PROBATE & ESTATE PLANNING SECTION

Supplemental Attachments for

Friday, April 19, 2024

Committee on Special Projects

and

Meeting of the Council of the Probate and Estate Planning Section

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Or *via* Zoom

Probate & Estate Planning Section of the
State Bar of Michigan

You are invited to the April meetings of the Committee on Special Projects (CSP) and the Council of the Probate & Estate Planning Section:

Friday, April 19, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.
When: Apr 19, 2024, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/tZYlcuisrj4tG9z_bSuB_rd5d-qVSxKaAOmS

After registering, you will receive a confirmation email containing information about joining the meeting. If you are calling in by phone, email your name and phone number to Angela Hentkowski ahentkowski@stewardsheridan.com, we will put your name in a zoom user list that will identify you by name when you call in.

Please note that the Zoom feature of these meetings entails that they will be recorded.

This will be a regular in-person and remote meetings of the Council of the Probate & Estate Planning Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects (CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate Planning Section page of the SBM website. Once those things are posted, you should be able to download them from: http://connect.michbar.org/probate/events/schedule.

Richard C. Mills
Section Secretary

SMITH HAUGHEY RICE & ROEGGE
213 S. Ashley St., Ste 400
Ann Arbor, MI 48104
Phone 734-213-8000
Fax 734-436-0030
rmills@shrr.com

Amicus Committee Attachment

BARRON, ROSENBERG,
MAYORAS & MAYORAS, P.C.

MEMORANDUM

To: Probate Council
From: Andrew W. Mayoras
Subject: Application for Amicus Brief - Ruth Adams Trust
Date: April 16, 2024

Background

In a trust dispute about whether a trust properly received and retained certain assets, the probate court at the onset of litigation issued a preliminary injunction disallowing any funds from being spent from the Trust, including on attorney fees. The Trustee petitioned to resign, citing inability to afford counsel without access to Trust assets. The probate court reversed itself and authorized a fund of $150,000 that could be used on legal fees. The challenging party (i.e., not the Trustee) appealed that order to the Court of Appeals, which has not yet held oral arguments or issued an opinion.

The Trustee's counsel submitted an amicus application asking the PEPS to support their argument that a probate court should not issue an injunction in a case of this nature to prohibit a trustee (which by extension would also apply to personal representatives) from paying counsel to defend the trustee in trust litigation.

Recommendation

We recommend no amicus brief be filed at this time, because:

1) While a probate court issuing an injunction against paying of a Trustee or PR's legal fees at the onset of a case is troubling, here the probate court reversed its initial order and allowed payment of fees;

2) If either the original order or the subsequent order was erroneous, the Court of Appeals has not yet had an opportunity to address it and could correct an order; our committee does not typically recommend filing amicus briefs prior to the Court of Appeals ruling, except in unusual or particularly important circumstances;

3) It is not clear if the underlying order is a final order, and more appeals and/or applications to the Supreme Court are likely, which means that we will most likely have an opportunity to consider filing an amicus brief at a more appropriate stage; and

4) The appellate case law on PR's/Trustees standard for paying costs of defense in good faith (MCL 700.3720 and 700.7904) is clear and well-settled; in particular, a recent,

comprehensive (albeit, unpublished) discussion of the "good faith" standard in a decision issued March 21, 2024 (Braun Kendrick Finkbeiner, PLC v Estate of Matthew Scott).

So we recommend not filing a brief at this stage of the appeal and instead waiting to see if there are further appeals or applications to the Supreme Court, at which point we would recommend re-evaluating the issue.

Guardianship, Conservatorship, and End of Life Committee Attachment

To: Probate Council c/o Rick Mills & Jim Spica

Cc: Members of the Guardianship, Conservatorship & End of Life Committee and Katie Lynwood

From: Sandra Glazier

Re: Death with Dignity Proposed Legislation/SB 678, 680 and 681

Date: March 29, 2024

The Guardianship, Conservatorship & End of Life Committee (the "Committee") met on March 27, 2024 to continue its analysis and discussion of SB 678, 680 and 681 in accordance with the direction received from CSP on March 15, 2023. That direction was to focus not on whether the Committee recommended or opposed enactment of Death with Dignity (known in other jurisdictions as MAID) legislation, but instead on if such legislation were to be enacted what considerations and guard rails we would recommend be included and considered in order to (1) protect vulnerable adults and (2) attorneys who might be asked to provide advice to clients or otherwise involved in processes required to address options made available as a result of enactment.

