You're Not Too Late: The Post-Mortem Donation of Conservation Easements

By Robert H. Levin, Attorney at Law

The following is an updated version of an article that appeared in Tax Notes Today in October 30, 2000. Robert H. Levin is a practicing Maine attorney who specializes in land conservation. He works with land trusts and landowners on all aspects of conservation matters. In this article, he examines the opportunities available under Section 2031(c) of the Internal Revenue Code, in particular the post-mortem donation of a conservation easement. The article demonstrates that fiduciary obligation law in most states does not prevent a personal representative from donating a conservation easement from a decedent's estate. The author would like to acknowledge Stephen J. Small, Esq., and Karin Marchetti Ponte, Esq., for their editorial assistance.

I. Background

The Taxpayer Relief Act of 1997 included an important new provision that allows for significant estate tax savings for individuals who donate a qualified conservation easement. An overarching purpose of the bill was to prevent heirs from having to sell family-owned land to meet estate tax liability. Internal Revenue Code Section 2031(c) allows a taxpayer to exclude up to 40% of the value of his real property from the taxable estate, up to a $500,000 cap. Given the top marginal estate tax rate of 49% in 2003, this exclusion would result in an estate tax savings approaching $245,000.

One year after adding § 2031(c) to the Code, Congress recognized the opportunity to enhance the section's usefulness by adding a new provision allowing for a donation to be made after the decedent's death but before the estate tax return is filed. In addition to donations made during one's lifetime or in one's will, the statute now authorizes a post-mortem conservation easement donation.

A post-mortem donation is useful in a number of different situations. Often, heirs are forced to sell the estate's real property to pay the substantial estate taxes. By granting a post-mortem conservation easement, however, they can significantly reduce these taxes and retain their lands. Moreover, many landowners, even those who have retained estate-planning advisors, are not aware of the conservation easement option as a means of reducing their income and estate taxes. Before 1998, once an individual passed away, there was no further opportunity to convey an easement before the estate tax bill was due. The post-mortem provision offers a second chance where a decedent fully intended to donate an easement during his lifetime but did not complete the process before he died. In essence, the post-mortem option enables a decedent to make a "gift from the grave," resulting in substantial estate tax savings and allowing his family to retain family-held land.

Unfortunately, the usefulness of the post-mortem provision has been limited by perceived complications in how to structure the transaction. This article intends to offer guidance to personal representatives and other attorneys who are considering whether a post-mortem donation meets their clients' interests. Some personal representatives may be concerned about their authority as a fiduciary to make a charitable gift from the decedent's estate. One commentator has raised this issue in

a prominent land trust publication. This article shows that, upon closer look, fiduciary obligation law in most states does not prevent a personal representative from donating a conservation easement from the estate. In those states where such authority is lacking, statutory reform may be readily accomplished. This report shall not attempt to provide an in-depth overview of the benefits and mechanisms of § 2031(c), as several such works already exist.

II. Joint Donation

A predicate question in determining how to structure a post-mortem conservation easement donation is the vesting of title to real property in the heirs and devisees. In states where title to real property vests immediately upon death in the heirs and devisees, these heirs and devisees may, with the joinder of the personal representative, directly donate an easement. Indeed, the heirs' and devisees' granting of the easement is suggested by the language of § 2031(c)(8), which authorizes either the decedent (in a testamentary gift), the personal representative, or a "member of the decedent's family" to grant the easement. In practice, there is no other scenario than a post-mortem donation in which a decedent's family member would execute this transaction.

For probate purposes, the question of title is closely bound up with that of possession. Even in states where title vests immediately upon death in the heirs and devisees, the personal representative has the right or the duty to possess and control the estate's real property, for the limited purposes of paying creditors' claims or his own fees.

As of 2000, immediate vesting of title occurs explicitly by case law or statute in 27 states. Of these 14 states follow the Uniform Probate Code (U.P.C.) on this point. The U.P.C. states that title devolves immediately upon death, but that the personal representative has a right to possess and control all estate property, as he deems it necessary. Thus, where the personal representative expects that the estate will have no difficulty meeting any creditors' claims, the personal representative need not take actual possession and the heirs and devisees, if they all agree, can donate a conservation easement.

Along these lines, it is important to note that the U.P.C. is a flexible guide, designed to facilitate the efficient transfer of property. The nuanced language of "possession" and "title" is meant to further this flexibility, not to prohibit a transaction that would yield considerable tax savings.

