the shares of stock, reinvest the proceeds, and use the income derived therefrom during his lifetime. Upon the taxpayer's death, the trust agreement provides for the outright distribution of the stock to various remaindermen. The IRS ruled that the revocable grantor trust created by the taxpayer meets the requirements of Code Section 1361(d)(3) to be treated as a qualified subchapter S trust (QSST) and is a permitted shareholder of the companies provided that the taxpayer makes a timely election to be treated as such. P.L.R. 200404037.

3. MARITAL DEDUCTION ALLOWED DESPITE CONFLICTING INCOME PROVISIONS

The decedent and his wife executed a joint revocable trust in 1997. Shortly thereafter, the decedent died, survived by his wife. The trust provided that upon the death of the first grantor to die, the decedent's separate share of the trust would divide into four separate trusts, one of which was to be called the "Marital Deduction Trust." The terms of the Marital Deduction Trust provided that the net income was to be paid annually to the surviving spouse. However, under a contingent trust provision, the trustee was authorized, in the event of a disabled beneficiary, to distribute to or apply for the benefit of the beneficiary so much of the net income and principal of the beneficiary's separate share as in the trustee's

absolute discretion deems appropriate. The IRS disallowed the marital deduction, arguing that the Marital Deduction Trust provision and the disability provision conflicted.

The Tax Court held that the trust qualified for the marital deduction pursuant to Code Section 2056(b)(7). In so holding, it recognized that the provisions conflicted, but held that under Arkansas law, force must be given to each provision of a trust, and only where there is an irreconcilable conflict between two provisions must one give way to the other. Further, under Arkansas law, the intention of the settler governs in the interpretation of a trust. The Tax Court found that in considering all language in the trust agreement, the decedent's intent was to qualify for the marital deduction. First, the trust in question was named the "Marital Deduction Trust." Second, the Tax Court found that it was evident from the trust agreement that the decedent intended to minimize federal estate taxes through the use of the marital deduction. Third, the Tax Court stated that the circumstances surrounding the drafting of the trust indicated that the decedent intended to qualify for the marital deduction because he knew he was terminally ill and had hired specialized tax attorneys to draft the trust. Finally, the Tax Court noted that the trust agreement required the trustee to distribute the net income annually, which was a positive and mandatory directive precluding the exercise of discretion in the disability provision. *Estate of Whiting v. Comm.*, T.C. Memo 2004-68.

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REAL ESTATE CASES

Submitted by Mark A. Andersen
Barber Emerson LC, Lawrence

KANSAS COURT OF APPEALS

**MUTUAL SAVINGS ASSOCIATION V.
RES/COM PROPERTIES, ET AL.
DOUGLAS DISTRICT COURT - REVERSED
AND REMANDED WITH DIRECTIONS
NO. 89,924 - NOVEMBER 14, 2003**

Mechanic's Liens

FACTS: Priority dispute between mortgage lender and unsatisfied mechanic's liens filed on property known as Whispering Meadows, a new residential development in Eudora.

Before development of streets and utility infrastructure was complete, Res/Com defaulted on its payment obligations under two mortgages and various construction contracts. The mortgages were held by Mutual Savings. The construction contracts were held by The Peridian Group, LRM Industries, and Modern Engineering Utilities Company. On cross-motions for summary judgment, the trial court found that Mutual Savings' first note and mortgage had priority over the subsequent mechanic's liens of LRM and Modern.

ISSUE: Did the district court correctly decide the priority of the unsatisfied mechanic's liens?

HELD: The court stated that subcontractors' liens attach at the time the general contractor began work or construction. Contractor's liens attach when there has been a furnishing of labor, equipment, material or supplies used or consumed for the improvement of the property. The liens of all contractors and subcontractors are similarly preferred to the date of the earliest unsatisfied lien. The court stated the central issue was when and if Peridian's work, done prior to Mutual's mortgage, became lienable and attached. If Peridian's on-site surveying and staking and off-site designing and planning, done prior to Mutual's mortgage being filed, were not lienable or had not attached, LRM and Modern's liens could only relate back to when Modern began work, which was subsequent to Mutual's mortgage. The court held Peridian's preliminary staking and surveying were lienable and attached when Peridian did staking work at the site since Peridian's work was just as necessary in the development of the project as the work of the dirt contractor digging the trenches for the foundation. Court held that the date Mutual filed its first mortgage securing the note from Res/Com, Peridian was an unsatisfied lien holder. As such, all contractors' and subcontractors' liens were perfected as of the date Peridian started work. Court held LRM and Modern's liens attached when they began work and had the same priority as of the date of the first unsatisfied lien. Court stated that a lender may ensure a mortgage has priority over later

perfected liens by ensuring such lender has lien waivers from all who have provided labor or materials to the project prior to the date the mortgage is filed. Court reversed district court for further proceedings consistent with its opinion. Petition for review denied by Kansas Supreme Court on Feb. 10, 2004.

STATUTES: K.S.A. 60-1101; K.S.A. 2002 Supp. 60-1103.

**MORGAN V. CITY OF WICHITA
SEDGWICK DISTRICT COURT - AFFIRMED
NO. 89,925 - DECEMBER 12, 2003**

Zoning

FACTS: Morgan filed a lawsuit to require the city of Wichita to issue license for a drinking establishment as a legal nonconforming use on Morgan's property. District court found use of property when zoning was adopted was a lawful permitted use and granted summary judgment to city. Morgan appealed. City cross-appealed, arguing trial court lacked subject matter jurisdiction to consider action because Morgan failed to register nonconforming use prior to filing lawsuit, and failed to exhaust remedies by seeking conditional use permit from Board of Zoning Appeals. City also claims Morgan failed to join neighboring property owners as necessary parties.

ISSUES: (1) Legal Nonconforming Use and (2) Cross-Appeal.

HELD: Any alleged nonconformity in use of the property became conforming following City's adoption of Unified Zoning Code in 1996. No error in granting summary judgment where Morgan failed to create genuine issue of material fact as to whether use conformed to the zoning regulations when adopted. Under facts of case, district court properly exercised subject matter jurisdiction over plaintiff's zoning appeal. Legal question of whether Morgan has vested right under theory of nonconforming use did not require exhaustion of administrative remedies, and no authority for requiring Morgan to apply for conditional use permit. Issue of whether neighboring property owners were necessary parties is not addressed.

STATUTES: K.S.A. 12-759(d), 60-219(a), -1712.

**PRENDIVILLE V. CONTEMPORARY
HOMES, INC, ET AL.
JOHNSON DISTRICT COURT - AFFIRMED
NO. 88,395 - FEBRUARY 13, 2004**

Economic Loss Doctrine

FACTS: Contemporary Homes built a house for Prendiville. The exterior covering of the house was dryvit, an artificial stucco product, selected by Prendiville. Prendiville's basement flooded shortly after he moved into the house and Contemporary installed a sump pump in the basement pursuant to

a written, 1-year home warranty. Prendiville testified that he noticed water infiltration through the dryvit siding. Prendiville sued all parties involved for (1) breach of warranty, (2) negligent construction of the house, and (3) violations of the Kansas Consumer Protection Act. The district court granted summary judgment to the defendants on the negligence claim but denied it on the remaining two counts. The district court ruled that Prendiville's negligence claim was barred by the economic loss doctrine, since Prendiville's damages were only to the house itself. The two remaining counts were dismissed without prejudice.

ISSUE: Whether the economic loss doctrine, recognized by Kansas in *Koss Construction v. Caterpillar*, 25 Kan. App. 2d 200, applies to a claim against a contractor in residential construction defect cases?

HELD: Court found there was no compelling reason why the economic loss doctrine should not be applied to a claim against a contractor in residential construction defect cases. Whether or not a house is deemed to be a "product," the court found that the principles underlying the economic loss doctrine apply to a residential construction transaction where the rights and liabilities of the parties are governed by contract and an express warranty. This did not bar all of Prendiville's claims against the defendants, but only those claims based on tort. Court stated that if an exception to the economic loss doctrine is to be made for homeowners, it should be up to the state Legislature. Court held Prendiville is barred from bringing a tort claim against the contractor for purely economic loss consisting of damage to the house itself, and that the district court did not err in granting summary judgment against Prendiville on the negligence claim.