Present for the zoom meeting were:

> Hon. Avery Rose, Kathleen Goetsch, Georgette David, Elizabeth Graziano, Josh Ard, James Steward and Sandy Glazier

The discussion focused on SB 681, which is at the core of the proposed legislation, and is tie barred to SB 678 and 680.

In advance of the meeting, Sandy circulated some articles and studies she had located relating to Medical Assistance in Dying ("MAID") legislation enacted in other jurisdictions. In particular, Canada has produced material regarding the use of MAID since it became available there.

Those studies reflected the following:

- Canada now has the highest rate of euthanasia in the world. 4.1% of all deaths were now aided by doctors;
- 1/3rd of those who availed themselves of MAID did so because they perceived themselves to be a burden on family, friends or caregivers;
- One person was offered MAID in response to a request for a wheel chair lift;
- The Canadian VA found 4 instances of inappropriate referral to MAID;
- Some patients who want to die may lie about their symptoms in order to obtain a prognosis that permits them to qualify for MAID;
- A critical assessment of the right to die needs to be established;
- People who have ALS choose death because they didn't feel they had other options
- The availability of MAD tens to deter funding other sources to alleviate suffering
- Many people who availed themselves of MAID did so because of an actual or perceived lack of access to medical, disability and/or social support

- There were many reports of MAID applications due to lack of access to medical, disability and social supports often with intersecting components of disability and mental health issues
- The number of people who availed themselves of palliative care before electing MAID was much lower than expected
- Individuals were guaranteed a right to MAID but not pharmaceuticals, mental health counseling or palliative care, dental care of disability supports
- There is a need to be concerned about cost cutting incentives built into health care systems which may incentivize individuals to avail themselves of MAID because they feel they have no other viable options – MAID should not be the first line of therapeutic options
- Voluminous scientific research has established that the right care for serious conditions can lead to adjustments and, for some, recovery. For newly diagnosed serious illness or injury, suicidality presents at the outset but it often does not persist, with ½ of persons with spinal cord injuries reporting suicidal ideation during the first 2 years post injury
- In Belgium & in the Netherlands, before euthanasia can be provided, physicians must agree that no further medical or social support options are available to relieve a patient's suffering
- Even in Canada the patient must be presented with other treatment options to consider
- It was found that one was able to die by MAID in a shorter time than to receive an appointment for treatment by a psychiatrist or pain management specialist or receive disability benefits

In the US, a doctor and senior fellow at the Harvard Center for Bioethics cautioned that states should proceed with caution in enacting death with dignity legislation. While he supports allowing terminally ill people the option to MAID, he urged that states improve their palliative and end of life care services so nobody chooses MAID because their other options are inadequate.

Against this backdrop, the members of the committee in attendance indicated the following:

- Hospice services are available when a person has a terminal illness that qualifies them for end of life (e.g. anticipated death within 6 months). This is however hardly an objective standard, but rather an educated guess. Sometimes that evaluation is accurate; sometime it is not. Nonetheless, it would important to incorporate some of the safeguards associated with hospice care, into any MAID legislation, as the current legislative proposal creates a rights but not options or safeguards or requirements that provide support for the person's condition before MAID becomes an option. Therefore, it might be advisable to require that before a person is able to avail themselves of MAID, that they undergo hospice care for some period and also require that physicians agree that no further medical or social support options are available to relieve the person's suffering
- When depression is present, an evaluation of what supports might be available to alleviate the person's depressive symptoms, this may require more than just counselling – it may require, if appropriate, the use of medication
- There is a large population of persons who suffer from dementia (such as Alzheimer's) who may still have capacity to make a decision but who lack a sufficient family or other support system. These individuals may attempt to avail themselves of MAID earlier than other members of the population out of fear that the progressive nature of their cognitive disabilities may result in them being robbed of the opportunity to use MAID at a later time. There needs to be supports

and alternatives available, in order to make sure people have hope and don't chose to die because they lack it.

