Cases, Regulations and Statutes

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Countries frequently mentioned are the Cook Islands, the Bahamas, Belize, Cayman Islands, Cyprus, Gibraltar, and the Turks and Caicos Islands.15

Ethical aspects

One hotly debated issue in recent years has been whether it is ethical for attorneys to establish asset protection trusts. The American Bar Association Model Rules of Professional conduct specify that it is unethical to represent a client with intent to defraud a creditor.16

Other considerations

Several risks are inherent in asset protection trusts. One important risk is that such trusts often take the form of discretionary spendthrift trusts with a foreign trustee given discretion in making distributions. The potential risks to the settlor are obvious.

Another important consideration is cost to establish (and maintain) the trust.17 The costs involved often run into five figures.18

Possible political and economic instability in the country (or a change in the attitude of the country toward asset protection trusts) is an important additional consideration. Organized groups of creditors can be expected to lobby the U.S. Government to use whatever leverage can be exercised to discourage statutory protection measures.

FOOTNOTES

3 See Marty-Nelson, supra n. 2 at 30.
4 Id.
5 E.g., Wis. Stat. Ann. § 701.06(1).
6 Id.
7 Uniform Fraudulent Transfers Act (UFTA) § 4(a)(1).
9 UFTA § 4(a)(1).
10 UFTA § 7.
11 See ns. 13-14 infra and accompanying text.
12 See Marty-Nelson, supra n. 2 at 61.
15 Id.
16 See ABA, Model Rules of Professional Conduct, rule 1.2(d) (1983).
17 See Marty-Nelson, supra n. 2 at 68.
18 Id.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ANIMALS

HORSES. The plaintiff was injured when the plaintiff’s motorcycle struck a horse on the highway. The plaintiff sued, under 510 ILCS 55/1 et seq. and a theory of negligence, the owner of the horse and the previous owner of the horse. The plaintiff also sued, under a theory of negligence only, the owner of the land on which the horse was kept. The previous owner had sold the horse to the current owner under an installment contract under which $170 was still owed at the time of the accident. The sale was recorded on the Certificate of Foal Registration. The court held that the previous owner had insufficient interest in the horse to be liable under the statute for the accident. The court held that liability for an animal at large on a highway had to be based upon the statute because under common law, landowners were not liable for damages done by escaped animals. Therefore, an action based solely on a theory of negligence against the defendant landowner was properly dismissed. Douglcss v. Dolan, 675 N.E.2d 1012 (Ill. Ct. App. 1997).

BANKRUPTCY

GENERAL-ALM § 13.03.*

EXEMPTIONS

HOMESTEAD. The debtors owned six parcels of land, including one used for the residence and five used for farming. Prior to filing for Chapter 12, the debtors had transferred title to three parcels to a family partnership. A creditor argued that the five parcels were not eligible for the rural homestead exemption because the parcels were located within city limits. However, the creditor failed to provide any evidence of the location of the parcels and the debtors testified that the parcels were all used for farming; therefore, the court held that all parcels were eligible for the rural homestead exemption. The creditor also argued that the three parcels transferred to the partnership were not eligible for the exemption because the parcels were not owned by the debtors. The court held that the debtors’ partnership interest in the three parcels was insufficient for eligibility for claiming a homestead exemption in the parcels. In re Cole, 205 B.R. 382 (Bankr. E.D. Tex. 1997).

GRAIN STORAGE FACILITY. The debtor’s business consisted primarily of purchasing grain for
conditioning and resale as seed, either to third parties or the producer of the grain. The debtor also sold farm equipment and various farm inputs. Several creditors sought a fifth priority under Section 507(a)(5)(A) for their claims against the debtor as a grain storage facility. The court held that claims from creditors who purchased, but did not receive, farm equipment and farm inputs were not entitled to priority because the claims did not involve grain or the proceeds of grain. The court also denied fifth priority to claims for unpaid wages. The court denied a fifth priority to claims for the prepayment for seed which was not delivered to creditors who were not producers of grain but who sold the seed to third parties. The last group of creditors were grain producers who sold grain to the debtor and who were not paid. Some of the grain was processed for seed but some was resold to third parties to the extent not needed for the seed inventory. The court held that Section 507(a)(5)(A) was not intended to apply to situations where grain was sold to the storage facility with title passing to the facility. The court assumed that the debtor qualified as a grain storage facility, although doubted that the debtor qualified as a grain storage facility. The court held that, in order for a producer to be entitled to the fifth priority, the producer must have retained title to the grain while the grain was in the storage facility. In re Mickelson, 205 B.R. 190 (D. N.D. 1996), aff’d, 192 B.R. 516 (Bankr. D. N.D. 1996).