STATUTES: K.S.A. 2003 Supp. 60-4701 *et seq.*

**LARSON OPERATING CO., ET AL., V.
PETROLEUM, INC., ET AL.
SEDGWICK DISTRICT COURT - AFFIRMED IN
PART, REVERSED IN PART,
AND REMANDED WITH INSTRUCTIONS
NO. 89,949 - FEBRUARY 20, 2004**

Oil and Gas; Purchase Rights

FACTS: Petroleum, Inc (Petro) owned a 25 percent working interest in the Merrill 1-8 and 2-8 gas units in Finney County. The units were operated by Larson which owned no interest in either unit. The operating agreement had provisions regarding preferential rights to purchase among working interest owners. Petro offered its working interest for sale at auction and included language concerning the preferential right to purchase language in the operating agreement.

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Petro sold its working interest to American Warrior, Inc. (Warrior) through an internet auction for \$28,500. Notice of sale was given to all other working interest holders, and Petro executed an assignment of its working interest to Warrior that included various warranty language. A few months after the sale, Larson contacted Petro concerning seismic work on the property, and Petro told them it was sold. Petro realized the significance of the preferential rights provision and made demand on Warrior for return of its working interests. Warrior refused, and Larson sued Petro for violation of the agreement and sought rescission of the sale. The trial court granted partial summary judgment to Larson finding Petro's sale did not fall within the exception to the preferential rights provision. After a bench trial, the court found that based on the disclosures and the testimony from Warrior witnesses, Warrior was a bona fide purchaser and was dismissed.

The court awarded damages to Larson against Petro in the amount of \$207,422, less the purchase price of \$28,500.

ISSUES: (1) Is Larson a real party in interest with standing to pursue preferential rights claims of the other interest owners? (2) Was Warrior a bona fide purchaser entitled to dismissal from the litigation? (3) Is the preferential rights provision unenforceable as violative of the rule against perpetuities? (4) Did the trial court err in granting discovery sanctions?

HELD: Court held under the unique facts of the case that Larson was a real party in interest to enforce preferential rights of working interest owners where: (1) the preferential rights, although in the nature of property rights, were created by the operating agreement and were not unrelated to operational benefits; (2) the express language of the operating agreement, although ambiguous as to precise extent, generally supports authority in the operator for suits to enforce defaults in its provisions; and (3) the written consent forms signed by interest owners serve as "ratification of commencement of the action" so as to satisfy K.S.A. 60-217(a). (2) Court concluded that the disclosure form constituted actual notice of the preferential rights and merely quoted without opinion one of the exceptions contained in the agreement's operative language; moreover, if Petro intended the form to reflect applicability of the exception, the court presumed that if could have simply marked "no" to the inquiry regarding whether the interests were subject to preferential rights. Consequently, Warrior cannot deny that it purchased the interests with a possible cloud on the title. Court held the trial court erred in finding Warrior was a bona fide purchaser of the working interests and dismissing it from litigation. (3) K.S.A. 59-3401 *et seq.* does not violate Kan. Const.

art. 2, sec. 16, because the subject matter of the bill of enactment did not embrace "dissimilar and discordant subjects" but rather embraced a singular purpose; amendment and enactment of certain uniform acts in an attempt to adopt or to harmonize such acts with Kansas legislative intent. Joinder of enactment and amendments of uniform laws in a singular enactment did not offend the constitution, since there was no obvious intent to tie a matter of legislative merit to an unworthy matter. (4) Court found the trial court's sanction award met the necessary requirements and was reasonably necessary for the administration of orderly procedure in the discovery process and obedience to discovery rules. Court affirmed in part and reversed for the court's determination whether there is any impediment to specific performance of the preferential rights covenant.

STATUTES: K.S.A. 55-501 -157; K.S.A. 2003 Supp. 55-165; K.S.A. 59-3401 *et seq.*; K.S.A. 60-217(a); K.S.A. 79-332a, -4216, -4220.

**CREME DE LA CREME, INC. V.
R&R INTERNATIONAL, INC.
JOHNSON DISTRICT COURT - AFFIRMED
NO. 89,286 - FEBRUARY 27, 2004**

Mechanic's Liens

FACTS: R&R contracted to construct a daycare facility. This appeal involves a mechanic's lien filed by Alpine, a subcontractor, who submitted its final bill Sept. 20, 1999, stating all work had been completed. District court found the mechanic's lien filed by Alpine on Dec. 23, 1999, was untimely, and that any work performed by Alpine on Sept. 23-24, 1999, was a courtesy and did not extend the 3-month statutory period for filing lien.

ISSUE: Filing Mechanic's Lien.

HELD: Record on appeal does not include agreement between contractor and subcontractor for specific work to be performed. No error in trial court finding mechanic's lien was not timely where work performed Sept. 23-24, 1999, was not part of the original contract or reflected in any change order, was performed in response to informal request from R&R, and evidence about this work was inconsistent.

STATUTES: K.S.A. 2003 Supp. 60-1103(a)(1); K.S.A. 60-1101.

**L.P.P. MORTGAGE, LTD V.
NATHAN HAYSE, ET AL.
KIOWA DISTRICT COURT - AFFIRMED IN
PART, DISMISSED IN PART, AND
REMANDED WITH INSTRUCTIONS
NO. 90,937 - MARCH 12, 2004**

Foreclosure; Appellate Jurisdiction

FACTS: The defendants borrowed money from the Small Business Administration (SBA) in 1978 and the mortgage encumbered the three parcels of land that are the subject of later foreclosure proceedings. After bankruptcy proceedings were filed

by the defendants, the SBA assigned the note to LPP when they purchased the loan in August 2000. LPP filed a foreclosure action in May 2002, when the defendants failed to make proper payments under the bankruptcy agreements. LPP was granted a default judgment, but LPP set aside the judgment after they discovered they failed to sue a necessary party. LPP amended its petition to include the necessary party. The court ruled that the bankruptcy proceedings created a new contract between the parties in 1997 and, as such, incorporated all the terms originally contained in the note and mortgage, including the provision for the collection of attorney fees. The court awarded judgment to LPP for \$159,415.16 and on March 10, 2003, the mortgage on the three tracts of land was ordered foreclosed with a three-month redemption period. On March 20, 2003, the defendants filed a motion to alter or amend the court ruling. The district court denied the motion and directed a sheriff's sale to proceed on May 2, 2003. Central Bank purchased all three tracts at the sheriff's sale on May 2, 2003. The district court confirmed the sale on May 21, 2003, but entered a nunc pro tunc order on June 3, 2003, that the sale had been conducted in conformity with the law, equity and the court's prior orders. The district court ordered LPP to pay any casualty insurance proceeds into court and directed LPP's attorney to provide the defendants attorney an itemized account of all fees and expenses they had included in the judgment. The defendants filed a notice of appeal on June 30, 2003, from "all adverse rulings" of the district court.

ISSUE: What rulings does the court have jurisdiction to consider on appeal?

HELD: The court held there was no appeal from the order of foreclosure filed on March 10, 2003. The defendants properly filed a motion to alter or amend the judgment, and it tolled the time for appeal. The district court denied the motion on March 25, 2003. No one appealed from the order denying the motion to alter or amend the foreclosure judgment. The defendants appealed after the district court entered its order of confirmation of the sheriff's sale. Court held that an order confirming a sheriff's sale is not a repetition of the judgment of foreclosure. The two orders are contiguous but not identical. A judgment of foreclosure and sale is a final decree.

The proceedings subsequent thereto relating to the sale are analogous to the execution of a judgment and simply enforce the parties' rights which have been adjudicated. A party who wishes to contest the judgment of foreclosure must appeal from that judgment. The judgment of foreclosure cannot be challenged on appeal from an order confirming a sale. The court held the defendants failed to timely appeal the rulings made by the

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district court in its judgment of foreclosure. Those rulings cannot be attacked in an appeal from the order confirming the sheriff's sale. The court held there were no transcripts provided concerning the fees and expenses and the court remanded for an evidentiary proceeding to determine the appropriate amount of attorney fees and expenses that should be awarded. The court also held the record did not contain any substantiation of the defendants' claims for reimbursement for completed storm repairs and their entitlement to casualty insurance proceeds. The court dismissed the portion of the appeal dealing with casualty insurance since no final order had been issued by the district court.

STATUTES: K.S.A. 60-259(f); K.S.A. 2003 Supp. 60-2103(a).

***IPC RETAIL PROPERTIES, L.L.C. V.
ORIENTAL GARDENS, INC., ET AL.
SEDGWICK DISTRICT COURT - REVERSED
NO. 90,509 - MARCH 12, 2004***

Landlord/Tenant; Accelerated Rent Clause

FACTS: In 2000, IPC, as landlord, and J&T Inc., as tenant, entered a 5-year commercial lease agreement for space to operate a Chinese restaurant in Wichita. Chung Wang and Tony Ho were principals in J&T and personally executed a guaranty for the performance of all obligations under the lease. J&T later changed its name to Oriental Gardens, Inc. In November 2002, after Oriental Gardens was in default for nonpayment of rent, IPC gave notice that it would terminate the lease if payment was not received in 10 days. Oriental Gardens failed to cure the default, and IPC sued to enforce its rights under the lease and personal guaranty. The trial court found that the personal guaranty executed by the parties was effective and that the acceleration provision was enforceable for past and future rents. The court entered judgment in favor of IPC and against Ho, Wang and Oriental Gardens for \$388,006.21, which consisted of overdue rent payments as well as acceleration of future rent payments.

