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THE SALVATION ARMY

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PLANNING NEWS AND IDEAS FOR THE PROFESSIONAL ADVISER

LEAVE WILL DRAFTING TO THE PROFESSIONALS

Irving Duke prepared a holographic will in 1984, specifically disinheriting certain family members. The will provided that if he and his wife should die at the same time, the estate was to be divided in equal shares for the City of Hope (COH) and the Jewish National Fund (JNF). The document also included a no-contest clause. Duke's wife died in 2002 and he died in 2007, leaving no children. His estate was valued at more than $5 million.

The charities jointly filed a petition for probate and the appointment of an administrator. Seymour and Robert Radin, Duke's nephews, filed a petition to remove the administrator. They acknowledged that the will was valid, but argued that the condition under which COH and JNF were to take under the will – that the couple died at the same time – had not occurred. The will did not address what was to happen if Duke survived his wife by several years. The two argued that, as a result, the entire estate was to pass by intestacy. COH and JNF said that the court should consider extrinsic evidence of Duke's intent, noting that he had established several charitable gift annuities after his wife's death and told representatives of the charities that he was leaving his entire estate to the organizations.

The Radins said that because the will was unambiguous, extrinsic evidence was not appropriate. The trial court agreed. The Court of Appeals of California upheld the trial court, noting that while a will is to be construed according to the intention of the testator and so as to avoid intestacy, a court may not write a will that the testator did not. The court also noted that the no-contest clause in the will cannot operate to prevent heirs at law from taking under the statutory rules of intestacy. Duke's will simply made no disposition of property in the event he survived his wife.

The court noted that after leaving specific gifts to the charities it was unlikely that he intended the bequests to take effect only if he and his wife died at the same time. However, evidence of Duke's actions could not be used to establish a latent ambiguity in the will. "Perhaps, the rule regarding the admission of extrinsic evidence should be more flexible when a testator's conduct after an event that would otherwise cause his will to be ineffective brings into question whether the written word comports with his intent," suggested the court, adding that it might be time for the state supreme court "to consider whether there are cases where deeds speak louder than words when evaluating an individual's testamentary intent."

Radin v. Jewish National Fund, B227954

SUIT TARGETS BANK, NOT ESTATE

Following his mother's death, Luther Dietrich told his bank that he wished to change the payable on death (POD) designation on his two accounts from his mother to the Watch Tower Bible and Tract Society of Pennsylvania. When Dietrich died several months later, the bank sent Watch Tower a notice informing it that bank records indicated it was the beneficiary of the two accounts, totaling nearly $100,000. The bank added that it believed the funds belonged to the estate, because a written beneficiary form and new signature card had not been completed to supersede the previous POD designation, although the change had been made in the bank's records.

Dietrich's estate filed a concealment action against the bank. Watch Tower was not named as a party. The probate court, finding no written agreement between Dietrich and the bank directing the funds to Watch Tower, ordered the accounts released to the estate.

Two years after the court ruling, Watch Tower filed suit against the bank, claiming negligence, breach of contract, conversion and tortious interference with an expectancy. The trial court granted the bank's motion for summary judgment, saying Watch Tower was estopped from bringing the claim.

The Court of Appeals of Ohio reversed, noting that the doctrine of collateral estoppel is designed to preclude relitigation of an issue that has already been litigated. However, Watch Tower was never a party to the probate court action and had no duty to intervene. The appeals court noted that Watch Tower is not claiming it is the proper POD beneficiary, but rather that Dietrich's intended bequest to Watch Tower was never consummated due to the bank's negligence. It's a question of material fact whether the bank acted negligently by failing to secure a proper POD designation, said the court, which remanded the case.

Fifth Third Bank v. Watch Tower Bible & Tract Society of Pennsylvania, 2011 Ohio 5180

CY PRES, EQUITABLE DEVIATION SALVAGE BEQUESTS

The New York Surrogates Court was asked to rule on changes to two bequests contained in The Dr. Robert Von Tauber and Olga Von Tauber, M.D. Revocable Trust.

The first bequest provided for the establishment of a foundation in the couple's names that would award a scholarship to a minor from Huntington, N.Y., to continue his or her education. The trustees told the court that the $200,000 allocated for the foundation was inadequate to fund a foundation for a substantial period of time.

The trustees proposed instead to establish a named fund at the Long Island Community Foundation that would be administered as an endowed fund. Recipients would be high school students from Huntington who demonstrate financial need.

The court allowed the change under the cy pres doctrine, noting that the expense of administering the foundation would significantly reduce the funds available for scholarships, thereby frustrating the donors' intent. Cy pres allows a court to modify a charitable bequest where literal compliance would be impractical.

The Von Taubers also left 25% of the remainder of the trust to be held in a perpetual trust, the net income of which was to fund a fellowship for the advanced study of psychiatry at the School of Medicine at SUNY. The trustees told the court that the $266,000 from the trust was insufficient to fund a fellowship. The court agreed to a proposed change, under the doctrine of equitable deviation, that would establish a named fund, administered by the school, that would benefit fourth year medical students and fellows.

In re Von Tauber, 2011 NY Slip Op. 52095

TRANSFER INSTRUCTIONS MADE FOUNDATION A BENEFICIARY

Hamilton James had a custodial arrangement with a bank that required the bank to transfer assets when so directed by James. As he had done several times before, James instructed the bank to transfer shares of a particular mutual fund as a charitable gift to his family foundation.

Instead of sending the letter of instruction to the mutual fund company, the bank sent it to the foundation's broker. The mistake was not discovered for about two weeks. Share prices had dropped, resulting in a sale price that was more than $1.6 million lower than the value at the time James gave the instructions.

The foundation trustee sued the bank, claiming breach of contract. The trial court granted the bank's motion for summary judgment, ruling that the foundation lacked standing. The Appeals Court of Massachusetts disagreed, pointing to the Restatement (Second) of Contracts, which recognizes the right of an intended beneficiary to sue for its enforcement or breach. James intended to give the foundation the benefit of the promised performance – transfer of the shares – noted the court. He had an ongoing arrangement with the bank to transfer assets at his instruction. Once the instruction was given, it supplemented the agreement and identified the bank's obligations with respect to the assets to be transferred.

The instructions James gave "clearly and definitely" identified the foundation as the recipient and stated that the purpose was to make a charitable gift. It makes no difference, said the court, that the foundation was not identified as an intended beneficiary at the time James and the bank originally entered into the agreement. The court added that its ruling dealt only with the question of the foundation's standing, not whether the bank's actions breached the agreement or caused the foundation any loss.

James Family Charitable Foundation v. State Street Bank & Trust Co., No 10-P-1616

Correction: Last issue a citation was mistakenly listed as *Van Dusen v. Commissioner, 136 TC No. 25* ("Volunteer Walks Away Mostly Empty Handed"). The correct citation for that article is *Van der Lee v. Commissioner, T.C. Memo 2011-234*.

THE BUSINESS OF GIVING

Individuals are the major source of philanthropy in this country. But businesses may find opportunities to satisfy philanthropic goals through gifts of inventory, cash, securities and other assets. Other possibilities: Both C and S corporations, as well as partnerships, can fund charitable remainder trusts that will pay income to the firm for a term of up to 20 years. A corporation can give charity an option to purchase its shares at a particular price at some future date and receive a deduction for the difference between the option price and the fair market value of the stock when charity exercises the option. The owner of a closely held company can make a gift of shares that are later redeemed by the company, entitling the owner to an income tax deduction on his or her personal return. The Salvation Army's Office of Planned Giving would be happy to discuss these and other gifts that make good business sense.