FEDERAL TAXATION-ALM § 13.03[7].*

DISCHARGE. The debtor had filed income tax returns for 1989 and 1990, more than three years before the bankruptcy petition and all assessments for those taxes were made more than 240 days before the petition. The IRS argued that the taxes were nondischargeable because the tax returns were fraudulent in that not all of the debtor’s and the debtor’s spouse’s income was claimed on the return. The spouse had embezzled money from an employer and had not reported the funds in income. The spouse had always prepared the income tax returns and the debtor signed the returns without questioning the accuracy of the returns or knowledge that the returns were false. The court held that the IRS failed to demonstrate that the debtor had knowledge that the returns were false or that the debtor’s failure to question the returns was unreasonable. In re Blaker, 205 B.R. 326 (Bankr. M.D. Fla. 1996).

In 1986, the debtor filed accurate income tax returns which included withheld taxes on wages received by the debtor. In 1987, the debtor filed a new Form W-4, claiming that no taxes needed to be withheld from the wages. The debtor attended several meetings of a tax protestor group and received advisor letters as to how to avoid paying income tax. The debtor failed to file returns for and pay taxes due for 1987, 1988, 1989 and 1990. The IRS sent the debtor several letters in these years warning the debtor that tax was owed on wages and that failure to pay the taxes could subject the debtor to civil and criminal penalties. The IRS sought to have the taxes for 1987, 1988, 1989, and 1990 declared nondischargeable for willful attempt to evade payment of taxes. The court held that the evidence demonstrated that the debtor understood the income tax return filing and tax payment requirements in pre-1987 years and that the decision to not file and pay the taxes was a willful attempt to avoid payment of the taxes, making the taxes nondischargeable in bankruptcy. In re El-Swaiaty, 97-1 U.S. Tax Cas. (CCH) ¶ 50,332 (Bankr. D. Hawaii 1997).

DISMISSAL. The debtor filed a Chapter 13 case in August 1991 and did not file income tax returns during the case for 1992, 1993, 1994 and 1995. The plan was confirmed in 1992 and the debtor was current in all plan payments. The court had issued a general order in 1993 requiring all debtors to file post-petition income tax returns. The court held that the failure to file post-petition income tax returns was sufficient grounds for dismissal of the case. In re Koval, 205 B.R. 72 (Bankr. N.D. Tex. 1996).

ESTATE PROPERTY. The debtor filed for bankruptcy in September 1995 and filed the 1995 tax return in January 1996, claiming a refund. The trustee argued that a prorated portion of the refund was estate property, equal to the proportion of pre- and post-bankruptcy days in the 1995 tax year. The debtor argued that the refund was not estate property because no refund was due when the petition was filed. The court held that the prorated portion of the refund was estate property. The case makes no mention of the effect of electing to end the tax year on the petition date, but the case raises another issue for consideration when determining whether that election would be beneficial to a debtor. In re Dussing, 205 B.R. 332 (Bankr. M.D. Fla. 1996).

JURISDICTION. The debtors included individuals and the partnership owned by the individuals. The debtor made the election, under I.R.C § 1398, to terminate their tax year as of the date of the bankruptcy petition. The debtors listed claims by the IRS for the pre-petition tax year and also identified the amount of post-petition taxes due for the second short tax year. The IRS disputed the pre-petition claim and also disputed the amount of post-petition tax due. The debtors sought a determination of the pre- and post-petition tax liabilities. The IRS objected, arguing that the Bankruptcy Court had no jurisdiction over the post-petition taxes because the taxes were the personal liability of the debtors and did not affect the bankruptcy estate. The court noted that, under the plan, the post-petition taxes were to be paid from a fund set up to make plan payments. The court held that it had jurisdiction, under Section 505(a), because the amount of post-petition taxes would affect the plan payments and were a personal liability of the debtors. In re Schmidt, 205 B.R. 394 (Bankr. N.D. Ill. 1997).