ISSUES: Did the district court err in finding the personal guaranty was effective and IPC was entitled to past and future rents under the acceleration of rents clause?

HELD: As guarantor on the lease, Ho was liable for the judgment amount. On appeal, Ho argues that his personal guaranty never became effective because his spouse did not sign the guaranty. The court found that the clear language of the lease did not require Ho's spouse to sign the guaranty. As a result, the personal guaranty was effective. Next, Ho argued that termination of the lease and acceleration of rent are mutually exclusive remedies under the language of the lease. The court disagreed, and found that the clear language of the lease allowed accelerated rent to be a remedy additional to termination of the lease. Ho next argued that the accelerated rent provision was in the nature of an unen-

forceable penalty. The court agreed with this argument, and found that the acceleration provision was unenforceable because it was in the nature of a penalty. The court stated that because the accelerated rent provision applied to every breach of the lease, major or minor, it was not a reasonable estimate of damages and not a valid liquidated damages clause. To recover under a liquidated damages clause, the amount of liquidated damages must bear some reasonable relationship to the actual injury caused by the breach. If such amount bears no such relationship, it is a penalty and void. The court found IPC, nevertheless, had a right to collect the remaining rent due under the lease as damages and remanded to the district court for further consideration on the issue of damages.

STATUTES: No statutes cited.

***DOWLING REALTY ET AL. V.
CITY OF SHAWNEE
AND MIDWEST HOLDINGS, LLC
JOHNSON DISTRICT COURT - AFFIRMED IN
PART, DISMISSED IN PART,
REVERSED IN PART, AND REMANDED WITH
DIRECTIONS***

NO. 90,078 - MARCH 12, 2004

Site Plan Regulations and Procedure

FACTS: Dr. Dowling, a dentist, was interested in four lots located across the street from his office near 75th and Quivera, in Shawnee, Kansas. Lot one had an abandoned convenience store on it, and lots two, three and four were vacant. He purchased lots two, three and four, and built a professional plaza on one of the lots. He shared the building with a chiropractor, a doctor, and an insurance broker.

The other two lots remained undeveloped. Dowling found out that a large development was proposed for the remaining lot (lot one) that he did not own. Kevin Tubbesing was the owner of lot one and at some point Midwest Holdings became the owner. Tubbesing was 55 percent owner of Midwest. Tubbesing had also been a member of the Shawnee Planning Commission since 2000.

Midwest's site plan was quickly approved by the commission and set on the consent agenda for the next commission meeting. At the meeting, Dowling objected to the consent agenda and asked that Midwest's site plan be removed from the consent calendar because the proposed building would likely block the view of his building from 75th street. The commission removed Midwest's plan from the consent agenda, but due to the length of the discussion of other commission matters, Midwest's plan was not discussed until after midnight. Dowling presented his objections to Midwest's site plan, and then Tubbesing stepped down from the commission bench and argued in favor of Midwest's plan. Tubbesing did not leave the room for the vote, but he abstained from voting on Midwest's plan. Tubbesing never filed a disclosure of interest.

Midwest's proposal was approved 7-2, placed on

the city council's agenda, and discussion was had concerning Tubbesing's conflicting interests. Tubbesing spoke on behalf of Midwest's proposal. The council's motion to send Midwest's proposal back to the commission failed on a 4-4 vote because the mayor, who had recommended Tubbesing for his commission position, did not vote. The council's vote to deny Midwest's proposal failed on a 3-5 vote. Dowling sued the city and Midwest for failure to comply with site plan regulations, failure to follow lawful procedure, and lack of reasonableness. The trial court held a bench trial and concluded that Tubbesing's actions did not violate K.S.A. 75-4305 or the commission's bylaws and that Dowling failed to prove the city's action was unreasonable.

ISSUES: (1) Did the trial court err in concluding that Tubbesing did not violate K.S.A. 75-4305?

(2) Did the trial court err in concluding that Tubbesing did not violate the commission's bylaws?

(3) Were Dowling's due process rights violated?

(4) Was the city's approval of Midwest's proposal unreasonable?

HELD: (1) The court held a local government officer or employee who advocates approval of his or her project to the governmental body of which he or she is a member without identifying himself or herself as having a substantial interest in the project violated K.S.A. 75-4305. The court found that Tubbesing did not abstain "from any action in regard to the matter" as required by K.S.A. 75-4305(b). The trial court erred when it found that Tubbesing's actions did not violate K.S.A. 4305. The court remanded the case to the trial court with directions to send it back to the commission to redo the entire process since it was tainted from the very beginning.

The court also stated that all future proceedings must be conducted without Tubbesing as long as he remains on the commission. (2) The court held that where a bylaw requires a government officer or employee to state the nature of his or her conflict for the record and does not do so, he or she violates the bylaws. Tubbesing never clearly stated the nature of his conflict; he violated the bylaws, and the trial court erred in holding otherwise. (3) Court dismissed Dowling's due process issues as not being raised in the trial court. (4) The court found there was no evidence that Midwest's proposal violated zoning restrictions or commission guidelines. The court affirmed the trial court's conclusion that the decision of the commission was reasonable given all the circumstances of the case and that it did not violate zoning restrictions or commission guidelines.

CONCURRENCE/DISSENT: J. Malone concurred in the majority's decision concerning Tubbesing's failure to file a written report of his conflict of interest. However, J. Malone disagreed that Tubbesing violated the commission's bylaws since he did not vote on the proposal, and disagreed that

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Tubbesing's transgression so "tainted" the ultimate decision of the city council that the parties must redo the entire process.

STATUTES: K.S.A. 12-747(a); K.S.A. 75-4301a, -4305.

OFFICE OF THE
KANSAS ATTORNEY GENERAL

OPINION 2003-27

**Personal and Real Property —
Land and Recreational Areas**

*Limiting Liability of Property Owners to Persons
Entering Premises for Recreational Purposes;
Whether Immunity Conferred;
Effect of Fee for Use*

SYNOPSIS: Under the Land and Recreational Area Act, an owner of agricultural land may operate under statutory protection from liability for ordinary negligence whether or not a fee is charged for recreational use of the land, but an owner of nonagricultural land operates under this statutory protection only if a fee is not charged. "Recreational purpose" includes, but is not limited to, hunting, fishing, swimming, boating, camping,

picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

STATUTES: K.S.A. 58-3201; 58-3202; K.S.A. 2002 Supp. 58-3203; 58-3204; K.S.A. 58-3206; 2003 S.B. No. 134.

OPINION 2003-30

**Personal and Real Property — Land
Surveys — Review by County Surveyor;**

Scope of Review

SYNOPSIS: K.S.A. 2002 Supp. 58-2005, which requires county surveyors to certify plats prior to recording, mandates compliance only with the requirements of K.S.A. 58-2001 *et seq.*

STATUTES: K.S.A. 58-2001; K.S.A. 2002 Supp. 58-2003; K.S.A. 58-2004; K.S.A. 2002 Supp. 58-2005; K.S.A. 74-7037.

MULTI-STATE ISSUES

Unauthorized Practice of Law. Kansas real estate attorneys who occasionally participate in multi-state or out-of-state real estate transactions must familiarize themselves with the laws of other states governing the unauthorized practice of law.

ESTATE TAX NOTES continued ...

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**4. LIFE INSURANCE PROCEEDS NOT INCLUDED IN
TRUSTEE-SPOUSE'S GROSS ESTATE**

The taxpayer created and funded an irrevocable trust. The taxpayer's spouse and a corporate trustee are named as co-trustees of the trust, and they have absolute discretion, both during the taxpayer's lifetime and following his death, to distribute income and corpus to the taxpayer's children and their descendants for such person's care, health, education, maintenance, support, purchase or improvement of a home, to establish a professional practice, or acquire an interest in a business. However, no income or principal may be distributed for support or maintenance of a beneficiary if the taxpayer or his spouse is legally obligated to support such beneficiary. Under the terms of the trust, the corporate trustee may be replaced by the vote of three designated advisors.

