

# GSRM

GULLETT SANFORD  
ROBINSON & MARTIN PLLC  
*Attorneys at Law*

GULLETT SANFORD  
ROBINSON & MARTIN

## GSRM News: Estate Planning & Probate from the Hill

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Gullett Sanford Robinson & Martin (GSRM) is pleased to introduce, for our professional colleagues and friends, a newsletter covering recent Tennessee legislative events. Since 1942, GSRM has represented individuals, fiduciaries and closely-held businesses throughout Middle Tennessee in estate planning and probate matters. It is our hope that this newsletter will provide you with valuable insight and assist you with identifying potential estate planning and probate issues affecting your clients.

GSRM's Estate Planning & Probate from the Hill tracks estate planning and probate legislation generally and is not intended to be legal advice. We will distribute this newsletter at the close of each legislative session and periodically as new significant developments occur.

The Tennessee General Assembly recently adjourned. This edition of our newsletter identifies bills enacted into law during the 2010 legislative session. Most take effect on July 1, 2010. More information on individual bills may be found at the Tennessee General Assembly website ([www.legislature.state.tn.us](http://www.legislature.state.tn.us)).

### 2010 BILLS ADOPTED

*Public Chapter No. 638; T.C.A. § 32-3-113*

#### **Trusts & Estates: Wills and Trusts of Persons who Die in 2010**

This new law provides that wills and trusts of persons who die in 2010, which contain certain specified tax planning language, shall be construed to refer to the federal estate and generation-skipping transfer tax laws that applied to persons who died in 2009. This new law shall not apply: (1) if Congress reinstates the Federal estate tax retroactively to January 1, 2010, (2) to a will or trust executed or amended in 2010 or which manifests an intent that a contrary rule shall apply if the person dies and no Federal estate tax exists, (3) if all interested parties to a will or trust opt out of the new law by giving proper notice within nine months following the person's death, or (4) if an interested party timely files a court proceeding and persuades the court that the tax planning formula should be construed based upon the law as it existed in 2010. This new law is designed to address the unintended consequences that might otherwise result in cases involving wills and trusts executed by persons prior to 2010 who did not contemplate the repeal of federal estate tax in 2010.

*Public Chapter No. 657; T.C.A. § 32-3-113*

#### **Estates: Post-Death Modifications of Wills**

This new law allows a court to modify the terms of a deceased person's will to achieve his or her probable tax objectives. It does not allow the court to apply a modification retroactively. The benefit



Jack Robinson, Sr.



Mark H. Westlake



Andra J. Hedrick



Robert J. Hazard

of this new law is that it allows interested parties to pursue various tax minimization techniques, even if the deceased person failed to include all of the necessary tax saving language in his or her will. This new law does not apply to revocable living trusts. However, post-death modifications to trusts to achieve tax objectives are already permissible in certain instances under the Tennessee Uniform Trust Code.

*Public Chapter No. 530; T.C.A. § 67-8-409*

**Estates: Automatic Twelve (12) Month Extension to File Inheritance Tax Return**

This new law provides for an automatic extension of twelve months to file and pay the Tennessee inheritance tax if a request for extension is made in writing by the personal representative, or by providing a copy of the personal representative's request for an automatic extension of time to file the federal estate tax return.

*Public Chapter No. 639; T.C.A. § 35-10-206(d)*

**Trusts: Modifications of Restrictions on Charitable Trusts**

This act amends the Uniform Prudent Management of Institutional Funds Act to allow the release or modification of certain restrictions that would otherwise apply to a charitable trust having a total value less than \$150,000 if the restriction has become impractical, wasteful, impossible to achieve or illegal. The charitable trust must have been established for at least 20 years, the attorney general must be given timely notice of the proposed release or modification, and the trust property must be used in a manner consistent with the charitable purposes expressed in the trust instrument. The primary benefit of this law is that it allows more flexibility to terminate a trust or to liquidate or distribute its assets in situations in which the value of the trust property is insufficient to justify the costs of administration.