SETOFF. The debtors operated a reforestation business which reforested land under contracts with the USDA. In order to finance their operations, the debtors assigned these contracts to a third party lender. The IRS filed a notice of setoff with the USDA to setoff the amounts owed to the debtors against tax deficiency claims filed by the IRS in the debtors’ bankruptcy case. The IRS also sought turnover of amounts paid to the lender. The court held that the assignments of the contracts were valid
but that financing statement filed by the lender as to the contracts were not valid as against the IRS; therefore, the IRS could setoff amounts due under the contracts even though the contracts had been assigned and pledged as security. However, the court also held that the IRS could not recover amounts already paid to the assignee. In re Medina, 205 B.R. 216 (Bankr. 9th Cir. 1996), aff’d on point, 177 B.R. 335 (Bankr. D. Or. 1994).

FEDERAL AGRICULTURAL PROGRAMS

CROP INSURANCE. The FCIC has issued proposed regulations which include the popcorn endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. 62 Fed. Reg. 17103 (April 9, 1997).

The FCIC has issued proposed regulations which include the Safflower seed endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. 62 Fed. Reg. 17758 (April 11, 1997).

FEDERAL ESTATE AND GIFT TAX

CHARITABLE DEDUCTION. The decedent’s will provided for establishment and funding of trusts for the decedent’s nieces, with remainders to a charitable foundation. The trust provided that the trustee had the discretion to allocate items of income and expense to income or principal. The trust sold some assets and realized taxable gain on the sale. The trustee allocated the gains to principal and sought an I.R.C. § 642(c) charitable set aside deduction for the amounts allocated to principal. The IRS ruled that, because the trustee had the power to allocate items of income to principal or income, no charitable set aside deduction was allowed. Ltr. Rul. 9714001, Dec. 5, 1996.

The taxpayer owned a farm which was rented out to third parties, except for the residence. The rent was paid in cash and was based on a percentage of the crop produced. The taxpayer had established a private foundation which was exempt from taxation under I.R.C. § 501(c)(3). The taxpayer served on the foundation’s board of directors and was an officer of the foundation. The taxpayer transferred the entire farm to the foundation, reserving a life estate. The taxpayer planned to abstain from all foundation board of director actions involving the farm. The IRS ruled that the transfer was eligible for an income tax charitable deduction and a gift tax charitable deduction based on the value of the remainder interest held by the foundation. Ltr. Rul. 9714017, Dec. 30, 1996.

DISCLAIMERS-ALM § 5.02[6]. The taxpayer’s parent’s will in 1984 established a trust for the surviving spouse as sole income beneficiary. The taxpayer had a remainder interest in the trust contingent upon surviving the beneficiary. The taxpayer wanted to disclaim any income interest in the remainder of the trust. The IRS ruled that the disclaimer would not be effective because it was not made within nine months after the trust was created in 1984. The IRS also ruled that the disclaimer resulted in a gift to the other remainder holders and that the value of the disclaimed portion was subject to GSTT when the trust principal passed to the taxpayer’s children. Ltr. Rul. 9714030, Jan. 7, 1997.

The decedent’s spouse died in May 1986 and the will provided for most of the estate to pass to the decedent. The decedent had discussed with attorneys the possibility of renouncing all or part of the bequest but no disclaimer in writing was executed. The predeceased spouse’s executor paid some of the decedent’s nursing home expenses from a joint bank account in the names of the predeceased spouse and the executor. The bank account funds were community property. The decedent died in January 1987 and the heirs obtained a court order that the decedent’s discussion with attorneys about disclaiming the bequest from the predeceased spouse was an effective renunciation of two-sevenths of the bequest. The court held that the decedent’s disclaimer of the bequest was not effective for federal estate tax purposes because the disclaimer could not be made by the decedent’s heirs. Under La. Civil Code art. 1007, heirs have the authority to accept a bequest for a decedent, but the statute was silent as to the authority of heirs to renounce a bequest for a decedent. In addition, the court held that the disclaimer was not effective because the decedent had received some of the benefits of the bequest when a portion of the decedent’s nursing home expenses were paid from the account in the name of the predeceased spouse. Est. of DeLaune v. United States, 97-1 U.S. Tax Cas. (CCH) ¶ 60,266 (M.D. La. 1997).