The trust purchased a joint and survivor life insurance policy on the lives of the taxpayer and his spouse. The trust will have adequate income each year to fully pay the annual premium. The taxpayer's spouse, as trustee, renounced her right to change the beneficiary of the policy, revoke any change of beneficiary, assign the policy, revoke any assignment of the policy, any right to make contributions to the trust, or to appoint a successor advisor. The taxpayer's spouse has consented to treat the gift as made one-half by her. Sufficient generation-skipping transfer tax exemption was allocated to the trust, resulting in a zero inclusion ratio for the trust.

The IRS ruled that neither the taxpayer nor his spouse have a beneficial interest in the trust. The trust purchased the life insurance policy using funds held in the trust, and neither the taxpayer nor his spouse will make additional transfers to the trust for purposes of paying the premiums on the policy. Therefore, the purchase of the life insurance policy by the trust will not be treated as a gift by the taxpayer or his spouse. Further, no part of the trust will be includable in the estates of either the taxpayer or his spouse under Code Section 2042(2) because neither possesses incidents of ownership, despite the fact that the taxpayer's spouse is a trustee. The trust purchased and owns the policy, is the designated beneficiary of the policy proceeds, and will make all future premium payments from the trust assets. Finally, with respect to the generation-skipping transfer tax, the IRS concluded that because the trust will pay all costs of the policy, the purchase of the policy by the trust will not affect the identity of the transferors to the trust and will not affect the trust's inclusion ratio. P.L.R. 200404013.

Even a routine real estate closing in another state could have unintended consequences for the attorney. For example, the Georgia Supreme Court recently opined that the mere preparation and execution of a deed of conveyance on behalf of another, and the facilitation of its execution by anyone except an attorney duly licensed in the State of Georgia constitutes the unauthorized practice of law. In re UPL Advisory Opinion 2003-2, 2003 WL 22533156 (Ga., Nov. 10, 2003). The Georgia Supreme Court was not persuaded that requiring a Georgia lawyer for real estate closings and the execution of deeds of conveyance of real property needlessly harms the public interest by increasing costs and limiting consumer choices. The Court stated that the public interest is best protected when a licensed Georgia attorney, trained to recognize the rights at issue during a property conveyance, oversees the entire transaction. The Court opined that the public has little or no recourse if a non-lawyer fails to close the transaction properly, and concluded that true protection of the public interest in Georgia requires that an attorney licensed in Georgia participate in the real estate transaction.

**5. WORKING OWNERS OF BUSINESSES CAN QUALIFY
AS ERISA PLAN PARTICIPANTS**

The taxpayer was the sole shareholder of his own professional corporation and was one of four participants in the company's Code Section 401 qualified retirement plan. Three weeks before an involuntary bankruptcy petition was filed against the taxpayer, he repaid a loan he had taken from the plan. The bankruptcy court determined that the loan repayment was a preferential transfer and that the exclusion from the bankruptcy estate for ERISA plans did not apply because the taxpayer was not a plan participant for ERISA purposes. Therefore, he could not use the anti-alienation provision of the plan.

The district court affirmed, as did the 6th Circuit, holding that neither a sole proprietor, nor a sole owner of a corporation, qualifies as a "participant" in an ERISA employee benefit plan. The Supreme Court reversed, stating that numerous ERISA provisions, considered together, showed that working owners can be plan participants for ERISA purposes. The Supreme Court held that a working owner of a business may participate in a business-sponsored ERISA plan on equal terms with other plan participants if the plan covers one or more employees other than the owner and the owner's spouse. Raymond Yates, M.D., *P.C. Profit Sharing Plan v. Hendon*, 124 S.Ct. 1330 (2004).

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6. TAXPAYERS ENTITLED TO GIFT TAX CHARITABLE DEDUCTIONS FOR PRESENT VALUE OF ANNUITIES PAYABLE TO CHARITY FROM CHARITABLE LEAD ANNUITY TRUSTS

The taxpayer established four twenty-one (21) year charitable lead annuity trusts (CLATs), one for each of his four children. The trustee of the CLATs is not related to the taxpayer by blood or by marriage. The annuity amount from each CLAT is to be paid to the taxpayer's family foundation, or if it does not qualify, then to some other qualified charity selected by the trustee. The taxpayer's children have the power to appoint 10 percent of the annuity amount to a qualified charity of the child's choice, upon attaining the age of 21 years. No part of the annuity amount may be paid to a charity of which the taxpayer is a director. The taxpayer irrevocably agreed not to become a director of the family foundation or of any other charity that has at any time received a distribution of any part of the annuity amount.

The IRS ruled that the annuities payable under the CLATs satisfied the requirements of Regulation Section 25.2522(c)-3(c)(2)(vi) and Code Section 2522(c)(2)(B); therefore, the taxpayer was entitled to a gift tax deduction under Code Section 2522(a) based on the present value of the guaranteed annuity of each CLAT payable to charity as determined under Regulation Section 25.2512-5. In addition, the CLATs will be allowed income tax charitable deductions under Code Section 642(c)(1) for income paid to charity each year. The IRS further concluded that no portion of the assets of the CLATs will be included in the taxpayer's gross estate under Code Sections 2036, 2037, 2038, 2041, or 2042, and that no portion of the assets transferred to the CLATs will be includable under Code Section 2035. P.L.R. 200404009.

7. PROPOSED TRANSFERS TO IRREVOCABLE MARITAL TRUST WILL QUALIFY FOR QTIP ELECTION

The taxpayer and his spouse are both U.S. citizens. The taxpayer proposes to transfer property to an irrevocable marital trust. While the taxpayer and his spouse are both living, the trustee (the taxpayer) is directed to pay all of the net income to the spouse at least quarter-annually for her lifetime and may pay to the spouse all or any part of the principal of the trust for any reason. If the spouse survives the taxpayer, the trustee is to pay the entire property to the spouse. However, if the taxpayer survives his spouse, the trustee is to pay the net income to the taxpayer at least quarter-annually for his lifetime. Upon the taxpayer's death, the remaining principal is to be distributed as the taxpayer appoints by will to his issue or charitable organizations. Any assets not appointed will be distributed to the taxpayer's living children and the living issue of a predeceased child.

The trust agreement provides that the spouse, in the case of property being held for her benefit, and the taxpayer, in the case of property being held for his benefit, may require the trustee to make nonproductive assets productive.

The IRS concluded that the spouse will have a qualifying income interest for life in the property, so the taxpayer may make a gift tax QTIP election under Code Section 2523(f). In that event, on the death of the taxpayer's spouse, the trust assets will be includable in the spouse's gross estate under Code Section 2044(a). If the taxpayer predeceases the spouse, no assets will be includable in the taxpayer's estate. If the spouse predeceases the taxpayer, the taxpayer will have a qualifying income interest for life in the trust property, and the spouse's estate may make an estate tax QTIP election under Code Section 2056(b)(7). If such an election is made, the assets will be includable in the taxpayer's estate under Code Section 2044(a) at his death. P.L.R. 200406004.

8. DUTY OF CONSISTENCY BINDS DECEDENT'S ESTATE TO REPRESENTATIONS MADE BY HER HUSBAND'S ESTATE

The decedent's husband died testate, and under the terms of his will, various property was bequeathed to the decedent. Section IV of the husband's will bequeathed to the decedent a life estate in all oil paintings for which no marital deduction was claimed. Section V of the husband's will bequeathed to the decedent other personalty. With respect to the other personalty, the decedent had the power to use, consume, sell, or otherwise dispose of all or any part of the property during her lifetime. A marital deduction was claimed for all assets distributed under Section V. On the decedent's death, the property was to pass to the husband's children. Among the personal property included in the husband's estate was a painting labeled on the appraisal as a "pastel." Because the painting was identified as a pastel, the executors of the husband's estate determined that it passed under Section V of the will, rather than Section IV. Thus, a marital deduction was claimed for the value of the painting under Code Section 2056(b)(5). Upon the decedent's subsequent death, the decedent's executors determined that the painting was, in fact, an oil painting and should have passed to the decedent under Section IV of the husband's will. Consequently, they contend that the painting is not includable in the decedent's gross estate. The decedent's estate, however, acknowledges that the marital deduction claimed for the painting in the husband's estate was erroneous.

The IRS National Office advised that the painting was includable in the decedent's gross estate under the doctrine of the duty of consistency, or quasi-estoppel. In order for the doctrine to apply, there must be a representation by the taxpayer,

reliance on the representation by the IRS, and an attempt by the taxpayer, after expiration of the statute of limitation on assessment, to change the representation. Where two people are deemed to be in privity, the doctrine can be applied to bind one person to a representation made by another. The IRS found that the three requirements for application of the doctrine were met and found sufficient privity between the decedent's estate and the husband's estate such that the decedent's estate would be bound by the representations made by the husband's estate. Therefore, the painting was includable in the decedent's estate. T.A.M. 200407018.

