The

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Probating an iPhone Will; Revisiting 2009; and The Bobrow 700

Stealing van Gogh

Is an iPhone message a valid Will? Why do the President's budget proposals keep returning the transfer taxation to 2009 standards…but not until 2018? What prompted 700 tax lawyers to come to the aid of their colleague Alvan Bobrow? Can owners reclaim a painting that was nationalized during the Communist revolution?

The Night Café by Vincent van Gogh

These are questions with a theme of counter-intuitive logic. Spoiler alert, the answers could be: Testamentary intent, politics, a secret tax attorney vow of allegiance, and international law (or fear of Vladimir Putin). Without further adieu, here is an unusual collection of fascinating cases.

Presented With Our Compliments

An App For What?

Our existence in this digitized era is reduced to banality what with ephemeral electronic communications and ethereal files stored in clouds. Can we also expect to shuffle off this mortal coil with a final shout-out to the Twitterverse: "Bad vibe, signing off @cruelworld #worstdayever?"

Alas, for Karter Yu, there would be no formal estate planning, no growing old with the security of well-crafted documents, no comfort, and no time. Driven by whatever desperation, he communicated his farewells in a series of emails and text messages from his iPhone, wrote a message on the phone that he referred to as his Will, and then committed suicide.

Our old-school colleagues at the Bar embellish upon the sanctity of duly witnessed and notarized Wills and guard against tampering or forgery with raised seals, wax seals, ribbons, specialty papers, special fonts, and even rivets! Is the common law of probate prepared to acknowledge an unwitnessed iPhone document as a valid Will?

Apparently so. Mr. Yu's case played out in Queensland, Australia, but the issue of an iPhone Will has captivated the attention of the international estate planning community. Almost everyone has phones capable of communicating testamentary intent. Mr. Yu could be you.

The fact that Mr. Yu's iPhone Will was admitted to probate and accepted as valid may prompt many people to draft their own digital versions. Entrepreneurs are undoubtedly preparing apps for that purpose already.

Although the rules for admitting a Will to probate vary from one state to the next, the applicable rules applied by the Supreme Court of Queensland were not unlike our own standards. Where a document does not meet the requirements of Section 10 of the Succession Act of 1981for a valid Will in Queensland, the document may still qualify as a valid Will under Section 18 of the Act, if it meets three conditions:

1) There has to be a document that exists that can be produced or reproduced, and the document on the iPhone certainly qualified.

2) The document must state the testamentary intentions of the decedent; here, the document disposed of the whole of the testator's possessions at a time when imminent death was contemplated, named an executor and an alternate, and authorized the executor to deal with the testator's affairs in the event of the testator's death.

3) The document was intended to be a Will, i.e., to be legally operative at the testator's death. Here, the document commenced with the words, "This is my last Will and Testament," identified the testator by name and address, appointed an executor, and included instructions to the executor demonstrating an intent for the document to be operative after the testator's death. Mr. Yu also typed his name at the end of the document with his address and the date.

Many authors have compared these standards to those of state jurisdictions. [In researching the Yu case, please note that many articles refer to the Decedent as "Karter Wu."]

Analysis from Bruce Steiner

Bruce D. Steiner, JD, LLM, an attorney with Kleinberg, Kaplan, Wolff & Cohen, P.C., in New York—with a distinguished 35-year body of work as an author and lecturer on estate planning and tax matters and who is frequently quoted in publications such as *Forbes, The New York Times*, and *The Wall Street Journal*—recently covered the iPhone case on the Leimberg website (LISI Estate Planning Newsletter #2195; February 18, 2014). Mr. Steiner was gracious enough to answer a few questions.

Q: What protocols would improve upon a digital Will, such as Karter Yu's, that could make it more reliable to be admitted to probate and more practical to administer?

A: Here, the facts were helpful. Mr. Yu prepared farewell notes, typed his Will, and committed suicide, all within a short time. The fact that he signed his name where the signature would be makes it more reliable. However, there is still the issue of the chain of custody of the digital Will—and whether someone else could have created the Will after his death.

Q: Could a digital Will that has date-stamped emails about the Will end up being more reliable than an unsigned Will, such as the one probated in *Estate of Ehrlich*? [427 N.J. Super. 64, 47 A.3d 12 (App. Div. 2012)]

A: The date stamping helps. It negates the possibility that someone else prepared or changed the Will electronically after the decedent's death. If *Ehrlich* is viewed as the probate of an unsigned Will, you have to show by clear and convincing evidence that he intended it to be his Will. In *Ehrlich*, the court noted that he sent the original to the named executor. That fact isn't usually present. I think *Ehrlich* is better viewed as the probate of a copy of a lost Will because the notation suggests that he signed the original.

Q: Will jurisdictions create a trend of allowing unsigned Wills to be probated?

