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Estates and Trusts

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ESTATES AND TRUSTS

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Four cases dealing with estates, trusts, and probate were decided in the one-year *Survey* period considered for review. Two cases consider issues of recurring importance: no contest provisions and the revocation and revival of wills. Two are limited to their facts and are of little continuing importance. Because of the great impact of federal taxation in this area, this article also includes significant federal tax decisions and rulings from the year under review.

I. NEW MEXICO DECISIONS

A. No Contest Provisions.

In re Estate of Seymour.[1] The decedent executed a will in 1971 while she was married. With the exception of a few minor bequests, the will provided that her estate was to go to her husband if he survived her by 60 days or more. The alternate disposition provided that her son would receive certain assets and that the residue would go to her stepson. The will also provided that if either her son or stepson made a claim that he was entitled to a greater share of the estate, or in any way contested any of the terms of the will, he would be disinherited.

The decedent and her husband were divorced in 1975. The decedent died in March of 1977. The will was submitted for probate. Its admissibility was contested by the decedent's son. The son argued that his mother's will was partially revoked by operation of law as a result of her divorce and, since the statute in effect on the date of the divorce did not prescribe an alternative disposition of the estate, it should be distributed pursuant to the laws of intestacy. The district court admitted the will to probate and found that because the son had contested the will's provisions, he should be disinherited pursuant to the "no contest" provision of the will.

The court of appeals reversed the district court.[2] The supreme court granted certiorari and reversed in part and affirmed in part the

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1. 93 N.M. 328, 600 P.2d 274 (1979).
2. *Id.* at 329, 600 P.2d at 275.

decision of the court of appeals.[3] At issue before the court were two questions of first impression in New Mexico: (1) whether a will should be construed in accordance with the Uniform Probate Code, effective on July 1, 1976, or with the law as it existed on the date of the divorce; and (2) whether a will's no contest provision is valid and enforceable.

The statute in effect on the date of the divorce[4] provided that a divorce revokes all provisions in a will for the testator's divorced spouse. The statutory section, however, was silent as to the manner of disposition of the revoked portion of the testator's estate. The Uniform Probate Code[5] provides for a similar revocation, but in addition provides that the property prevented from passing to such a former spouse by divorce "passes as if the former spouse failed to survive the decedent."[6] The supreme court reversed the court of appeals on this issue and held that the effect of the divorce should be determined under the new probate code. The decedent died after the new probate code became effective—the date of death, rather than the date of divorce, controls which law applies.[7]

The supreme court affirmed the court of appeals' decision that the son should not be precluded from sharing in his mother's estate because of the will contest. The court adopted the view, held by most jurisdictions, that no contest provisions are valid and enforceable, but are not effective to disinherit a beneficiary who has contested the will in good faith and with probable cause to believe that the will was invalid.[8]

B. Revival of Revoked Will.

In re Will of Greig.[9] The decedent executed a will in 1972. In 1975, she executed a second will. Each will was validly executed and effective at the time it was signed. Sometime between 1972 and 1976 the first two pages of the 1972 will were torn. In 1976, the decedent executed a document entitled "Affirmation of Last Will and Testament" declaring her 1972 will to be her last will and testament.

It was contended that because the 1972 will had been revoked by

3. *Id.*
4. N.M. Stat. Ann. § 30-1-7.1(B) (Supp. 1975) (repealed 1975).
5. N.M. Stat. Ann. § § 45-1-101 to -7-401 (1978). The Uniform Probate Code was in effect on the date of the decedent's death.
6. N.M. Stat. Ann. § 45-2-508 (1978).
7. 93 N.M. at 331, 600 P.2d at 278.
8. *Id.* at 332, 600 P.2d at 278.
9. 92 N.M. 561, 591 P.2d 1158 (1979).

tearing,[10] it could not be revived.[11] The supreme court found that section 45-2-507, by its terms, requires that, to be revoked by tearing, a will must be torn with the intent to revoke.[12] Because there was no evidence to support a finding that the 1972 will had been torn by the decedent with this intent, the 1976 revival was effective to revoke the 1975 will and the 1972 will was admitted to probate.