*Public Chapter No. 658; T.C.A. § 35-17-101 et seq.*

**Trusts: Tennessee Community Property Trust Act of 2010**

The Tennessee Community Property Trust Act of 2010 allows married couples to convert property to community property by conveying it to a Tennessee community property trust. Tennessee is not a community property state. This new law is designed to allow married couples living in Tennessee to take advantage of some of the same benefits previously available only to persons living in a community property state. The primary benefit is a step up in cost basis of the trust property on the death of the first spouse who dies on or after January 1, 2011. While Tennessee community property trusts are expected to be beneficial for some couples, these trusts may potentially have harsh or undesirable consequences for others. The circumstances of every married couple are unique. If married persons are contemplating use of a Tennessee community property trust, they should first seek competent professional advice as to the potential benefits and pitfalls of this option.

*Public Chapter No. 725 (Sec. 1); T.C.A. § 35-6-409*

**Trusts & Estates: Estate Tax Marital Deduction**

Current law applicable to estates and trusts provides that interest and dividend payments are allocated to income and other payments are allocated to principal. If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income, then the trustee must allocate to income the additional amount necessary to obtain the marital deduction. This act amends the current law to provide that if the payments made according to the current law would not qualify for the deduction, then internal income from a qualified "separate fund" may be allocated as income payments to obtain the amount necessary to obtain the marital deduction. This new law is designed to assist taxpayers in meeting and maintaining the necessary requirements to qualify for the marital deduction for estate tax purposes, and ultimately to minimize and/or defer payment of taxation.

*Public Chapter No. 725 (Sec. 2); T.C.A. § 35-15-505(a)*

**Trusts: Creditor's Claims Against Special Needs Trusts**

This act provides that a creditor of the settlor of an irrevocable special needs trust (SNT) may not reach or compel distributions from the SNT, to or for the benefit of the settlor of the SNT. The existence of one or more nondisabled remainder beneficiaries of the SNT does not disqualify it from being subject to the asset protection aspects of this new law. This act protects the assets of the SNT and promotes responsible long-term planning for the care of persons with special needs.

*Public Chapter No. 725 (Sec. 7); T.C.A. § 35-15-505(d)*

**Trusts: Inter-Vivos Marital Trust Distributions to Settlor**

This act specifies that distributions from an inter-vivos marital trust established for the benefit of the settlor's spouse, which are made to or for the benefit of the settlor after the death of the settlor's spouse, are not to be considered an amount that may be distributed to or for the benefit of the settlor. Thus, the trust does not become subject to the settlor's creditors.

*Public Chapter No. 725 (Sec. 8); T.C.A. § 35-15-802*

**Trusts: Trustee/Fiduciary Transactions with Affiliates**

This act revises the Tennessee Uniform Trust Code to specify that a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment, as well as delegate to an affiliate or other agent associated with the fiduciary. The transaction must be fairly priced and in accordance with the interests of the beneficiaries and must otherwise comply with the Uniform Prudent Investor Act. Further, the fiduciary may receive compensation at the same rate as the fiduciary would otherwise be entitled. The act provides that there is no presumption of a conflict between the personal and fiduciary interests of the fiduciary so long as certain disclosure requirements are met.

*Public Chapter No. 725 (Sec. 9); T.C.A. § 35-15-813*

**Trusts: Confidentiality Restrictions**

This act provides that if a trustee of a trust is bound by any written confidentiality restrictions with respect to an asset of a trust, the trustee may require any beneficiary eligible to receive information about the asset to agree, in writing, to be bound by the same confidentiality restrictions as applicable to the trustee, before the beneficiary receives such information.

*Public Chapter No. 725 (Sec. 10); T.C.A. § 35-15-1010*

**Trusts: Tort Liability for Trustees**

Under present law, a trustee is not personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, unless the trustee is personally at fault. This act amends the present law to clarify that the immunity applies unless the trustee is personally at fault “on account of the trustee’s own willful misconduct proven by clear and convincing evidence.”