A: Time will tell. So far, there haven't been very many cases involving probating unsigned Wills by clear and convincing evidence (and I think *Ehrlich* is really more about proving a copy of a lost Will). There have been some cases in New Jersey involving attempts to probate unsigned Wills by clear and convincing evidence. I had one such case. You can usually defeat a motion to dismiss or a motion for summary judgment. That will usually allow you to settle the case. I don't know whether New Jersey's approach (of allowing you to probate an unsigned Will based on clear and convincing evidence) is better, or whether New York's traditional approach (of requiring the Will to be signed, published, and witnessed, with very limited exceptions) is better.

Q: Will we come to regret relaxing standards and creating a wild frontier of overly convenient electronic testaments?

A: The advantage of the traditional approach of requiring a formal ceremony is that it impresses the seriousness of a Will on people. However, many things in our society are becoming less formal, especially among younger people. People with large estates will go to lawyers and have formal Wills prepared. However, younger people with smaller estates might want a more informal approach.

New Green Book Proposals

The Administration's budget proposal for 2015, also referred to as the "Green Book," contains several new provisions relating to estate taxation.

***Crummey* Trusts:** The present interest requirement for gifts qualifying for the annual gift tax exclusion would be abolished, making it unnecessary to provide a trust beneficiary with a *Crummey* withdrawal power. This proposal resembles one made by the Clinton Administration. The annual exclusion would apply to a gift that is made directly to an individual or to a trust for a single individual. The trust assets would be includible in the beneficiary's estate if the donee died before the trust assets were distributed. The proposal would allow up to $50,000 of annual exemption for gifts to trusts or of other property that would not currently qualify as a transfer of a present interest.

Defining "Executor": The proposal acknowledges that not all estates have conventional executors, yet there are reporting obligations for estates in contexts such as foreign accounts, brokers holding securities as collateral, custodians of property, individuals making DSUE elections, etc., and conflicts may arise among the various persons with qualifications to represent the estate. Therefore, the IRS would be authorized to regulate this area.

The Book of Peeves

The estate taxation section of the proposed budget for 2015 has become an annual recitation of the Administration's pet peeves. There is, in fact, a list of seven proposals that have reappeared from previous Green Book proposals without much change. These are:

Transfer Taxation Circa 2009: The transfer tax system of 2009 would largely be restored but not until 2018. This includes returning to a $3.5 million exemption. Currently the exemption is $5.34 million and is indexed for inflation. This would mean going from an exemption of approximately $6 million in 2018 to $3.5 million. Estate taxation would once again be severed from gift taxation. Gifts would have their own lifetime exemption of $1 million (as it was in 2009) and a top tax rate of 45%.

Background: The unfortunate, recent history of transfer tax reform resulted in a "permanent" return to the unified estate and gift tax system, with exemptions to be adjusted for inflation to maintain the system on automatic pilot. A proposal for radical changes in 2018 after the current Administration has left office does not create the same dynamic of the Byrd Rule's required return to 2001 rates in 2011 or the Fiscal Cliff of 2013 that Congress inflicted upon itself. This proposal has become like a parent's empty threat to turn the car around and head back to 2009.

Analysis: Portability of a deceased spouse's unused exemption would be continued under this future "vision," but the proposal takes the time to indicate that there would be no "clawbacks" to recapture tax if there were higher exemptions at the time of the spouse's death. There would also be a distinction applied based on available gift tax exemption and estate tax exemption. Yet these are worthy refinements of a flawed vision, which might as well be titled the "Raise Taxes After I'm Out of Office Act."

Consistent Valuation: It is proposed that transferees who are gifted assets or inherit assets would be required to utilize the same valuation reported for gift or estate tax purposes as for the basis in the property upon a subsequent sale. Additional reporting requirements would be imposed on executors to ensure compliance.

Estate Tax Liens: The absolute life of an estate tax lien under IRC §6324(a) is currently 10 years. But estate tax can be deferred about 15 years under §6166. To correct the gap between the length of the current lien and the full length of the deferral of tax payments, the proposal would extend the lien to 15 years and 3 months from the decedent's date of death for estate tax deferred under §6166.

HEETs: Health Education Exclusion Trusts have enabled grandparents to expand a generation skipping transfer tax loophole to cover tax-free growth inside of trusts. This year's budget proposal would only allow the GST exclusion to apply where grantors pay educational or medical costs directly and not to trust contributions.

Dynasty Trusts: A 90-year limit would be placed on trusts remaining free of estate and GST tax. *Analysis:* This would counteract the exceptions to the rule against perpetuities that have arisen in a number of states. Trusts would be able to continue beyond 90 years but would be subject to estate tax.

GRATs: This year's proposal once again requires a minimum term of 10 years for GRATs and would prevent zeroed-out GRATs. The donor would therefore have to bear some risk of dying during the term of the GRAT and having the assets included in the donor's estate.