C. *Enforcement of Decedent's Note to Himself Against the Community.*

In re Estate of Shadden.[13] The decedent left a will bequeathing certain items of his separate property to his son. One of the items was a promissory note "payable to me from the community in the amount of $9,000.00 which represents money I received from some of my personal property."[14] The note was executed by the decedent only, although on its face it purported to bind both the decedent and his wife.

The decedent's son filed a claim against the estate for the payment of the promissory note. The claim was disallowed by the estate but, following a hearing, the district court entered judgment for $9,000.00 for the son against the estate. The court of appeals affirmed the district court in part.

The central issue before the court was the validity and enforceability of the promissory note against the community property of the decedent and his surviving spouse. Evidence had been admitted in the district court that supported a finding that the decedent had contributed $9,000.00 of his separate property to the community, that he considered the contribution to be a debt from the community to him, and that he intended the note to be a preferential charge against his

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10. N.M. Stat. Ann. § 45-2-507 (1978) provides:
A will or any part thereof is revoked by:
. . .
B. a subsequent will which revokes the prior will or part thereof, expressly or by inconsistency; or
C. being burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

11. N.M. Stat. Ann. § 45-2-509 (1978) provides that "[i]f a person having made a will, makes a subsequent will, revoking the prior will, and afterwards revokes the subsequent will, the prior will is not thereby made valid, unless the validity of the prior will is acknowledged in writing."

12. 92 N.M. at 563, 591 P.2d at 1160.

13. 93 N.M. 274, 599 P.2d 1071 (Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979).

14. 93 N.M. at 276, 599 P.2d at 1073.

estate. The court of appeals held that the note created a valid and binding obligation that could be satisfied out of the decedent's separate property and his share of the community personal property, but declined to hold that community real property could be committed to the repayment of the note.[15]

The court noted an apparent conflict between the intent of the testator and sections 45-2-804[16] and 40-3-13[17] of the New Mexico statutes. In resolving this conflict, the court of appeals held that, pursuant to section 45-2-804, the entire community is subject to claims of third parties who dealt in good faith with the community during its existence, but that this section did not extend to claims arising as a result of a note between a member of the community and himself.[18] The court further held that the claim should be satisfied out of the decedent's separate and community personal property in the manner prescribed by section 45-3-902.[19]

D. Oral Antenuptial Agreements.

In re Estate of Lord.[20] The supreme court held that an alleged oral antenuptial agreement in which decedent agreed to devise her entire estate to Lord if he would marry her "and take care of her like a husband would" was void as against public policy.[21] The suit arose when decedent's sister sought formal probate of decedent's will. Decedent's husband objected to the formal probate, contending that the oral antenuptial agreement should be specifically enforced. On certiorari, the supreme court held that the oral antenuptial agreement, irrespective of any evidence based on it, was invalid as a matter of law and unenforceable. The supreme court held that it is the policy of this state to foster and protect the marriage institution and not to encourage spouses to marry for money.[22]

Under the statute of frauds, the court could have excluded evidence of the antenuptial agreement because it was oral. In using the public policy rationale instead, the supreme court chose to affirm a broader principle.

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15. *Id.* at 280-81, 599 P.2d at 1077-78.

16. N.M. Stat. Ann. § 45-2-804 (1978). This section provides that "[u]pon the death of either spouse, the entire community property is subject to the payment of community debts."

17. N.M. Stat. Ann. § 40-3-13 (1978). This section provides in part that the community real property cannot be encumbered without the joinder of both spouses.

18. 93 N.M. at 281, 599 P.2d at 1078.

19. *Id.* at 282, 599 P.2d at 1079. N.M. Stat. Ann. § 45-3-902 (1978) provides for the order of abatement of shares of distributees.

20. 93 N.M. 543, 602 P.2d 1030 (1979).

21. *Id.* at 544, 602 P.2d at 1031.

22. *Id.*

II. DEVELOPMENTS IN FEDERAL TAXATION

A. Taxation of Trust Gains.

In Letter Ruling 7903021, the Internal Revenue Service stated that, pursuant to the provisions of section 644 of the Internal Revenue Code, gains from the sale of trust property that is a capital asset in the hands of the trust, where the trust is created after May 21, 1976, will be taxed at the grantor's ordinary income rates when the asset is an ordinary asset to the grantor.[23]

B. Carry-Over Basis Repealed.

Carry-over basis, which was introduced into the law in 1976 and postponed by the Revenue Act of 1978, was repealed as part of the Windfall Profits Tax.[24] The stepped-up basis rules of section 1014[25] have been reinstated.