*Public Chapter No. 725 (Sec. 14) ; T.C.A. § 35-16-104*

**Trusts: Tennessee Investment Services Trust - Claims Against**

Present law provides for certain exceptions to the limitations on actions by creditors, as well as the present law statute of limitations. This act amends present law to clarify that these exceptions do not apply to claims for forced heirship, legitime or elective share. It further authorizes an action in the case of a creditor whose claim arose after a qualified disposition, if the qualified disposition was made with actual intent to defraud the creditor.

*Public Chapter No. 725 (Sec. 19); T.C.A. § 35-16-111*

**Trusts: Tennessee Investment Services Trust - Payment of Taxes and Certain Debts**

Under present law, an investment services trust is not deemed revocable even if it includes certain provisions as detailed in present law. This amendment adds various provisions regarding the payment of taxes and certain debts, and provides that the inclusion of such provisions does not make an investment services trust revocable.

*Public Chapter No. 725 (Sec. 18); T.C.A. § 35-16-109*

**Trusts: Tennessee Investment Services Trust - Investment Advisor Authority**

Present law authorizes a person to serve as an investment advisor even if the person is the transferor of the qualified disposition. However, the person may not otherwise serve as advisor to a trust that is a qualified disposition except with respect to the retention of the veto right to veto a disposition of the trust. This amendment removes this exception to the provision authorizing a person to serve as an investment advisor even if the person is the transferor of the qualified disposition.

*Public Chapter No. 725 (Sec. 20); T.C.A. § 66-1-202(f)*

**Trusts: Rule Against Perpetuities**

Under present law the terms of any trust that is created after June 30, 2007 or that becomes irrevocable after June 30, 2007 must include language requiring that all beneficial interests in the trust vest or terminate or that the power of appointment be exercised within 360 years. This provision only applies to trusts that grant a power of appointment at death to at least one member of each generation of beneficiaries who are beneficiaries of the trust more than 90 years after the creation of the interest. This amendment removes the provision that there be a power of appointment to at least one member of each generation of beneficiaries who are beneficiaries more than 90 years after the creation of the interest.

*Public Chapter No. 725 (Sec. 21); T.C.A. § 35-17-101*

**Trusts: Unitrusts**

This new law authorizes a majority of the trustees who are not interested trustees to convert an income trust to a total return

unitrust. A unitrust provides for mandatory distributions of income and principal. If there is no trustee of the trust other than an interested trustee, the interested trustee, or where two or more persons are acting as trustee and are interested trustees, a majority of such interested trustees may, in their sole discretion and without court approval, convert an income trust to a total return trust and change the percentage used to calculate the unitrust amount. The primary benefit of converting to a unitrust is to reduce the inherent conflict between income beneficiaries and remainder principal beneficiaries.

*Public Chapter No. 604; T.C.A. § 56-50-101*

#### **Trusts & Estates: Viatical Settlements**

This new law creates a new structure for the operation and management of the purchase of an insurance policy on the life of a chronically ill person from the chronically ill person. The new law further requires anyone operating as a viatical settlement broker to be licensed in Tennessee.

*Public Chapter No. 893; T.C.A. § 30-2-301(b)*

#### **Estates: Heir Finders**

This act limits the fees chargeable by heir finders to reasonable fees as stated in the contract by the legatee and the heir finder so long as the fee does not exceed one-third of the legatee's interest.

If you have general questions or need additional information regarding the contents of GSRM's Estate Planning & Probate from the Hill, please contact a member of the firm's Estate Planning & Probate Section at 615.244.4994. More information can be found at [gsrcm.com](http://gsrcm.com).

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315 Deaderick Street, Suite 1100  
Nashville, Tennessee 37238  
615.244.4994 | [www.gsrcm.com](http://www.gsrcm.com)



GULLETT SANFORD  
ROBINSON & MARTIN PLLC

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