GIFT-ALM § 6.01.* The taxpayer wanted to set up a son in business and formed a new corporation, contributing $5,000 in exchange for 51 percent of the shares of the company, with the other 49 issued in the son’s name. The taxpayer then issued a “counterletter” which stated that all of the stock was actually owned by the son and that the taxpayer was listed as owner only to make use of the taxpayer’s business reputation for the new corporation. The counterletter was effective under local law to vest the son with ownership rights in the stock. Full title was conveyed several years later and the IRS argued that a gift occurred at that time because the taxpayer did not relinquish control over the stock and the corporation until that time. The court held that, because the counterletter was effective under local law to transfer all rights in the stock to the son, the gift was completed upon issuance of the letter. Autin v. Comm’r, 97-1 U.S. Tax Cas. (CCH) ¶ 60,265 (5th Cir. 1997).

SPECIAL USE VALUATION-ALM § 5.03[2].* Senator Lugar has introduced S. 549 which would allow, without causing recapture of special use valuation benefits, a qualified heir to cash rent special use valuation property to a member of the decedent’s family or the decedent’s spouse’s family if “such member uses such property in a qualified use.” Query: what does the quoted language mean?

* Agricultural Law Manual (ALM). For information about ordering the Manual, see the last page of this issue.
The IRS has issued the 1997 list of average annual effective interest rates charged on new loans by the Farm Credit Bank system to be used in computing the value of real property for special use valuation purposes:

<table>
<thead>
<tr>
<th>District</th>
<th>Interest Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Columbia</td>
<td>8.88</td>
</tr>
<tr>
<td>Omaha</td>
<td>8.09</td>
</tr>
<tr>
<td>Sacramento</td>
<td>8.49</td>
</tr>
<tr>
<td>St. Paul</td>
<td>8.39</td>
</tr>
<tr>
<td>Spokane</td>
<td>8.27</td>
</tr>
<tr>
<td>Springfield</td>
<td>8.57</td>
</tr>
<tr>
<td>Texas</td>
<td>8.42</td>
</tr>
<tr>
<td>Wichita</td>
<td>8.21</td>
</tr>
</tbody>
</table>


TRUSTS. The taxpayer transferred three parcels of land, including one parcel containing the residence and two parcels with associated buildings. The taxpayer was the beneficiary of the trusts for a set number of years, after which the taxpayer had the option to lease the properties from the trust for fair rental value. The IRS ruled that the trust was a Qualified Personal Residence Trust and if the taxpayer survived the term of the trust, the trust corpus would not be included in the taxpayer’s estate. Ltr. Rul. 9714025, Jan. 6, 1997.

VALUATION. The decedent had been the beneficiary of two trusts, a revocable trust and a marital trust established at the death of the decedent’s pre-deceased spouse. The decedent’s two heirs were the trustees of both trusts. Two days before the decedent’s death and when the decedent was known to be terminally ill, the trustees transferred the trusts’ assets to a new limited partnership in exchange for limited partnership interests. The heirs then each purchased 30 percent interests in the partnership in exchange for promissory notes. The purchase left the estate with minority interests in the partnership and the estate decreased the value of the partnerships for estate tax purposes, using a minority discount. The transactions did not affect each heir’s share of the estate which was acquired at the decedent’s death. The IRS ruled that the estate would not be allowed a minority discount for the value of the partnership interests because the transactions were done only to create a valuation discount and had no valid business purpose. Unpublished T.A.M.

FEDERAL INCOME TAXATION

BAD DEBTS. The taxpayer made advances of cash to two interrelated companies. The advances were evidenced by notes which contained interest rates and maturity dates but did not set a repayment schedule. The notes were not produced at trial, nor were any other corroborating records of the taxpayer. The court held that, without any supporting records or copies of the notes, the mere testimony of the taxpayer that the advances were loans and not capital contributions was not credible; therefore, the court held that no business bad deduction was allowed for the advances. Pyron v. Comm’r, T.C. Memo. 1997-178.

CASUALTY LOSSES. The President has declared certain areas of West Virginia as disaster areas from Feb. 28, 1997 storms and areas of Illinois as disaster areas from storms and flooding beginning on March 1, 1997. Losses from these casualties may be deducted in taxpayers’ 1996 returns.

The IRS has announced that uninsured casualty losses from the floods in North and South Dakota may be claimed on taxpayers’ 1996 returns. IR-97-21.

