Estate Planning Briefs

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Mars Estate Dispute

Frank Mars was the co-founder of the Mars candy company. In 1940 Frank's son Forrest Mars and his daughter-in-law Audrey Mars created two family trusts funded with common and preferred shares of Mars Inc.

Forrest Mars, Jr., Frank's grandson, had four children. In 2003, 2008, and 2014, the trustee (a bank) made discretionary distributions of preferred shares to each of the four children.

After Forrest Jr. died in July 2016, the IRS audited his estate tax return. The Service recharacterized the transfers from the trust as gifts from Forrest Jr., and so asserted a gift tax deficiency of nearly $117 million in gift taxes, as well as $143 million in estate taxes.

Two of the great-granddaughters have now filed suit in the Tax Court challenging the deficiency. They argue that discretionary transfers of trust principal were not transfers from their father, and that various costs of administrating the estate should be deductible.

— *Estate of Forrest E. Mars Jr. et al. v. Commissioner; No. 7104-20*

COMMENT: Forbes magazine estimated that Forrest Mars Jr. was worth $25 billion at the time of his death at age 84, which would make him the 16th-wealthiest American and 25th-richest person in the world.

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Trustee Ousted

Shirley Glass created a dynasty trust in 2005, shortly before the death of her husband, Sherwin, who was a successful businessman. The $43 million trust was for the benefit of Sherwin's two sons, their descendants and certain charities. The initial trustees included Shirley and two of Sherwin's business associates.

A resolution was signed by the trustees in 2008 covering their compensation. After Shirley died, disputes developed between the beneficiaries and the trustees over the level of compensation and the trust disbursements. Legal wrangling commenced that left no one satisfied.

In 2018, Georgia law was amended to provide for modification of trust administration. "Following the settlor's death the court shall approve a petition to: . . . Modify a non-charitable irrevocable trust if all the beneficiaries consent, the trustee has received notice of the proposed modification, and the court concludes that modification is not inconsistent with any material purpose of such trust" [OCGA § 53-12-61(c)(1)]. Consistent with that law, the trust beneficiaries unanimously asked the court to replace the individual trustees with a corporate trustee.

When the lower court granted the request, the individual trustees appealed so as to keep their positions. The Court of Appeals has now denied their motion and affirmed the decision, holding that replacing the trustees is not inconsistent with the purpose of the trust.

—Faircloth et al. v. Glass et al., A19A2393

Special Use Interest Rates

The IRS has announced the interest rates to be used in calculating the value of agricultural property under IRC §2032A, special use valuation. That section allows an executor to ignore the development potential of farm real estate, instead valuing it only as a working farm. A variety of requirements must be met to qualify for the treatment. The interest rates vary around the country, ranging from 4.53% to 5.37%.

— Rev. Rul. 2020-17; 2020-37 IRB 552

COMMENT: With the federal estate tax exemption now at $11,580,000, the number of farms exposed to the federal estate tax is expected to be low.

The Case of the Missing Key

A new conundrum may soon face the estate planning community. What happens if a decedent owned bitcoin or a similar cryptocurrency, and no one has the private key needed to access it? Perhaps the documentation can't be found, or perhaps the decedent never wrote the key down, preferring to keep it locked up in his head.

The issue was discussed by Suzanne Brown Walsh of Murtha Cullina LLP during a July 16 American Law Institute webinar and reported in Tax Notes. It the key is truly lost there is nothing of value to report on an estate tax return, because there is no mechanism for finding lost keys. On the other hand, one might argue that the bitcoin still had value at the moment of death, even though it became valueless afterward. In that case, Walsh suggested, the asset should be listed on the return but given a value of zero. If the IRS contests the zero value, "you'd want to take some sort of casualty loss deduction and take the position that the casualty loss occurred during the estate administration," she said.

COMMENT: Planning for the digital estate will only become more and more important as time marches on. As more and more financial services go digital, there will be less of a paper trail for executors to rely on for marshalling a decedent's assets.

How to Become a Highly Paid Broker

Robert Connell was a successful stockbroker, first at Bache and later Smith Barney, where he was among their top 20 advisors nationally. In 2009, after Connell learned that Smith Barney might be acquired by Morgan Stanley, he began looking for new employment. Ultimately he joined Merrill Lynch, bringing his five-person team and some $350 million worth of assets under management along with him.

The employment contract called for paying Connell $42,980 per month. In a move that was routine in these circumstances, Merrill Lynch then loaned Connell some $3.6 million, to be repaid by Connell at

$42,980 per month, deducted from his pay. This gave Connell access to his entire signing bonus while spreading the tax liability out over the term of the loan.

Loan forgiveness is taxable ordinary income to the borrower. Connell instead treated the payment as the sale of his book of business to Merrill Lynch, which could merit capital gains treatment. Indeed, Connell's former team remains at Merrill Lynch servicing the clients that he brought to the firm.

The Tax Court looked to the FINRA proceedings to determine the character of the damage award. To be thorough, Connell's lawyer had argued both the sale-of-the-book theory and breach of the employment contract. Unfortunately for Connell, FINRA did not explain their rationale for the award. The Tax Court held that he did not meet his burden of proof, so the forgiveness was ordinary income [T.C. Memo. 2018-213].

The Third Circuit Court of Appeals has now found that the Tax Court's decision was not clearly erroneous, and affirmed the judgment.

—Robert A. Connell et ux. v. Comm'r, CA-3, No. 19-2668