Proskauer

Wealth Management Update

November 2023

November Interest Rates for GRATS, Sales to Defective Grantor Trusts, Intra-Family Loans and Split-Interest Charitable Trusts

The November Section 7520 rate for use with estate planning techniques such as CRTs, CLTs, QPRTs and GRATs is 5.6%, which is up from 5.4% in October. The May applicable federal rates ("AFR") for use with a sale to a defective grantor trust or intra-family loan with a note having a duration of:

- 3 years or less (the short term rate, compounded annually) is 5.3%, which is up from 5.22% in October;
- 3 to 9 years (the mid-term rate, compounded annually) is 4.69%, which is up from 4.43% in October; and
- 9 years or more (the long-term rate, compounded annually) is 4.83%, which is up from 4.46% in October.

The Section 7520 rate and the AFRs have been steadily rising with inflation although the rates are still not at historic highs. Clients contemplating any type of transaction whose success depends on these "hurdle rates" may wish to proceed sooner rather than later.

In re IMO Amelia Noel Living Trust, Del. Ch. August 16, 2022, aff'd, 293 A.3d 1000 (Del. 2023)

The Decedent executed a Pour-Over Will and Revocable Trust in 2018. The trust provided that on the Decedent's death, the residue would be distributed to her then living issue, per stirpes.

In 2019, the Decedent retained new counsel and she decided to disinherit her daughter. The Decedent's new attorney was aware of the existence of the trust, but she testified that she neither reviewed, revoked nor did anything involving the trust. Instead, she simply drafted a new Pour-Over Will that stated that the relevant daughter would be disinherited.

After the Decedent's death, the executor recognized the conflict between the Will and the Revocable Trust and filed an action for a declaratory judgement.

The Court held that the relevant daughter was disinherited. The court first held that to not disinherit the daughter would not properly conform with the Decedent's intent. Furthermore, the Court held that the Will in essence acted as an amendment to the Revocable Trust.

The takeaway here is that an attorney must be cognizant of all nuances of a client's estate plan to help mitigate unnecessary post-death litigation and administrative costs.

In re the Trust of Eva Marie Hanson Living Trust dated December 11, 1995 (Minn. Ct. App. Jan. 30, 2023)

Settlor established a revocable trust under Minnesota law in 1995. She had two children: Randy and Shari. After Settlor established the trust, Randy was in a car accident in which he became disabled and received government assistance.

In 2013, Settlor amended the trust to provide that if her spouse predeceased her, one-half of the residue would be distributed to her children, per stirpes.[1] In 2013, Settlor also executed a durable power of attorney granting Shari all standard powers, including "fiduciary transactions". However, the trust provided that the right "to amend or revoke my trust is personal to me, and may not be exercised by any legal representative or agent acting on my behalf."

In 2017, a series of transactions which created the controversy occurred. Randy's wife, Linda, established a special needs trust for Randy. Randy was the life beneficiary and Linda was the remainderman. Randy executed a Will in which he left his entire estate to Linda and disinherited his children.

Shari, via her power of attorney, amended the Settlor's trust to provide that on the Settlor's death, Randy's share was to be distributed to his special needs trust.

Randy died in 2019 and his children contested the 2019 amendment. The trial court held for Linda and Shari. On appeal, the Court of Appeals of Minnesota held that the 2017 amendment was invalid because the trust did not provide for the ability for amendment via a power of attorney.

Glynn v. Kenney, 884 S.E.2d 259 (Va. Ct. App. 2023)

The Decedent died a resident of Virginia Beach, Virginia. In the years preceding her death, she had executed several estate planning instruments with a local attorney and was a member of a document updating subscription service with that attorney.

The Decedent had a Pour Over Will and Revocable Trust. She disinherited her sons and made a number of changes to the trust in the years preceding her death using the subscription service. None of the changes involved a change of course with respect to disinheriting her sons.

From the opinion, it's clear that the Decedent retained her original estate planning documents. After the Decedent's death, the executrix was unable to locate the original Will. At trial, there was testimony that her house was in an almost uninhabitable condition. There were documents littered throughout the house, human waste was stored in bottles and there was a rodent issue. The executrix hired a professional remediation company to clear out the house.

> The executrix never found the original Will and attempted to probate a copy. The Decedent's sons objected and they were her heirs at law.

In Virginia, a copy of a Will can be admitted if the proponent of admission can prove by clear and convincing evidence that the testator did not destroy the Will with the intent to revoke the Will. In the present case, when looking at the state of the house, the Court held that the executrix proved by clear and convincing evidence that the Decedent did not destroy her Will with the intent to revoke it.

The takeaway here is that clients should store their estate planning documents with their attorney.

