WHERE THERE'S A WILL by Eddy Smith

Death and Taxes
Select Trusts and Estates Developments

"Our new Constitution is now established, and has an appearance that promises permanency;
but in this world nothing can be said to be certain, except death and taxes."
—*Benjamin Franklin, 1789*[1]

As the United States' largest generation moves into the "golden years," trusts and estates (T&E) practice remains a growth field. Others can speak more knowledgably than I about the potential effects on T&E practice of artificial intelligence, remote lawyering and other evolving dynamics, but the bottom line is that our country has tens of millions of people who need to plan for aging, death and the distribution of immense wealth.[2] This column summarizes some recent developments in the T&E world that lawyers should know as they counsel clients.

Tennessee Legislation

Tennessee continues to revise its trust laws in the effort to attract trust business. Among the statutory changes enacted in 2023 were the following.[3]

Extrajudicial trust termination. *Tenn. Code Ann.* § 35-15-411 previously allowed termination of a noncharitable irrevocable trust with court approval. Now the agreement of the trustee and all qualified beneficiaries that termination does not violate a material purpose of the trust is sufficient to terminate the trust without court approval.[4]

Nonjudicial settlement agreements in estates. Nonjudicial settlement agreements, previously available to trustees and trust beneficiaries, are now available to personal representatives of probate estates (PRs) and estate beneficiaries under new *Tenn. Code Ann.* § 30-2-615. Matters that may be resolved by a nonjudicial settlement agreement include the interpretation or construction of a will, liability of a PR for an action relating to the administration of the estate, administration of real property as part of the probate estate and approval of attorney and PR fees. The legislation explicitly provides that entering into a nonjudicial settlement agreement does not violate an *in terrorem*/no-contest clause in a will.

Expanding virtual representation. The 2023 legislation expanded "virtual representation" under *Tenn. Code Ann.* § 35-15-303 to, among other things, allow the trustee of a trust ("beneficiary trust") that is a beneficiary of another trust to represent and bind the beneficiaries of the beneficiary trust as to the other trust.

Power to appoint and direct successor and additional trustees. Under new *Tenn. Code Ann.* § 35-15-716, the power under a trust instrument (1) to appoint a successor trustee includes the power to appoint multiple successor trustees, (2) to remove and replace a trustee includes the power to appoint additional trustees to serve with the current trustee, and (3) to do either includes the power to allocate various trustee powers, including the power to direct or prevent certain actions of the trustees, exclusively to one or more of the trustees serving from time to time.

Decanting. The decanting provisions were moved from *Tenn. Code Ann.* § 35-15-816(c) to a new section, *Tenn. Code Ann.* § 35-15-818.

New small estates procedure. Revised *Tenn. Code Ann.* § 30-4-101 et seq. governs estates with no real property and value not exceeding $50,000. A key difference from the previous regime is that the probate court now can issue "limited letters of administration" or "limited letters testamentary" to make it more likely that financial institutions and other third parties will cooperate in disposition of the assets.

Tennessee Cases

There have been several cases in Tennessee that inform T&E practice, including these three:

Estate of Sane v. Sane.[5] The surviving spouse argued that her deceased husband's PR defrauded her by saying that the PR did not wish to pursue probate, but later submitting the decedent's will for probate. The Tennessee Court of Appeals held that the surviving spouse had sufficient information about the will and assets of the estate to cause claims for specific property, year's support allowance, and elective share, filed more than nine months after the date of the decedent's death, to be time barred pursuant to *Tenn. Code Ann.* § 31-4-102.

Estate of Bone.[6] The Tennessee Court of Appeals held that the settlor's attorney-in-fact (AIF) was authorized to amend the settlor's revocable trust. The power of attorney (POA) included the power "[t]o exercise any powers of . . . amendment . . . which I may have over the income or principal of any trust." The trust, executed eight years later, provided that the power to revoke or amend "is personal to me and may not be exercised by any other person on my behalf during any time that I am incompetent, unless I have expressly granted the power to amend or revoke this Agreement in writing to any agent under a power of attorney." (Emphasis added.) Because the settlor was competent when the trust was amended, the court found that provision did not apply, and instead looked to *Tenn. Code Ann.* § 35-15-602(e), which provides: "A settlor's powers with respect to . . . amendment . . . may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power." (Emphasis added.) The court found that the POA being executed eight years prior to the trust did not keep it from being an express grant of power to amend the later trust.

Williams v. Lewis Preservation Trust.[7] As a follow up to the *Bone* case above, this case analyzes the powers and fiduciary duties of a trustee and an AIF under a POA. Son was AIF for his mother and also successor trustee of a trust she created. The Tennessee Court of Appeals held, where the trust provided that the POA principal could revoke the original trust and the POA allowed the AIF to exercise the principal's power of revocation and to create a new trust with the assets of the revoked trust, the AIF had the power to do so. However, the Court of Appeals (1) reversed summary judgment for the son and remanded on the issue of whether the son breached his fiduciary duties under the POA or initial trust, because the new trust granted another son business income and management rights that extended beyond the deceased principal's lifetime,[8] and (2), given the possible breach, vacated the trial court's ruling that the lawsuit violated both trusts' *in terrorem*/no-contest clauses, causing the plaintiff to forfeit all beneficial interests.[9]