- Concern remained whether counselling to determine if a person doesn't suffer from impaired judgment was sufficient for persons with depression
- The issue of who will determine if a person is capable of making the health care decision will arise in the context of guardianship cases. Someone who has a guardian may still have testamentary capacity. They might have sufficient capacity to elect to utilize MAID. What if the physician determines they have sufficient capacity, a family member challenges and the court needs to get involved. What liability might a GAL have, if appointed and they feel for moral or religious reasons they can't recommend MAID? What about attorneys who are asked to provide advice regarding end of life options? What about a Judge who is asked to resolve the dispute over whether the person has sufficient capacity to avail themselves of MAID, but they feel they must disqualify themselves because of their moral or religious convictions? Any bill must provide safeguards for professionals beyond the medical profession who feel for moral or religious reasons that they cannot render advice or be involved in the process. At least one judge felt that making such a decision was different from ruling on a petition for DNR because DNR is the election not to have life support attempts when the body's processes would otherwise result in death as opposed to affirmatively ruling on someone taking their own life.
- A concern exists about how to protect individuals from undue influence to elect MAID, when the individual may have diminished capacity or other vulnerabilities, but still has sufficient capacity to voice a desire to elect MAID.
- Perhaps there should be a requirement that family members be notified of the election to make use of MAID. In Canada, while patients are encouraged to let family members know about the patients decision, when family was informed to late (or after the fact), there were occasions when the family was able to establish that the person actually didn't qualify for MAID, but at that point it was too late for them to be able to intervene or do anything about it. Such a notice provision should be one with a work around where family can't be located. One suggestion was perhaps if a patient executed a document reflecting their desire and intent to be able to avail themselves of MAID more than 1 year before making such an election, then no notice would be required. Another work around would be publication.

In order to have suggestions in one document for further reference purposes, the following were additional suggestions brought up during the prior meeting of the Committee:

- The question of who will be the person to evaluate issues when a person is in a long term care facility, but be adequately addressed in the legislation. They should be independent and not an employee of the long term care facility.
- Should there be an option for persons who can't administer the medication themselves due to physical limitations. Under such circumstances, could medical personnel administer the medication (e.g. ALS patients)
- Section 19(d) only applies to a prohibition against civil and criminal liability and professional discipline for participating in the physician-assisted suicide envisioned under the statute. It is

believed that there should also be a specific prohibition against such liabilities being imposed for refusing to participate in physician-assisted suicide.

While some might object to the use of terms such as “euthanasia” or “suicide”, the actions authorized under the bill as drafted qualify for use of those definitions. Euthanasia is defined as the “practice of intentionally ending life to eliminate pain and suffering”. Suicide is defined as the “act or an instance of taking one’s own life voluntarily and intentionally”. Therefore, the Committee urges those who read this report to focus on the recommendations and concerns expressed as opposed to the use of words such as “euthanasia” or “suicide” expressed within these minutes.

Tax Committee Attachment

MILLER JOHNSON Attorneys

45 Ottawa Avenue SW
Suite 1100
P.O. Box 306
Grand Rapids, MI 49501-0306,
UNITED STATES OF AMERICA

616.831.1700
616.831.1701 fax
www.millerjohnson.com

MEMORANDUM

TO SBM Probate Council

FROM John T. McFarland **DATE** April 18, 2024

SUBJECT Tax Nugget: Tax Planning with FLIP Charitable Remainder Unitrusts

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Taxpayers are often hesitant to consider making charitable gifts of illiquid assets because of a perceived complexity surrounding such gifts. Gifts of real estate and closely held business interests can seem daunting for both taxpayers and charities. For taxpayers who are looking for an income stream, a charitable income tax deduction, and an upfront bypass of capital gains taxes, a FLIP Charitable Remainder Unitrust (FLIP CRUT) offers a solution. See *Reg. 1.664-3(a)(1)(i)(c)*.

Charitable remainder unitrusts are referred to as split-interest vehicles. This is because the trust first pays an income stream to the donor and then upon the termination of the trust the remainder interest passes to charity. A special type of charitable remainder unitrust is the FLIP CRUT, also referred to as a "combination of methods" unitrust.[1] Typically, the FLIP CRUT first operates as a net income only unitrust which pays income beneficiaries the lesser of the net income or the stated unitrust percentage set forth in the trust document. Typically, but depending upon the interest rate environment, the trust will initially only pay the net income to the unitrust income beneficiaries prior to the flip. After a stated "triggering event" occurs, which can be defined in the trust document as the sale of certain real estate or other illiquid assets, the trust will convert, or flip, to a standard unitrust on January 1st of the following calendar year. The valuation date for the trust is typically December 31st of each year. With a standard unitrust, the unitrust payout percentage is multiplied by the trust value to arrive at the annual unitrust amount. Charitable remainder unitrusts must make unitrust payouts or they will be disqualified.[2] The "combination of methods" unitrust allows taxpayers to use illiquid assets to fund a charitable remainder unitrust without having to distribute fractional interests of the illiquid asset prior to the sale of the asset. The FLIP CRUT solves a liquidity issue for taxpayers and charities.