James v. Mounts, 660 S.W.3d 801 (Ark. 2023)

The Decedent was an Arkansas veterinarian who owned a life insurance policy with a $300,000 death benefit and his wife, Teresa James, was designated as the beneficiary. On September 5, 2016, Ms. James informed the Decedent that she was divorcing him.

Several days later, the Decedent called Allianz Insurance Company. He told the representative that his wife left him, he was sick and that he needed to change his beneficiary designation to remove Ms. James and insert his children. Thereafter, Allianz faxed the Decedent a form. The Decedent filled out the form and sent back to Allianz. However, the Decedent failed to sign and date the form. Allianz claims that it sent the Decedent a letter that the form couldn't be processed but there is no evidence that Allianz ever sent the letter or that it was received by the Decedent. The Decedent's divorce was finalized in 2017 and he died later that year.

The Ouachita County Circuit Court issued a declaratory judgment holding that Ms. James was removed as a beneficiary of the policy. The case eventually worked its way up to the Arkansas Supreme Court. The Court held that the Decedent substantially complied with his obligations under the policy with respect to changing a beneficiary by completing the form and sending it back. Accordingly, the Court ruled that Ms. James was removed as a beneficiary and his children were the beneficiaries.

The takeaway here is that clients should consider consulting their attorney with respect to beneficiary change designations.

PLR 202339008

The Decedent established a revocable trust. The Decedent was survived by a spouse and two children. The trust provides as follows on the Decedent's death:

1. A credit shelter type trust (the "Credit Shelter Trust") receives a formula credit bequest. The Credit Shelter Trust provides that all income must be distributed between spouse and children annually and that distributions of principal are fully discretionary for HEMS. Upon the children reaching a certain age, the principal of the Credit Shelter Trust was to be distributed outright to them.
2. A Martial Trust received the residuary estate. The Martial Trust provides that all income must be distributed annually to spouse and the distributions of principal are fully discretionary for HEMS.

The Decedent exhausted his unified credit during life. After the expiration of the qualified disclaimer period, the Decedent's spouse sought to renounce her interest in the Marital Trust. With respect to the income interest, spouse sought to enter into a net gift agreement with the children. With respect to the trust principal, spouse planned to exercise her right to recover the gift liability from that gift.

Furthermore, spouse planned to disclaim her interest in the Credit Shelter Trust during the qualified disclaimer period.

Spouse requested the following rulings from the IRS:

1. Spouse’s renunciation of the income interest in the Martial Trust will be a completed gift under Sec. 2511 and the gift of the principal interest will be a completed gift under Sec.
2. Spouse’s renunciation of her interest in the Credit Shelter Trust will be a qualified disclaimer.
3. Spouse’s renunciation of the income interest in the trust will be reduced for gift tax purposes by the amount of gift tax paid by the children attributable to the net gift agreement.
4. Spouse’s renunciation of the principal interest will be reduced for gift tax purposes by the amount of the gift tax liability that spouse can recover under Sec. 2207A.
5. No portion of the Martial Trust or the Credit Shelter Trust will be included in spouse’s estate for Federal estate tax purposes.
6. All gift tax imposed by reason of the renunciations related to the Marital Trust will be included in spouse’s estate.
7. Spouse’s income tax liability will be restricted to the amount spouse received pursuant to the net gift agreement.

The Service made the following rulings.

Spouse’s renunciations of the principal and income interests of the Martial Trust were complete.

Spouse’s disclaimer of her interest in the Credit Shelter Trust would have occurred within nine months of the creation of the interest so the disclaimer would be timely.

Spouse’s gift of the income interest would be reduced by the gift taxes paid by the children pursuant to the net gift agreement and the gift of the principal interest would be reduced by the amount of gift taxes that spouse could recover pursuant to Sec. 2207A.

The final two rulings are noteworthy. With respect to any gift tax paid within three years of death, the Service ruled that any gift tax paid would be included in the spouse's estate. The Service cited several cases to support its position. However, the caselaw and the Service's position directly contravenes the plain language of Sec. 2035(b). Sec. 2035(b) states, "The amount of the gross estate (determined without regard to this subsection) shall be increased by the amount of any tax paid under chapter 12 by the decedent or his estate on any gift made by the decedent or his spouse during the 3-year period ending on the date of the decedent's death."

In the final ruling, the Service ruled that the spouse's income tax liability was limited to the amount she received from the net gift agreement. The spouse did not have any income tax liability attributable to any gift taxes she recovered pursuant to Sec. 2207A with respect to the principal interest.

The private letter ruling is extremely complex, but clients should take care to ensure that any time a disclaimer or renunciation is made, it's timely.

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[1] The opinion does not state whether such distribution was in trust or outright.

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