EMPLOYER. The taxpayer owned farm land which was rented on a cropshare basis to several tenants. Because the tenants did not have sufficient funds to pay any employees during the crop year, the taxpayer paid all wages for the employees and deducted the payments from the tenants’ share of the crop at the end of the year. The IRS assessed unpaid FICA and FUTA taxes against the taxpayer as the employer of the tenants’ employees. The taxpayer argued that the tenants were the employees for purposes of payment of FICA and FUTA taxes because the tenants controlled the employees. The IRS argued that I.R.C. § 3401(d) was clear that whoever controlled the payment of wages was considered the employer for FICA and FUTA purposes. The court held that the taxpayer was the employer for FICA and FUTA purposes. Winstead v. United States, 97-1 U.S. Tax Cas. (CCH) ¶ 50,322 (4th Cir. 1997).

PARTNERSHIP-ALM § 7.03.*

DEFINITION. The IRS assessed the taxpayer for employment taxes not paid on amounts paid to a person who worked in the taxpayer’s business. The taxpayer argued that the person was a partner in the business and received a share of the partnership profits. The court found that the employee did not have any right to the business books and had no authority to write checks and that the taxpayer had not filed any federal partnership income tax returns, had not registered the business as a partnership with the state and had represented to the IRS in earlier audits that the business was not a partnership. The court held that the worker was an employee and that the taxpayer was liable for the employment taxes on the amounts paid to the worker. In re Boyd, 97-1 U.S. Tax Cas. (CCH) ¶ 50,324 (Bankr. W.D. Okla. 1997).

SALE OF PARTNERSHIP INTEREST. Under the partnership agreement, upon the death or withdrawal of a partner which did not cause a dissolution and termination of the partnership, the remaining partners were to purchase the withdrawing partner’s interest. The payments were the personal liability of the remaining partners and the withdrawing partner or the decedent partner’s estate was prohibited from seeking any deficiency from the partnership or the other partners if any one partner failed to make the required payments. The payments were fixed in part, calculated as the partner’s capital account plus a fixed cash amount plus any previous amounts paid by the partner to another withdrawing partner. The payments also included an amount contingent upon the net profits of the partnership. The IRS ruled (1) the withdrawal payments constituted a sale of the withdrawing partner’s interest under I.R.C. § 741; (2) under Treas. Reg. § 1.706-1(c)(3)(v), the portion of the distributive share of partnership income that was attributable to the decedent ending with the date of the decedent’s death was income
in respect of decedent, including payments made by the remaining partners which would have been income in respect of decedent had the items been owned directly by the deceased partner; and (3) contingent payments made by remaining partners increased that partner’s basis in the partnership interest to the extent treated as principal. Ltr. Rul. 9715008, Dec. 4, 1996.

RETURNS. Under the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1210, 110 Stat. 1452 (1996) the “timely mailing as timely filing/paying” rule of I.R.C. § 7502(a) can be met by using designated private delivery service instead of the U.S. Postal Service. The IRS has announced the designation of four private delivery services: (1) Airborne Express: Overnight Air Express Service, Next Afternoon Service and Second Day Service; (2) DHL Worldwide Express: DHL “Same Day” Service and DHL USA Overnight; (3) Federal Express: FedEx Priority Overnight, FedEx Standard Overnight and FedEx 2Day; and (4) United Parcel Service: UPS Next day Air, Next Day Air Saver, UPS 2d Day Air and UPS 2d Day Air A.M. Notice 97-26, I.R.B. 1997—___—._

S CORPORATIONS-ALM § 7.02[3][c].*

ELECTION. The taxpayer was a corporation which wanted to make the S corporation election for a tax year. The corporation filled out Form 2553 and gave the form to its attorney for filing with the IRS; however, the attorney failed to file the form in time to allow the S corporation election to be effective for the tax year desired. The IRS ruled that the taxpayer had established reasonable cause for the failure to timely file the election; therefore, the taxpayer was allowed to file as an S corporation as of the originally intended tax year. Ltr. Rul. 9715021, Jan. 10, 1997.

SALE OF RESIDENCE. The taxpayers, husband and wife, owned a residence and sought to purchase a new residence. The taxpayers had difficulty financing the second house because the first house was unsold. The taxpayers had the husband’s parents purchase the new house. The title to the new house was in the parents’ name and the parents obtained a mortgage loan for the purchase. The taxpayers reimbursed the parents for all payments on the mortgage. The taxpayers sold their first house in the same tax year to the husband’s parents and used a portion of the proceeds to establish a fund from which the mortgage payments were made to the parents for the second house. More than two years later, the parents transferred the second house to the taxpayers as a gift. The court held that the taxpayers were not eligible for rollover of the gain from the sale of their first house because they did not acquire title to the second house until more than two years later when the second house was given to them. The court focused on the facts that the parents had title to the second house and were liable on the mortgage and that none of the sale documents mentioned anything about the parents acting as agents for the taxpayers in acquiring the house. De Ocampo v. Comm’r, T.C. Memo. 1997-161.