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[1] In Reg. 1.664-3(a)(1)(i)(c), the Service permits a trust to function initially as a Type II or Type III trust. After a "triggering event," the trust will change the following January 1 to a Type I or standard unitrust. The triggering event may be a sale of unmarketable assets, marriage, divorce, death or birth of a child.

[2] See Estate of Atkinson v. Comm'r, 115 TC 26 (2000), aff'd, 309 F3d 1290, 90 AFTR2d 2002-6845 (11th Cir. 2002), cert. denied, 124 S. Ct. 388.

Unitrust income distributions are taxed first as ordinary income, then capital gain, then tax-free income, and finally return of corpus. This distribution method is often described as the "Four Tier" accounting structure. The unitrust distribution rules are set forth in Reg. 1.664-1(b). The structure of the "Four Tier" accounting structure is set forth as follows:

Category	Tax Rate
Ordinary Income	37 percent
- Dividends	15 percent/20 percent/ 23.8 percent
Capital Gain -	
- Short-Term Gain	37 percent/40.8 percent
- Tangible Personalty Gain	28 percent
- Depreciation Gain	25 percent
- Long-Term Gain	15 percent/20 percent/23.8 percent
Tax Free	0 percent
Return of Principal	0 percent

Although it appears complex, the basic concept is simple. The distribution to the recipient requires payment of the tax at the highest possible rate. Thus, all ordinary income earned by the trust must be distributed before any capital gain is paid out. Since the goal for most charitable remainder unitrusts is to distribute capital gain, the trust investments may be carefully selected to attempt to minimize the production of ordinary income and maximize recognized capital gain. The Trustee of the CRUT may wish to discuss this investment strategy with the trust's investment manager. Investing for growth and attempting to create gain involves inherent risk, which should be carefully weighed before considering such a strategy. However, the lower capital gains tax rates provide greater tax efficiency for the unitrust income beneficiaries.

A unitrust payout percentage must not be less than 5 percent or more than 50 percent of the net fair market value of the trust assets, pursuant to federal law.[3] Additionally, there is a 10 percent Minimum Remainder Interest (MRI) rule, which states that the charitable deduction generated from the gift to the trust must be 10 percent or greater of the net fair market value of such property as of the date such property is contributed to the trust.[4] This same 10 percent MRI rule applies for all additional contributions to the charitable remainder trust. A lower unitrust

[3] IRC § 664(d)(2)(A), Reg. §§ 1.664-1(a)(1)(i), 1.664-3(a)(1)(i), 1.664-3(a)(2)(i).
[4] IRC § 664(d)(2)(D)

payout percentage will produce a larger charitable income tax deduction. The charitable income tax deduction may be utilized the year in which the gift is made plus an additional five years for the carryover of any excess.[5] Contributions of appreciated assets to public charities held long term are deductible up to 30 percent of the taxpayer's contribution base unless the taxpayer elects to limit the deduction to his or her basis.[6]

A taxpayer may own real estate that he or she has depreciated, e.g., rental property. As a result, there may be depreciation recapture issues. If a donor has taken accelerated depreciation, depreciation recapture requires the donor to realize ordinary income upon sale of the depreciated property in an amount equal to the excess of accelerated depreciation over straight-line depreciation. In the event depreciation recapture applies to a donor, any gift of the depreciated property will be subject to the income tax reduction rules. Basically, the initial fair market value charitable deduction will be reduced by the ordinary income component of the real estate.[7]

The value of the illiquid asset contributed to the trust, whether it is real estate, a business interest, or even tangible personal property, will be determined by obtaining a "qualified appraisal."[8] The regulations for "qualified appraisals" are strict and must be satisfied.[9] Otherwise, the donor's charitable income tax deduction may be jeopardized.

JTM

[5] See IRC § 170(d)(1); Reg. §§ 1.170A-8, 1.170A-10. See IRS Publication 526, Charitable Contributions for a discussion of the order of use of current carryover contributions.
[6] IRC § 170(b)(1)(C)(i); Reg. § 1.170A-8(d)(1).
[7] IRC § 170(e)(1)(A).
[8] Reg. § 1.170A-13(c)(1)(i).
[9] IRC § 170(f)(11)(E)(i); Reg. § 1.170A-17(a)(1). See also Alli v. Comm'r, TC Memo. 2014-15; Costello v. Comm'r, TC Memo. 2015-87.