9. IRS NULLIFIED UNNECESSARY QTIP ELECTION

Upon his death, the decedent created a credit shelter trust for his surviving spouse and children and left the residue of his estate outright to his spouse. As executor, the spouse made a QTIP election for the property passing outright to her. The IRS ruled that the QTIP election was ineffective for purposes of Code Sections 2044(a), 2519(a), and 2652 because the spouse received the entire interest in the property, not just a qualifying income interest, and that the property passing outright qualified for the marital deduction under Code Section 2056(a). P.L.R. 200403093.

10. OFFICER AND SOLE SHAREHOLDER OF SUBCHAPTER S CORPORATION PROPERLY CLASSIFIED AS EMPLOYEE

The taxpayer was an officer and sole shareholder of Nu-Look Design, Inc., which operated a home improvement business as a subchapter S company. The taxpayer also managed the business, solicited business, performed necessary bookkeeping, handled finances, and hired and supervised workers. Rather than pay the taxpayer a salary or wages, the company distributed its net income to him as his needs arose. The taxpayer then reported those amounts as non-passive income on Schedule E of his income tax returns. The IRS sent a notice to the company advising that it had classified the taxpayer as an employee for purposes of federal employment taxes. The Tax Court found that the taxpayer performed more than minor services for the company and that he had received remuneration for those services. As a result, the Tax Court held that the taxpayer was an employee. The 3rd Circuit affirmed the Tax Court, holding that the Tax Court properly focused on the nature of the services the taxpayer rendered, in accordance with Regulation Sections 31.3121(d)-1(b) and 31.3306(i)-1(e). The record established that the taxpayer single handedly managed the company's entire operation, which services were substantial. Therefore, he was an employee, and the company was liable

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for employment taxes attributable to the remuneration paid him. *Nu-Look Design, Inc. v. Comm.*, T.C. Memo 2003-52.

11. RECAPITALIZATIONS TO CREATE VOTING AND NONVOTING STOCK DOES NOT CREATE TWO CLASSES OF STOCK FOR PURPOSES OF S ELECTION

As part of a corporate recapitalization transaction under Code Section 368(a)(1)(E), shareholders of two subchapter S corporations will give up their voting common stock in exchange for 20 nonvoting common shares and one voting common share of a new company. The voting and nonvoting shares received by the shareholders have similar rights as those voting shares given up. The only distinction between the two types of shares received in the recapitalization will be as to voting rights. All shares of stock will have identical rights to distribution and liquidation proceeds. The IRS ruled that the transaction did not create different classes of stock within the meaning of Code Section 1361(b)(1)(D) that would serve to terminate the S election. In addition, the IRS concluded that the transaction did not create senior stock under Code Section 2701 and did not constitute a substantial modification of the shareholder agreement for purposes of Code Section 2703. P.L.R. 200407006.

12. FULL VALUE OF FLPs INCLUDABLE IN DECEDENT'S ESTATE WHERE DECEDENT RETAINED RIGHT TO INCOME FOR SUPPORT

The decedent, during her lifetime, created three family limited partnerships (FLPs) and gifted interests in the FLPs to each of her three children. The children were to receive the income from the FLPs only after deducting from the gross income the partnership expenses and a reserve of monies needed for the decedent's support, as determined by the decedent's guardian ad litem. Upon the decedent's subsequent death, an appraiser gave discounts of 30-40 percent for the FLP interests includable in the decedent's estate. The Tax Court held that the full value of the FLPs was includable in the decedent's gross estate under Code Section 2036 because the documentary evidence and testimony at trial showed that the decedent continued to enjoy the right to support and maintenance from all the income that the FLPs generated. *Estate of Abraham, et al. v. Comm.*, T.C. Memo 2004-39.

13. HEIR'S DISCLAIMER OF LLC INTEREST PASSING TO HER UNDER INTESTACY LAWS QUALIFIED DESPITE ACTIONS TAKEN AS FIDUCIARY

The decedent was survived by her mother, siblings, and issue of a predeceased sibling. Under state intestacy laws, the decedent's property

would pass to her mother. Included in the decedent's property is an interest in a limited liability company (LLC), of which the decedent's mother is a co-manager. The decedent's mother plans to disclaim the LLC interest that would pass to her, and she owns no interest in the LLC other than the interest she would acquire by reason of the decedent's death. Following the decedent's death, the other LLC members, not including the decedent's mother, decided to execute an amendment to the LLC agreement. The decedent's mother, as a manager of the LLC and as a representative of the decedent's estate, had to consent to the amendment for it to be effective. The IRS ruled that the decedent's mother's disclaimer would be qualified under Code Section 2518, assuming that the other rules are satisfied, and that the property would be treated as passing directly from the decedent according to state intestacy laws. The mother's execution of the amendment to the LLC agreement in her capacity as personal representative of the decedent's estate would not be considered the acceptance of any benefits of the disclaimed interest, in accordance with Regulation Section 25.2518-2(d)(2). P.L.R. 200406038.

14. CREATION OF TRUST PURSUANT TO PROPERTY SETTLEMENT A TRANSFER FOR FULL AND ADEQUATE CONSIDERATION

Pursuant to the dissolution of their marriage, the settlor and his wife entered into a judgment to settle and determine all existing personal and property rights of the parties with respect to each other. The settlor was required to pay a certain sum of money to the wife each month in the form of spousal support. Upon the occurrence of a triggering event, including the sale of the settlor's company, the settlor was required to either purchase an annuity contract or establish a trust for the benefit of the wife. The settlor's company was subsequently sold, and a modification to the spousal support amount was entered. The settlor proposes to establish an irrevocable trust to make the spousal support payments to the wife for her lifetime. The remainder of the trust will go to the settlor's children upon the death of the wife. The IRS held that the transfer of property to the trust for the wife's benefit is a transfer incident to the divorce within the meaning of Code Section 1041(a)(2) and Regulation Section 1.1041-1T, Q&A-7. Because the transfer is pursuant to a divorce or separation instrument and occurs not more than six (6) years after the date on which the marriage ceased, no gain or loss is recognized on the transfer. The IRS additionally held that the transfer to the trust is in full satisfaction of the settlor's support obligation to the wife. Accordingly, the transfer to the trust will constitute a transfer for full and adequate consideration under Code Section 2516 to the extent of the annuity interest

of the wife. The only taxable gift by the settlor will be the gift of the remainder to the settlor's children under Code Section 2511. Additionally, no portion of the trust will be included in either the settlor's estate or in the wife's estate. P.L.R. 200408015.

15. MARITAL DEDUCTION REDUCED TO PAY ESTATE TAXES ON PROPERTY OMITTED FROM DECEDENT'S GROSS ESTATE

During his lifetime, the decedent created a revocable trust, which, upon the decedent's death, distributed property to a marital trust for which a marital deduction was claimed. The trust directs the trustee, in the event that the assets in the residue of the decedent's probate estate are insufficient to pay estate taxes and legal costs, to pay such estate taxes and legal costs from the assets of the trust. The decedent fully used his unified credit during his lifetime, so the nonmarital residuary trust was not formed under his revocable trust. In addition, during the decedent's lifetime, he exercised certain powers of appointment granted him by certain trusts created by his mother. The value of the assets over which the powers of appointment were exercised was not included in the gross estate on decedent's federal estate tax return.

In its notice of deficiency, the IRS concluded that the value of the assets over which the decedent exercised powers of appointment were includable in his gross estate and noted that the marital deduction would be reduced in order to pay the additional estate taxes attributable to such assets. The decedent's estate contended that under Illinois law, only the decedent's will may be used to ascertain intent regarding which property is to be used to pay estate taxes. The Tax Court disagreed, stating that because the decedent executed the will and revocable trust agreement within three days of each other, they were a part of the same estate plan, and the decedent intended the documents be read together to ascertain his intent regarding the source of payment for federal estate taxes. The Tax Court additionally held that the Illinois equitable apportionment rules did not apply because the decedent's trust instrument clearly stated his intent. Thus, the marital deduction gift was reduced to pay the estate taxes on the property omitted from the decedent's gross estate on the federal estate tax return. *Estate of Lurie v. Comm.*, T.C. Memo 2004-19.