The taxpayers purchased unimproved land with the intent to build a residence on the land. The taxpayers were unable to fund the construction and the land was sold with only the foundation of the house completed. The taxpayers were over the age of 55 and sought to exclude gain from the sale under I.R.C. § 121. The court held that no exclusion was allowed because the land was never used as the taxpayers’ primary residence. Vidaurre v. Comm’r, T.C. Memo. 1997-164.

SELF-EMPLOYMENT INCOME. In Harl, “Renting Land to Family Entity,” 7 Agric. Law Dig. 157 (1996), Mizell v. Comm’r, T.C. Memo. 1995-571 and Ltr. Rul. 9637004, May 1, 1996, were discussed. The case provided that self-employment income tax was incurred on rental income from a non-material participation crop share lease to a family farm partnership in which the landowner was a 25 percent partner and required, under the partnership agreement but not the lease, to participate in the partnership operations. The ruling involved a cash rent lease to a corporation. In both, the IRS had focused on language in I.R.C. § 1402 which included in material participation an arrangement between the landowner and tenant which required the material participation of the landowner in the farm operation. Senators Grassley and Grams have introduced S. 529, the “Farm Independence Act of 1997,” which amends I.R.C. § 1402 to change the term “an arrangement” to “a lease agreement.” In remarks concerning the legislation, Senators Grassley and Grams clarify that the legislation is intended to limit the scope of IRS investigation of required material participation by the landlord to the terms of the lease. 97 ARD 072-13 (CCH).

SOCIAL SECURITY BENEFITS. The taxpayers sought a refund of income taxes paid on social security benefits, arguing that the imposition of tax was unconstitutional (1) as a tax levied without apportionment according to population, (2) under the doctrine of intergovernmental tax immunity, and (3) as too indefinite and vague. The court rejected the taxpayers’ arguments and upheld the tax, under I.R.C. § 86, of social security benefits. Lansden v. Comm’r, 97-1 U.S. Tax Cas. (CCH) ¶ 50,319 (M.D. Tenn. 1997).

TRAVEL EXPENSES. The taxpayer was a corporation which owned an airplane used 90 percent in the corporation’s business. The corporation used the airplane to transport an officer-shareholder to and from a vacation site where no corporation business was transacted. The corporation deducted all costs of the airplane as business expenses and included the costs of the transportation of the officer-shareholder to the vacation site as wages subject to withholding. The IRS ruled that, under I.R.C. § 274(e)(2), the corporation could deduct the airplane expenses for the vacation trips only to the extent the costs were included in the taxable compensation of the officer-shareholder. Ltr. Rul. 9715001, Oct. 31, 1996.

TRUSTS. The IRS has issued a warning to taxpayers to avoid abusive trust arrangements that are promoted as allowing tax benefits without changing the control or true ownership of the taxpayer’s assets, including income. The IRS noted that abusive trusts are being actively examined under National Compliance, Fiduciary and Special Projects and may subject taxpayers and promoters to civil and/or criminal penalties. Taxpayers should be aware of arrangements that make personal living expenses deductible or that make transfers to family members

* Agricultural Law Manual (ALM). For information about ordering the Manual, see the last page of this issue.

LANDLORD AND TENANT

LEASE. The property involved in this case was originally owned by the grandparents of the defendant. The grandparents had entered into leases with the tenants and, when the grandparents died, the parent as executor of the estate entered into a lease with the tenant for 20 years. The tenants failed to produce a signed copy of this lease but had an unsigned copy and claimed to have made advance payments of $30,000 toward the 20 year lease payments. The parent died and the defendants pledged the farm as security for a loan. When the defendants defaulted on the loan, the creditor sought to foreclose against the property. The tenant argued that the lease took priority over the security interest or that the tenant was entitled to damages for loss of profits over the normal term of the lease and for return of advance lease payments. The creditor argued that the grandparent had no authority to enter into the lease because the grandparent was restricted by the probate court to first obtain court permission before any conveyance of the property. The tenant argued that a lease was not a conveyance and was allowable without prior probate court consent. The court held that although the term “convey” was ambiguous, under either interpretation, a summary judgment for the creditor was improper because the tenants may not have had notice of the restriction on the grandparent’s authority to make the lease. The court also reversed summary judgment for the creditor on the issue of unjust enrichment in that the tenants had presented sufficient evidence that advance payments may have been made. AgAmerica v. Westgate, 931 P.2d 1 (Idaho Ct. App. 1997).