C. Unified Credit.

Revenue Ruling 79-398 holds that the use of the unified credit for estate and gift taxation is mandatory rather than permissive as was the case with regard to the use of the pre-1977 $30,000 gift tax exemption.[26]

D. Retained Power to Change Corporate Trustee.

Revenue Ruling 79-353 holds that if a grantor retains the power to remove a corporate trustee without cause and substitute another corporate trustee, the powers of the corporate trustee will be imputed to the grantor.[27] Thus, if the corporate trustee has the discretionary power to distribute income or principal which is not limited by the ascertainable standards of section 2041, the trust property is includable in the estate of the grantor.[28]

Revenue Ruling 79-353 has been criticized as not being supported by the authorities relied upon by the Internal Revenue Service.[29] Until this issue is resolved, it will be wise to limit all discretionary distributions of principal from a trust to the ascertainable standards of health, education, support, or maintenance as set forth in section

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23. I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 7903021 (Sept. 29, 1978).
24. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401(a), 94 Stat. 229.
25. I.R.C. § 1014.
26. Rev. Rul. 79-398, 1979-2 C.B. 338.
27. Rev. Rul. 79-353, 1979-2 C.B. 325.
28. I.R.C. § § 2036(a)(2), 2038.
29. *See* Mertens Law of Federal Income–Current Tax Highlights 1-2 (Vol. 21, No. 17 Dec. 20, 1979); [1980 Master Binder] Tax Mngm't Mem. (BNA) 3-7 (Feb. 11, 1980).

2041.[30] In the alternative, the grantor could forego the power to change corporate trustees.

E. Assignment of Term Insurance.

In November, 1979, the Internal Revenue Service issued Letter Ruling 8006109, stating that the annual gift tax exclusion ($3,000) is available for premiums paid by an employer on a group term insurance policy where the employee-insured has assigned the policy to an irrevocable trust.[31] The ruling required, however, that the irrevocable trust contain the so-called *Crummey* clause,[32] which grants to the trust beneficiary the right of withdrawal for a limited time. The problem is how premium payments made by an employer on term insurance could be withdrawn. Must the beneficiary be granted the right to withdraw the insurance policy itself? The answer may be to give or loan funds to the trust so that there is sufficient cash available for withdrawal under the *Crummey* clause, since the employer does not give the trustee any funds, but pays the premiums directly to the insurance company.

F. Disclaimer of Jointly Held Property.

The Internal Revenue Service has taken the position that property held in joint tenancy cannot be disclaimed by the surviving joint tenant unless the disclaimer is made within a reasonable time after the creation of the joint tenancy, rather than within nine months after death.[33] Letter Ruling 7829008 concerned the case of a husband and wife in Arizona, a community property state. Thus, the problems of joint tenancy by spouses in New Mexico include not only the problems of loss of stepped-up basis on the surviving spouse's community interest and the possible double taxation of decedent spouse's one-half community interest when surviving spouse dies, but also the possible loss of the estate tax advantage otherwise available under state and federal disclaimer statutes.

G. Special Valuation.

As part of the 1976 Tax Reform Act, Congress passed section 2032A, permitting the valuation of certain farm and closely held business property for estate tax purposes at its economic value rather

30. I.R.C. § 2041.
31. I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 8006109 (Nov. 20, 1979).
32. Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968).
33. I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 7829008 (Apr. 14, 1978).

than fair market value.[34] The maximum reduction in value under the law is $500,000.00.[35]

Section 2032A(e)(10) was added by the Revenue Act of 1978 to allow the inclusion of the entire community to ascertain if the required conditions of section 2032A are met. The 1978 amendment, sub-paragraph (e)(10), could be construed as limiting the maximum benefit to $500,000.00 for the entire community.[36]

34. I.R.C. § 2032A.
35. *Id.* § 2032A(a)(2).
36. *See* I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 8023027 (Mar. 7, 1980).