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16. EXTENSION OF TIME TO ALLOCATE GENERATION-SKIPPING TRANSFER TAX EXEMPTION GRANTED

The decedent created and funded a trust for the benefit of her issue. Four months later, the decedent's husband died. On two separate dates later in the same year, the decedent transferred additional property to the trust. When the decedent's accountant prepared the gift tax return for the year, the accountant erroneously elected to split the gifts between the decedent and her deceased husband. In addition, the accountant failed to allocate the decedent's generation-skipping transfer tax exemption to the trust transfers. Several years later, the decedent made additional generation-skipping transfers, and in the following year, she died. When a new attorney filed an amended gift tax return for the previous year, he corrected the gift-splitting election made several years earlier by reporting the entire value of the two transfers made subsequent to the decedent's husband's death as the decedent's adjusted taxable gifts. The entire value of these assets exceeds the decedent's available generation-skipping transfer tax exemption after taking into consideration the decedent's lifetime gifts to skip persons.

The IRS granted the decedent's estate's request for relief under Code Section 2642(g) and Regulation Section 301.9100-3 to allocate the decedent's available generation-skipping transfer tax exemption to the two transfers the decedent made to the trust following her husband's death. The IRS also ruled that the decedent would be treated as the transferor despite the erroneous election to split gifts, and that a division of the trust into two trusts, one with a zero inclusion ratio and the other with an inclusion ratio of one, would be a qualified severance. P.L.R. 200408014.

17. WEALTHIER HUSBAND ABLE TO RETAIN CONTROL OVER ASSETS AND STILL USE WIFE'S EXEMPTIONS

A husband proposed to create a trust under which he retained the right to amend or revoke the trust and to withdraw income or principal. If his wife was living at his death, the trust would provide the wife a testamentary general power of appointment to appoint part of the assets of the husband's trust estate, having a value equal to the amount of the wife's remaining applicable exclusion amount less the value of the wife's taxable estate determined by excluding the amount of assets subject to the power. The IRS held that if the wife predeceases the husband and exercises the power of appointment, the husband will be deemed to have made a completed gift to the wife that will qualify for the federal gift tax marital deduction. In addition, if the wife predeceases her husband, the value of trust assets over which

the wife holds a power of appointment will be included in her gross estate. P.L.R. 200403094.

18. OTHERWISE SIMPLE TRUST ALLOWED DEDUCTIONS FOR CHARITABLE CONTRIBUTIONS MADE BY PARTNERSHIP

The governing instrument of a trust provides that all income is to be distributed annually to one individual, and upon that individual's death, the remaining assets will be distributed to another individual. The trustee is not authorized to make charitable contributions. The trust owns an interest in a partnership that makes a charitable contribution. Under Code Section 651(a), a simple trust provides that all income is to be distributed currently and does not provide that amounts are to be paid, permanently set aside, or used for charitable purposes. Under Regulation Section 1.651(a)-4, a trust is not considered to be a trust that may pay, permanently set aside, or use any amount for charitable purposes for any taxable year in which the trust is not allowed a charitable deduction under Code Section 642(c). For a trust to claim a charitable deduction under Code Section 642(c), the governing instrument of the trust must give the trustee the authority to make charitable contributions. However, the IRS ruled that under the above circumstances, that in taking into account its distributive share of the partnership's income, gain, loss, deductions, and credits, the trust's deduction for its distributive share of a charitable contribution made by a partnership will not be disallowed under Code Section 642(c) merely because the trust's governing instrument does not authorize the trustee to make charitable contributions. Accordingly, the trust will be treated as a complex trust for the taxable year because it is allowed a charitable deduction for that year. Rev. Rul. 2004-5, 2004-3 IRB 295.

19. COURT INTERPRETS VARIOUS PROVISIONS UNDER DECEDENT'S WILL

During her lifetime, the decedent executed a durable power of attorney that jointly named her daughter and son as attorneys-in-fact. Upon the power of attorney taking effect, the son formally declined the appointment, leaving the daughter to act alone. The decedent owned stock of a subchapter S corporation (the "Corporation"), and subsequent to becoming her mother's attorney-in-fact, the daughter, acting as her mother's agent, purchased some of the Corporation's debt from a bank, making the decedent a creditor of the Corporation. The debt was personally guaranteed by the decedent's son, as a shareholder of the Corporation. The decedent died the following year. Under the terms of her will, the decedent forgave any debt owed to her by any child of hers, bequeathed any stock she owned in the Corporation to her son, created a family trust for

her grandchildren and their issue, and created a charitable trust. Prior to the decedent's death, her son and his wife owned the remaining Corporation stock not owned by the decedent. Thus, following the decedent's death, the son and his wife owned all of the Corporation stock. When the estate filed its return, the forgiveness of the Corporation debt was treated as a devise to the son under the will. Therefore, although the debt was treated as an asset on the return, it was not included in computing the value of the residuary estate subject to the generation-skipping transfer tax. Additionally, the return assigned all of the tax burden to the family trust instead of to the charitable trust created under the will, effectively decreasing the value of the residuary estate subject to the generation-skipping transfer tax.

The IRS audited the estate and concluded that the Corporation debt was not forgiven under the decedent's will, or alternatively, that the daughter had exceeded her authority under the power of attorney when she purchased the debt on behalf of the decedent. The IRS also concluded that the property qualifying for the charitable deduction must be reduced by its pro rata share of the gross estate taxes. The Alabama District Court disagreed, holding that the daughter did not exceed her authority under the power of attorney because although the power of attorney named the daughter and son jointly, the son expressly refused to serve. Consequently, the probate court found that the decedent had intended to confer joint and several authority, so the daughter was authorized to act alone. In validating the daughter's action, the Court further held that the purchase of the debt did not constitute a specific devise because the daughter did not know of the contents of the decedent's will and was unaware that her mother would die four months later. Thus, the purchase of the debt was not a testamentary disposition. Finding the purchase of the debt valid, the Court held that the will served to forgive the debt in favor of the decedent's son. He had personally guaranteed the debt, and he and his wife wholly owned the Corporation following the decedent's death. The debt, therefore, was consistent with the concept of a debt owed by a child of the decedent, which was forgiven by the will. Finally, the Court held that the apportionment of estate taxes is determined by the decedent's will, and in the present situation, the decedent's will clearly stated that all estate taxes were to be paid by the family trust. *Estate of McDonald v. U.S.*, 93 AFTR 2d 2004-592.

20. ACCRUAL OF LIFE INSURANCE PROCEEDS ON CORPORATION'S KEY PERSON REQUIRED AS OF DATE OF KEY PERSON'S DEATH

The minority shareholders of a corporation, acting through a limited liability company they own, acquired a life insurance policy on the corporation's key person. The shareholders intend to transfer ownership of the policy to the corporation and liquidate the limited liability company. Upon the death of the key person, the corporation plans to immediately redeem the corporation stock held by the key person at his death by means of the issuance of a promissory note to his estate. After the redemption, the remaining shareholders intend to elect to terminate the corporation's taxable year, seeking to have all the insurance proceeds allocated to their stock. As such, they sought a ruling that the insurance proceeds would not be recognized or affect their basis in the stock until the insurance company acknowledged the validity of the corporation's claim under the insurance policy. The IRS held, however, that under the all events test of Regulation Section 1.451-1(a), accrual of income is required if the right to receive income is subject to one or more conditions precedent or contingencies. The IRS stated that existence of a contractual requirement for the submission of a claim or other documentation before payment is made does not delay the establishment of the fact of liability under the all events test if the act is merely ministerial. The submission of a claim on the life insurance policy on the key person would be a ministerial act. Thus, the proceeds of the life insurance policy on the key person will be required to be recognized as of the date of the key person's death. P.L.R. 200409010.

21. DIRECTORS OF TRUSTEE COMPANY NOT OWNERS OF TRUSTS AND HAVE NO DEEMED GENERAL POWERS OF APPOINTMENT

The grantor and his wife created three trusts during their lifetimes — one for each of their children. The trusts provided for all income to be paid to the child annually during his or her lifetime. Upon the child's death, the income would continue to be paid annually to the child's living issue, in equal shares, per stirpes. Each trust was to terminate 20 years after the last child died. In addition, the grantor established a fourth trust during his lifetime. Among other provisions, the trust provided that upon the death of both the grantor and his wife, the remaining assets would be divided into three shares, one for each child and that child's descendants. Under the terms of this trust, net income of each separate trust would be paid to the beneficiaries in equal or unequal proportions as determined by the trustee. The

trusts will terminate one day before the 21st anniversary of the date of death of the last survivor of the grantor and his wife and all descendants of the grantor living at the time of his death. The grantor and his wife were survived by three children and seven grandchildren. Following the death of the grantor and his wife, a trust company was formed to serve as trustee of each of the above-described trusts. The three children were the initial members. Upon the death of a child, successor members had to be selected from that child's lineal descendants. The trust company had seven directors, and none of the children could be a director. However, each child appointed two directors, and the three children, together, selected the seventh director. The seven appointed directors were the seven grandchildren. The board of directors, as a whole, had the authority to make any and all decisions regarding the trust company's actions as trustee. Sometime after formation, the trust company's bylaws were amended to provide for a discretionary distribution committee to make all decisions regarding discretionary distributions under the trusts. Membership on the committee was subject to the following requirements and limitations: the committee had to consist of one to three members; the directors would appoint the committee members for a term of two years, subject to removal only for malfeasance or bad faith conduct; no member of the committee could be a grantor or have a beneficial interest in the trusts; no member of the committee could be an employee of the trust company, or the corporation whose stock funded the trusts, or any subsidiary or affiliate of either entity; and no member of the committee could be a related or subordinate party of a grantor or any trust beneficiary within the meaning of Code Section 672(c).