Intentionally Defective Grantor Trusts (IDGTs): Under the proposed rules, a grantor who pays income tax on trust assets would also have those assets included in the grantor's taxable estate or be deemed to have made a taxable gift upon the termination of the grantor trust status or upon distribution of assets from the trust.

The 700 Club

It's nice to have 700 tax lawyers as friends, and the concept of them acting in concert is impressive (and scary).

Imagine the group exchanging their secret handshake, ordering 700 turkey sandwiches, and laughing in unison at the recitation of the official tax joke. [There is only one tax joke: "What's the difference between tax avoidance and tax evasion? About 20 years in Federal prison." Laugh. Stop.]

In "Gotcha! Tax Court Penalizes IRA Rollover That IRS Publication Says Is Allowed," *Forbes,* March 25, 2014, Janet Novack reported that 700 tax attorneys from the Board of Regents of the American College of Tax Counsel asked permission to file an amicus curiae brief, which was ultimately signed by several prominent attorneys, including former IRS Commissioner Fred T. Goldberg, Jr.

Bobrow v. Commissioner, T.C. Memo 2014-21 (January 28, 2014), involved IRA Rollovers by prominent tax attorney Alvan Bobrow and his wife. Mr. and Mrs. Bobrow made withdrawals from several IRA accounts and then replaced funds or directed their financial institution to move funds back into the IRAs within 60 days. The IRS assessed a tax deficiency of $51,298 and a penalty of $10,260.

On appeal, the Bobrows argued that they were permitted to take one distribution from each of their three IRAs in a calendar year under IRC §408(d)(3)(B). The Tax Court disagreed based on *Martin v. Comm'r.,* T.C. Memo 1992-331 and other cases and applied the 60-day rollover on an aggregate basis, i.e., to all of the taxpayers' IRAs collectively.

The amicus curiae brief argues that, since 1984, Publication 590 has specifically applied the 60-day rollover to each separate IRA that a taxpayer owns. The IRS does not dispute this and, in fact, is adopting new regulations along the lines of the Tax Court's decision in *Bobrow* but will only apply them prospectively starting January 1, 2015.

What we have here is a failure to communicate. It is not clear if the Tax Court will reconsider or if the collective tax counsel will take the issue to a higher authority. The amicus brief asserts that the Court "made an error with potentially catastrophic financial consequences." It is also very bad precedent to rewrite rules and impose penalties after 30 years of accepted standards. Stay tuned.

A taxpayer born of Nantucket,
Once filed his return in a bucket,
His tax-saving plans,
Were no better than clams,
And thus he decided to shuck it.

—Editor's submission to the 700 Club

Stealing van Gogh

In 1888, Vincent van Gogh stayed up for three nights in a row to paint an all-night café in Arles, France, that was frequented by derelicts who enjoyed drinking and playing billiards (and Paul Gauguin, who painted the same café). In a letter to his brother, Theo, he wrote:

"In my picture of the *Night Café* I have tried to express the idea that the café is a place where one can ruin oneself, go mad or commit a crime. So I have tried to express, as it were, the powers of darkness in a low public house, by soft Louis XV green and malachite, contrasting with yellow-green and harsh blue-greens, and all this in an atmosphere like a devil's furnace, of pale sulphur."

The resulting work, T*he Night Café,* was a masterpiece…that was given to van Gogh's landlord, Joseph Ginoux (who is depicted in the painting), in lieu of rent.

The painting became part of the collection of Russian industrialist Ivan Morozov in 1908 but was nationalized by Russia during or following the Communist revolution in 1918 when the Bolsheviks abolished private property. Later, the Soviet Union sold the painting, and it was acquired in 1933 from a New York City art gallery by Stephen Carlton Clark, a grandson of another industrialist, the founder of the Singer sewing machine company.

Clark receoved a BA from Yale in 1903 and an honorary doctorate from Yale in 1957. At his death in 1960, he bequeathed 40 paintings to Yale, including *The Night Café,* which has been displayed at Yale's Art Gallery for 50 years.

Pierre Konowaloff, a purported great-grandson of Ivan Morozov, asserted a claim to the painting, which may currently be worth as much as $150 million. His attorney argued that modern legal decisions have invalidated confiscations of art and returned paintings to rightful owners. Upholding Yale's claim would "rubber stamp good title on any dictator's plunder."

Yale argued that while the nationalization of the painting is contrary to American values, it does not violate international law. Moreover, invalidating the nationalization of art by the Soviet Union would throw tens of billions of dollars worth of artwork into turmoil and increase tensions between nations.

Federal Judge Alvin W. Thompson in New Haven, Connecticut, recently dismissed Konowaloff's claim. The judge indicated that under the "act of state" doctrine, the Court could not examine acts done by a recognized foreign government within its own territory.