Federal Corporate Transparency Act

Estate planning attorneys help create and advise many family-owned or other closely held entities, and things are about to get more complicated for those entities. Consistent with efforts of the international Financial Action Task Force (FATF) to combat money laundering, tax evasion, and terrorism funding, effective Jan. 1, 2024 the Corporate Transparency Act ("CTA")[10] will require millions of U.S. businesses to file required information through the Financial Crimes Enforcement Network ("FinCEN") website.[11]

The CTA requires "reporting companies" to provide information regarding individuals who own or control at least 25% of the company ("beneficial owners") and (for entities created on or after Jan. 1, 2024) "applicants" who helped form the entity (presumably including attorneys). "Reporting companies" are corporations, LLCs and other "similar entities" formed through filings with the secretary of state. Private trusts appear excluded, and specific exemptions include charities and organizations that employ more than 20 people and have gross receipts exceeding $20 million. "Beneficial owners" include trustees of a trust that meets the ownership or control requirement.

The filing deadline is Jan. 1, 2025 for entities formed prior to Jan. 1, 2024. For entities formed on or after Jan. 1, 2024, filings must be completed within 30 days of the entity's formation. All filings must be updated within 30 days of a change in the information reported or an error in the initial filing. Failure to file a timely report can result in civil and criminal fines up to $10,000 and up to two years' imprisonment. Look for more on the CTA through 2023 and into 2024.

Federal Estate and Gift Taxes

Wealthy clients continue to plan for federal estate taxes, and Jan. 1, 2026 looms as a key date for that planning. The cumulative gift tax (during life) and

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estate tax (at death) exemption amount in 2023 is $12.92 million per person ($25.84 million per married couple).[12] The exemption is adjusted annually for inflation but is scheduled to be cut in half in January 2026 (less than two and a half years from now). For example, if by 2026 inflation otherwise would raise the exemption to $15 million per person, on Jan. 1, 2026 it would drop to $7.5 million per person ($15 million for a married couple). That drop will happen unless the House, Senate and president agree on legislation changing that result, a questionable prospect given what one T&E practitioner describes as Washington's "legislative constipation." Thus, many clients who do not currently have estate tax exposure are looking at exposure in 2026 and beyond.

Two Other Nuggets Picked Up Along the Way

We conclude with two items of wisdom from experienced T&E lawyers. First, for liability protection consider this point: "Never own a motor vehicle jointly with anyone else, including a spouse." Second, when drafting trusts remember this: "People who cannot share a bathroom should not share a trust."[13] Happy planning for the twin certainties of death and taxes.

NOTES

1. Although sources agree that Franklin wrote this, the point about death and taxes did not originate with Franklin, and some sources recite Franklin's quote slightly differently.

2. "The U.S. population age 65 and over grew nearly five times faster than the total population over the 100 years from 1920 to 2020, according to the 2020 Census. The older population reached 55.8 million or 16.8% of the population of the United States in 2020." www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html. See also www.census.gov/library/visualizations/interactive/exploring-age-groups-in-the-2020-census.html, which shows that folks ages 45-84 make up 40.3% of the U.S. population and 41.1% of the Tennessee population.

3. Thanks to colleague Michael Crowder for background work on this section.

4. Query, other than for smaller trusts, to what extent will trustees feel protected without a court determination that termination does not violate a material purpose of the trust? Could a contingent beneficiary bring an action many years later arguing that the termination violated a material purpose of the trust and is, therefore, voidable?

5. *Estate of Sane v. Sane,* No. E2021-01525-COA-R3-CV, 2023 Tenn. App. LEXIS 74 (Tenn. Ct. App. Feb. 27, 2023).

6. *Estate of Bone,* No. M2022-00771-COA-R3-CV, 2023 Tenn. App. LEXIS 213 (Tenn. Ct. App. May 19, 2023)

7. *Williams v. Lewis Preservation Trust,* No. E2022-01034-COA-R3-CV, 2023 Tenn. App. LEXIS 280 (Tenn. Ct. App. July 14, 2023)

8. Citing *Tenn. Code Ann.* § 35-15-801 and quoting § 35-15-803 ("If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.").

9. The court noted that *Tenn. Code Ann.* § 35-15-1014(c)(1) & (5) provide that *in terrorem*/no-contest clauses are not implicated in any action "brought solely to challenge the acts of the trustee or other fiduciary of the trust to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust" or "brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the trust[.]"

10. 31 U.S.C. § 5311 et seq.

11. Thanks to University of Tennessee College of Law student Kevin Escalona for background work on this section.

12. The federal estate tax (FET) exemption is "portable" between spouses, meaning, with some exceptions and conditions, that a surviving spouse has the benefit of any unused exemption of the first spouse to die. Paired with the unlimited marital deduction (which results in no estate tax at the first death to the extent that the estate passes to the survivor), an estate plan that gives all to the survivor at the first death will result in federal estate taxes only at the second death and only to the extent that the net value of the estate exceeds two exemptions. However, (1) the generation-skipping transfer tax (GST) exemption is not portable between spouses and (2) while the survivor's FET exemption is indexed for inflation the unused exemption "ported" from the deceased spouse is not. Thus, some married couples whose net estate is worth between $7.5 million and $15 million should consider adding first-death trusts to their estate plan.

13. Jane Ditelberg of Northern Trust.