PROPERTY

PARTITION. The plaintiff claimed a one-half interest in a farm occupied by the defendants. The defendants claimed ownership of the entire farm through adverse possession. The plaintiffs filed the current action for partition of the property and the trial court ruled that the plaintiff owned a one-half interest in the farm and ordered the partitioning of the property. The defendants argued that, because the defendants claimed title by adverse possession, the plaintiffs were first required to obtain a judgment of ejectment before a partition could be ordered. The court held that an action for ejectment was unnecessary where the trial court determined that the plaintiffs had an interest in the property. Greene v. Pearson, 937 S.W.2d 743 (Mo. Ct. App. 1996).

STATE REGULATION OF AGRICULTURE

LIVESTOCK EXHIBITIONS. The plaintiff had entered a steer in the Junior Livestock Division at the Ohio State Fair. The steer was sold as part of that competition and was slaughtered and tested. The steer was found to have vegetable oil in its carcass and the plaintiff was notified that the entry was disqualified for tampering. The plaintiff was required to return the proceeds of the sale and was barred from competition in the next three state fairs. The defendant commission provided the plaintiff with a hearing on the notification and disqualification. The plaintiff was allowed to be represented by counsel and the state department of agriculture was represented by counsel who assisted the attorney general’s office in the hearing. The commission did not change its ruling after the hearing and the plaintiff sought judicial review. The commission argued that the court had no jurisdiction under Ohio Rev. Code Chapter 119, because the commission was not listed as an agency subject to that chapter nor did the commission conduct the hearing under that chapter. The court agreed, holding that without express statutory authority for applying Chapter 119 to the commission, the court had no review jurisdiction over the disqualification ruling. Abt v. Ohio Expositions Comm'n, 675 N.E. 2d 43 (Ohio Ct. App. 1996).

TRESPASS

DAMAGES. The defendant had negligently cut timber on the plaintiff’s land. The plaintiff discovered the cutting before the logs were removed, repossessed the logs and sold them. The trial court calculated damages by using the sale price of the logs as the fair market value of the trees and doubling that amount. The court then reduced the damage award by the proceeds of the sale of the logs, decreased by the income tax paid on the proceeds, increased by the costs to the plaintiff to clean up the logging site, and decreased by the costs incurred by the defendant in cutting the trees. Under Wis. Stat. § 26.09, the plaintiff was entitled to double “the amount of damages suffered.” The plaintiff argued that the term “amount of damages suffered” referred solely to the market value of the trees cut, without adjustment for the costs of the cutting. The court examined the legislative history to resolve the ambiguity in the statute and held that the statute intended that the damages be determined as the actual amount of loss of the plaintiff, determined by adjusting the award of double the fair market value of the trees by any recovery made by the plaintiff and the costs of cutting the trees incurred by the defendant. Tydrich v. Bonkamp, 558 N.W.2d 692 (Wis. Ct. App. 1996).

WATER

UNDERGROUND STREAMS. The plaintiffs owned farm land adjacent to land owned by the defendant which operated a gravel quarry on the land. An underground spring flowed from the defendant’s land through the plaintiff’s land and was used by the plaintiffs as a source of water. The plaintiffs alleged that the defendant’s quarry activity caused an underground spring to dry up. The trial court had granted the defendant summary judgment, ruling that no action could lie where the defendant was pursuing a lawful activity on the land. The appellate court reversed, holding that persons who benefit from a subterranean watercourse have a public or natural easement to the uninterrupted use of the watercourse and that an upstream landowner may not stop or divert the watercourse, even through lawful use of the property. Maddocks v. Giles, 686 A.2d 1069 (Me. 1996).
SEM Tin PARADISE
FARM ESTATE AND BUSINESS
PLANNING by Dr. Neil E. Harl
January 5-9, 1998

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