The IRS ruled that none of the seven grandchildren will have the power to vest the corpus or income from the trusts in themselves. Therefore, they will not be treated as owners of the trusts under Code Sections 671 and 678(a). In addition, no beneficiary of the trusts can participate, directly or indirectly, in any decisions regarding discretionary distributions to any beneficiary under the trusts, and the distribution committee consists of individuals who are not related or subordinate to any grantor or beneficiary. Accordingly, the directors will not be deemed to possess a general power of appointment under Code Sections 2041 and 2514 with respect to the trusts. Finally, the IRS held that replacement of the current bank trustee with the trust company would not cause the trusts to lose exempt status for generation-skipping transfer tax purposes. P.L.R.s 200404005-007; 200404012; 200404014; 200404017-018; 200404020-022.

22. VALUE OF TRUST ATTRIBUTABLE TO DECEDENT'S ONE-HALF INTEREST IN JOINT TENANCY PROPERTY INCLUDABLE IN DECEDENT'S GROSS ESTATE

The decedent and his wife created a joint revocable trust during their lifetimes. They retained the powers to add property to the trust during their lives, transfer trust property to a separate irrevocable trust, amend or revoke the trust in whole or in part, except as it relates to any irrevocable trust, and receive as much of the net income and principal of the revocable trust as they request. One provision of the trust instrument provides that upon the death of the first grantor to die, the assets of the decedent's separate trust estate and the decedent's share of the joint trust estate must be distributed to the surviving grantor and will merge with the surviving grantor's share of the joint trust estate to form a survivor's trust. However, another provision of the trust instrument provides that upon the death of the first grantor, the revocable trust will be divided into a decedent's trust, a survivor's trust, and an insurance trust. The surviving grantor does not have a general power of appointment with respect to the decedent's trust. Neither grantor has a general power of appointment over the irrevocable trust, but the grantors, or the survivor of them, have the right to all of the income from the irrevocable trust for life. The pages containing the dispositive provisions upon the death of the second grantor are missing from the trust instrument. The assets of the revocable trust consist of two parcels of real property held by the decedent and his wife as joint tenants, and one parcel of real property held by the wife. The assets of the irrevocable trust within the revocable trust consist of a parcel of real estate held by the decedent and his wife as joint tenants. The trust instrument, as modified by court order, provides that upon the death of the first grantor, the assets of the separate estate of the decedent and that decedent's share of the joint trust estate, except for the assets of the decedent's trust and the irrevocable trust, will be merged with the survivor's share of the joint trust estate and the assets of the survivor's separate trust estate to form the survivor's trust, which can be revoked or amended by the surviving grantor. The modification additionally provides that upon the death of the second grantor, the assets of the decedent's trust, the survivor's trust, and the irrevocable trust will be distributed according to the state's intestacy statute.

Under the above circumstances, the IRS ruled that the portion of the revocable trust attributable to the decedent's one-half interest in the real property held in joint tenancy with his wife would be includable in the decedent's gross estate under Code Sections 2036 and 2038. In

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addition, one-half of the value of the irrevocable trust on the date of the decedent's death that is attributable to the decedent's one-half interest in the real property transferred to the irrevocable trust is includable in the decedent's gross estate under Code Sections 2036 and 2038 because of the retained right to receive income from the trust for life. The IRS also ruled that the court order construing and reforming the trust instrument will not be considered a release or transfer of any retained interest or power that would subject the assets of the irrevocable trust or the survivor's trust to inclusion in the wife's gross estate under Code Section 2041. Finally, the IRS held that the court order did not result in a transfer of an interest in property subject to federal estate, gift, or generation-skipping transfer tax. P.L.R. 200404004.

23. VALUATION DISCOUNT DISALLOWED FOR INCOME TAX LIABILITY ATTRIBUTABLE TO RETIREMENT ACCOUNTS

The decedent's estate timely filed a federal estate tax return and timely paid the tax in full. On the return, the estate reported two retirement accounts that the decedent had accumulated while employed; both were comprised of marketable securities. The estate subsequently timely filed a refund claim, and on its revised estate tax return, discounted the value of the retirement accounts by 30 percent, contending that the discount reflects the federal income tax liability triggered upon distribution to the beneficiaries. The IRS disagreed, stating that the federal income tax liability should not be considered in valuing the retirement accounts. The Texas District Court, in agreeing with the IRS, applied the willing buyer-willing seller test and held that a willing buyer would pay the value of the securities as determined by applicable securities exchange rates. While the potential tax to be incurred by the seller would be significant to the seller, it would not affect the sales price of the securities and would not factor into negotiations between the parties. *Estate of Smith v. U.S.*, 93 AFTR 2d 2004-556.

24. EXECUTION OF NONJUDICIAL BINDING AGREEMENT NOT A TRANSFER OF PROPERTY FOR GIFT OR ESTATE TAX PURPOSES

The decedent created an irrevocable trust during his lifetime and named a bank as the trustee. The trust distributed its net income to the decedent's wife during her lifetime. Upon her death, the trust distributed its net income to the decedent's daughter during her lifetime. Upon the daughter's death, the trust assets will be distributed outright to the living issue of the daughter. The trustee is barred from investing in the bank's stock but may retain bank stock in the trust if it

was transferred to the trust by the decedent or beneficiaries, or is received as a stock dividend on bank stock. The trustee is required to confer with the daughter prior to exercising its investment powers. The decedent, his wife, or his daughter may add property to the trust. The bank stock currently constitutes a certain percentage of the trust, but the daughter consistently tells the trustee that she wants the stock retained until the trust terminates. An additional issue has arisen regarding whether the assets will be distributed per stirpes or per capita upon the daughter's death. The trust was created in state A, but the situs and administration of the trust were subsequently transferred to state B. Two separate opinion letters, each interpreting either state A's law or state B's law, have concluded that the trust calls for a per capita distribution upon the daughter's death. The bank as trustee, the daughter, and the daughter's children and grandchildren have entered into a nonjudicial binding agreement providing that the bank stock must be retained in the trust, that the bank as trustee has no duty to diversify with respect to the bank stock, which waives any conflict of interest of the bank resulting from the trust's retention of the bank stock, that provides for per capita distribution of the assets upon the daughters death, and that relinquishes any right of the daughter to contribute additional property to the trust.

The IRS found that the agreement was consistent with both state A law and state B law. Therefore, the execution of the agreement does not result in a transfer of property for purposes of the gift tax or for purposes of Code Sections 2036 through 2038. Additionally, it will not cause the interests of the beneficiaries in the trust to be includable in their respective gross estates under Code Section 2033. Finally, the IRS ruled that because the trust was irrevocable prior to the application of the generation-skipping transfer tax, execution of the agreement will not cause the trust to become subject to the tax since the agreement does not change the beneficial interests of the beneficiaries. P.L.R. 200411024.

25. STATUTORY INTEREST ON PECUNIARY BEQUEST DEDUCTIBLE ADMINISTRATION EXPENSE ON ESTATE TAX RETURN

The decedent's will provided a pecuniary bequest to a named charitable organization, provided that the organization qualified as a charitable organization at the time of the decedent's death. The executrix of the estate waited until receiving an estate tax closing letter from the IRS before funding the charitable bequest. Under the Texas Probate Code, statutory interest began to accrue on the bequest one year after letters testamentary were issued. The IRS issued the closing letter more than two and one-half years after let-

ters testamentary were issued. The executrix subsequently paid the bequest plus the statutory interest and sought a refund of estate taxes, claiming that the statutory interest was either an administrative expense under Code Section 2053 or a charitable distribution under Code Section 2055(a). The IRS rejected the claim, arguing that the interest expense was not a deductible expense on the estate tax return and should instead be deducted on the estate's income tax return.

