Proskauer

Wealth Management Update

March 2021

March 2021 Interest Rates for GRATs, Sales to Defective Grantor Trusts, Intra-Family Loans and Split Interest Charitable Trusts

Certain federal interest rates increased slightly for March of 2021. The March applicable federal rate ("AFR") for use with a sale to a defective grantor trust, self-canceling installment note ("SCIN") or intra-family loan with a note having a duration of three-nine years (the mid-term rate, compounded annually) is 0.62%, up from 0.56% in February.

The March 2021 Section 7520 rate for use with estate planning techniques such as CRTs, CLTs, QPRTs and GRATs is 0.8%, which is up from 0.6% in February.

The AFRs (based on annual compounding) used in connection with intra-family loans are 0.11% for loans with a term of three years or less, 0.62% for loans with a term between three and nine years, and 1.62% for loans with a term of longer than nine years.

Thus, for example, if a 10-year loan is made to a child, and the child can invest the funds and obtain a return in excess of 1.62%, the child will be able to keep any returns over 1.62%. These same rates are used in connection with sales to defective grantor trusts.

Habal v. Habal, So.3d, 2020 WL 5372289 (Fla. 4th DCA September 9, 2020): Revocable Trusts are difficult to attack on capacity grounds

After forty years of marriage, Settlor created a revocable trust of which his son was a beneficiary ("Son"). Subsequently, Settlor remarried and amended the revocable trust. Son filed a complaint seeking rescission or revocation of the amended revocable trust due to the trustees' undue influence and the settlor's capacity, and (2) damages for the trustees' tortious interference with Settlor's testamentary expectancy.

Under Fla. Stat. § 736.0207(2), a contest may only be commenced on a revocable trust when the trust becomes irrevocable by its terms or the settlor dies. This, however, does not prohibit an action by the guardian of the property of an incapacitated settlor.

The trust remained revocable, Settlor remained alive and the Son was not the guardian. Thus, the Court dismissed the Son's claims due to lack of standing.

Matter of Ryan, 2021 NY Slip Op 21010 (N.Y. Sur. Ct. Broome County Jan. 25, 2021): First case in New York admitting remotely notarized Will to probate

A case of first impression and appropriate for the times, this is the first reported case in New York where a Will was admitted to probate under the temporary remote witness and notarization law.

Facts surrounding the execution of the Will:

- The Testator had conversations with the scrivener before signing the document.
- The Testator was in the hospital when he executed the Will.
- The video between Testator and two witnesses, which included the scrivener and another employee of his office, was via cellphone.
- Testator provided his driver's license to the witnesses.
- Testator was asked if this was his Will and if he wished for the two witnesses to serve as witnesses, both of which Testator responded in the affirmative.
- Immediately after the Testator executed the Will, the original was driven back to the scrivener's office where the scrivener executed the attestation clause and witness affidavit accordingly.

Interestingly enough, the scrivener did not even know about New York's new stance on remote notarization. The Court found the execution ceremony satisfied EPTL 3-2.1 and the Governor's EO 202.14.

Sells, et al. v. Commissioner, T.C. Memo. 2021-12 (January 28, 2021): Tax Court denies conservation easement

Steven and Janine Moses bought a property for $2.4 million in late 1999. Unfortunately, most of their wealth was in technology stocks and they suddenly became insolvent shortly thereafter during the tech bubble. The Moses' were able to sell part of the land for $1.4 million, but were left with mountainous land and a large pile of debt. Thus, the Moseses' concocted a plan: eight individuals, including Steven Moses, formed Burning Bush LLC (the "LLC") in August 2002 to purchase the remaining land for $1.4 million, which equaled the existing debt on the land. In December 2003, the eight individuals valued the conservation easement at $5.4 million when the LLC donated the land. The deed that transferred the remaining land away from the LLC subtracts "any increase in value after the date of this Deed attributable to improvements."

The Tax Court was faced with two main issues:

- whether the partners are entitled to deductions for the LLC's donation of the conservation easement; and
- whether the partners are entitled to deductions for the LLC's donation of the timber.

The three requirements for a conservation easement are that the "qualified conservation contribution" be (A) of a qualified interest (B) to a qualified organization (C) exclusively for conservation purposes. First, as to whether the partners are entitled to deductions for the LLC's donation of the conservation easement, the focus here is on the third requirement that the contribution be "exclusively for conservation purposes." *See* § I.R.C. 170(h)(1)(C). This is defined in the negative as "a contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is *protected in perpetuity.*" *See* I.R.C. § 170(h)(5)(A). Part of the protection in perpetuity is that the proceeds that go to the donee must be used in a "manner consistent with the conservation purposes of the original contribution." *See* Reg. 1.170A-14(g)(5)(ii); *see also* Oakbrook Lane Holdings, LLC v. Commissioner, 154 T.C. 180 (2020). Further, the amount that goes to the donee must be in "proportionate value" to the fair market value of the contributed property unburdened by the easement. Here, the charitable deduction for the conservation easement was denied in full because the deed from the LLC would subtract the value of any improvements from any condemnation award before calculating what percentage of those proceeds would go to the donees.

Second, the Tax Court denied the charitable deduction for the timber because the value of the land was its timber. Under Alabama law, timber that has not been severed from the land is property of the land owner. The Tax Court reasoned that no charitable deduction could be made for the timber separately as it was part of the land, which was denied a deduction as a purported conservation easement.

Related Professionals

- **Albert W. Gortz**
- **Nathaniel W. Birdsall**
  Partner
- **Stephanie E. Heilborn**
  Partner
- **Henry J. Leibowitz**
  Partner
- **Jay D. Waxenberg**
  Partner