The Texas District Court held that the statutory interest expense was a deductible expense of administration under Code Section 2053(a). It was incurred in the administration of the decedent's estate because it was incurred in the distribution of property to the person entitled to it. The expense was actually incurred, and it was necessarily incurred because the executrix acted properly within her fiduciary duty to the beneficiaries of the will by awaiting the receipt of a closing letter before distributing the bequest. Finally, the expense was allowable under state law because it was required by the Texas statutes. *Turner v. U.S.*, 93 AFTR 2d 2004-686.

26. TREASURY AND IRS SHUT DOWN ABUSIVE LIFE INSURANCE POLICIES IN RETIREMENT PLANS

The Treasury Department and the IRS issued guidance to shut down abusive transactions involving specially designed life insurance policies in retirement plans under Code Section 412(i). Among the guidance is a set of new proposed regulations, effective for transfers made on or after Feb. 13, 2004, which state that any life insurance contract transferred from an employer or a tax-qualified plan to an employee must be taxed at its full fair market value. Rev. Proc. 2004-16, issued with the proposed regulations, provides a temporary safe harbor for determining fair market value. In addition, the IRS issued two new revenue rulings. Rev. Rul. 2004-20 states that an employer cannot buy excessive life insurance in order to claim large tax deductions. These arrangements generally will be listed transactions for tax-shelter reporting purposes. Rev. Rul. 2004-21 states that a Code Section 412(i) plan cannot use differences in life insurance contracts to discriminate in favor of highly paid employees. IR-2004-21.

27. LIMITED PARTNERSHIP DISREGARDED IN VALUING DECEDENT'S GROSS ESTATE

The decedent and her brother were in the real estate business and loaned money to each other over the years. In 1994, they signed a 29-year business loan agreement (the Agreement) naming the decedent as debtor and her brother as lender. The Agreement was never recorded. The

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Agreement's schedules were switched at signing, so it was unclear if only a multitenant industrial park was subject to the Agreement, or if it and three other properties were subject to the Agreement. In exchange for consideration given by the brother, the decedent encumbered the three other properties and gave her brother the right to sell those properties for the Agreement's term. The brother also agreed to provide any necessary funds to maintain the decedent's financial positions in the industrial park. The decedent granted her brother a 25 percent lender interest in all net cash sales/refinance proceeds from the industrial park. In January 1997, the decedent and her brother formed a limited partnership (the Partnership). The decedent held a 99.95 percent capital interest and a 75 percent profits interest. The brother, as general partner, held a .05 percent capital interest and a 25 percent profits interest. The brother also received a 25 percent operational interest as compensation to him for time spent managing the Partnership. The decedent had attempted suicide in October 1996 and succeeded in June 1997. The Partnership's certificate of limited partnership was not filed with the California secretary of state until 1999, when the IRS began examining the decedent's estate tax return.

The estate tax return valued the decedent's gross estate at more than \$2.5 million. The return reported the decedent's interest in the Partnership at more than \$2.2 million after discounts for lack of marketability and control. The value of the Partnership included seven different properties. The industrial park and three other properties were discounted based on the Agreement between the decedent and her brother. The IRS determined that the decedent's interest in the Partnership was more than \$4.5 million based on undiscounted values of the properties. The IRS claimed that the Partnership was not a valid entity and that the Agreement encumbered only the industrial park.

The Tax Court held that the Partnership was not a valid entity and that the Agreement encumbered the industrial park and three other properties. Consequently, the undiscounted values of three properties were includable in the decedent's gross estate under Code Section 2036(a), and the values of the industrial park and the other three properties were includable, subject to discounting only for the impact of the Agreement on their values. In so holding, the Tax Court recognized that title to the Partnership properties remained in the decedent's name, the decedent received all income distributed from the partnership in the five months before her death, the decedent was dependent on the Partnership for her living expenses, the Partnership's certificate of limited partnership was not filed until the IRS

audit began, the brother and the decedent disregarded the Partnership's existence as situations arose, the brother and the decedent's estate restated financial affairs after the decedent's death, and the Partnership was formed shortly after the decedent's suicide attempt and shortly before her death. *Estate of Hillgren v. Comm.*, TC Memo 2004-46.

28. ESOP DISTRIBUTION OF STOCK TO IRA WILL NOT TERMINATE S ELECTION

Rev. Proc. 2003-23, 2003-1 C.B. 599, provides that an S corporation's election is not affected as a result of an ESOP's distribution of S corporation stock in a direct rollover to an IRA if the terms of the ESOP require that the S corporation repurchase its stock immediately upon the ESOP's distribution of the stock to the IRA, the S corporation actually repurchases the stock contemporaneously with, and effective on the same day as, the distribution, and no income, loss, deduction or credit attributable to the distributed S corporation stock is allocated to the participant's IRA. A new revenue procedure issued by the IRS modifies these rules by allowing the ESOP to assume the rights and obligations of the S corporation to repurchase the S corporation stock immediately upon the ESOP's distribution of the stock to an IRA, and the ESOP actually repurchases the S corporation stock contemporaneously with, and effective on the same day as, the distribution. Rev. Proc. 2004-14, 2004-7 IRB 489.

29. RETIREMENT PAYMENTS EXCLUDED FROM NET EARNINGS FROM SELF-EMPLOYMENT

A professional limited liability partnership engaged in the practice of law requested rulings from the IRS with respect to its retirement plan. The IRS ruled that retirement payments made under the retirement plan to a retired partner will be excluded from "net earnings from self-employment" by Code Section 1402(a)(10) if the following requirements are met: (1) the retired partner renders no service during the taxable year of the partnership that ends within or with the taxable year of the partner and, in which the payment is received; (2) at the close of that taxable year of the partnership, no obligation exists from the partners to the retired partner except with respect to retirement payments under the plan or rights such as benefits payable on account of sickness, accident, hospitalization, medical expenses, or death; and (3) at the close of that taxable year of the partnership, the retired partner's share of the capital of the partnership has been paid to him in full. P.L.R. 200403056.

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30. REFORMED TRUSTS MEET DEFINITION OF QUALIFIED SUBCHAPTER S TRUSTS

The terms of eight different trusts provide, in one form or another, for payments to multiple beneficiaries at any given time. The trustees of the eight trusts have petitioned the state court to reform the trusts so that they comply with the qualified subchapter S trust rules under Code Section 1361(d)(3). As reformed, the trusts will allow distribution of income and principal to the current income beneficiary only. In addition, the trusts will provide that the trust instrument is intended to comply with the requirements of Code Section 1361(d)(3), and that any provision

not in compliance with the requirements will be null and void as of the effective date that the trust becomes an S shareholder, with the remaining provisions of the trust to be carried in effect. The IRS ruled that the eight trusts, as reformed, meet the definition of a qualified subchapter S trust under Code Section 1361(d)(3), and provided that the beneficiaries make the proper elections, the trusts will be treated as such. P.L.R. 200403031.

31. SEPARATE ACCOUNT RULES NOT AVAILABLE FOR TRUST BENEFICIARIES OF IRA

The decedent died in 2001. During his lifetime, the decedent created a revocable trust, that was the beneficiary of the decedent's IRA. At the time of his death, the decedent had not yet attained his

required beginning date with respect to the IRA. Upon the decedent's death, his wife was entitled to all income from the trust annually. Upon the wife's death, the trust provisions provided for the division of the trust into equal shares for the decedent's surviving son and daughter. Accordingly, in 2003 the IRA was divided into two equal separate accounts. The IRS held that if distributions are made to a trust, even if the trust is a "see-through" trust, that the separate account rules of Regulation Section 1.401(a)(9)-8, Q&A A-2 are not available to the trust beneficiaries. Thus, each beneficiary must receive the required minimum distributions over the life expectancy of the oldest beneficiary, which in this case was the decedent's wife. P.L.R.s 200410019-021.

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To the KBA Real, Estate, Probate, and Trust Law Section meeting at the KBA Annual Meeting. Date and time to be announced.





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| 8:00 a.m. | Registration |
| 8:30 a.m. | Estate planning under the Kansas Death Tax
Timothy P. O'Sullivan,
Foulston Siefkin LLP, Wichita |
| 9:20 a.m. | 2003 Kansas of Attorney Act Power
Stewart T. Weaver,
Foulston Siefkin LLP, Wichita |
| 10:10 a.m. | Break |
| 10:25 a.m. | Medicaid estate planning after the Miller decision
Valerie L. Peterson,
Peterson Law Office, Manhattan |
| 11:15 a.m. | Professional responsibility issues
Gabrielle M. Thompson, Kansas Legal Services, Manhattan |
| 12:05 p.m. | Adjournment |