Thirteen other states, while not following the U.P.C. per se, embrace a similar treatment of title and possession. The personal representatives in these states enjoy the right but not the obligation to possess the estate's property, while title vests immediately in the heirs and devisees.

In these 27 states, the personal representative, with the joinder of the heirs and devisees, may donate the easement without the need for a court order, once she determines that the estate has enough assets to cover any liabilities. In effect, the personal representative holds a lien on the estate's real property, and he may release this lien for the purposes of donating a conservation easement. Through joinder, both the personal representative and the heirs and devisees would appear on the property deed conveying the easement, and thus the public chain of title record.

Alternatively, the heirs and devisees may donate the easement without the personal representative's joinder in the deed. In this case, the heirs should nevertheless obtain the personal representative's written consent to the donation, based on her opinion that the estate has enough assets other than the conservation easement property to pay the estate tax and other liabilities. This consent might also specify who would cover the shortfall in the unlikely event that the estate's assets cannot meet the estate tax liability. For precedent, one estate planner who was arranging the post-mortem extinguishment of development rights structured an agreement that specified who would pay any estate tax amount owed at the close of the administration.

In contrast, the personal representative's power to donate a conservation easement is more of an issue in the following situations: (1) where the personal representative has a duty to take possession of the estate's real property (6 states), (2) where the personal representative actually acquires title to the real property (4 states), or (3) where the relevant case and statutory law does not provide a clear answer (14 states). Note that in certain states, the duty to possess may not apply to the decedent's homestead, which is often the property that is eligible for the conservation easement. Post-mortem donations may still be executed in most of these 24 states under the structures discussed in Parts III, and IV.

III. Family Settlement Agreement

In the 22 states where the heirs and devisees do not have title or it is unclear and there has not been specific enabling legislation (see Part VI, infra), a post-mortem easement donation is still possible through the intermediary step of a "family settlement agreement." Under this written contract, the interested heirs and devisees agree that the personal representative may donate an easement. This agreement should also include a release and indemnification clause, by which they agree never to sue the personal representative for any reason related to the easement transaction. These agreements are quite common in most state probate systems and have been looked on favorably by the courts. The personal representative, in turn, should petition for court approval of the transaction.

Of course, a family settlement agreement will be easiest when the property is devised without restrictions to adult family members. Thus, for example, if the property is devised in trust to the decedent's children, with the remainder to his grandchildren, gaining the consent of all the interested parties may be quite difficult, especially if the grandchildren are minors. However, the use of a family settlement agreement is no additional barrier in this context, for the consent of all the parties would have to be secured under any of the methods outlined in this article.
The family settlement agreement is a simple way of overcoming the traditional objections that a fiduciary may not lower the value of the estate because it is not in the "best interests" of the beneficiaries. In reality, it is not always apparent what this necessarily vague phrase means, especially when there is a choice between selling land for the highest value or preserving the land in its natural state while maintaining family ownership. The family settlement agreement removes any ambiguity by giving the interested parties a voice to express what they believe is in their best interest.

There are added considerations where a devisee of the property is not a member of the decedent's family. It appears that a non-family-member devisee may donate a post-mortem conservation easement, although only the reduction in the estate's value and not the additional 40% exclusion will apply. The post-mortem donation

provision, section 2031(c)(9), applies to a "qualified conservation easement," which is defined in section 2031(c)(8) by reference to the section 170(h)(1) "qualified conservation contribution." The restrictions imposed by section 2031(c)(8)(C), which implicitly omit an unrelated devisee from donating a conservation easement, apply only to the 40% exclusion portion of the section. Of course, a post-mortem conservation easement donation might be desirable only if the heirs and devisees can take advantage of the 40% exclusion. If this is the case, it is important that the personal representative make the donation without the joinder of the heirs and devisees. Again, this should be achievable through a family settlement agreement and court approval.

IV. Authorization Under the Personal Representative's General Power of Sale

An argument could be made for the donation of an easement under a liberal power of sale provision. In most states, the personal representative may sell real property without court approval or express authorization in the will. In New Hampshire, one attorney as performed two post-mortem donations (one a bargain sale and one a straight donation) pursuant to N.H. Stat. § 559:18, which authorizes the personal representative to sell real property "with fidelity and impartiality" and with the consent of the heirs or devisees. The IRS, in a review of the donation, did not contest the personal representative's power to make this donation.

Some states require the testator to expressly authorize the power of sale in his will. If a personal representative in these states wishes to donate a conservation easement, this power of sale should be given in the will.

V. Amending the State Fiduciary Powers Act

The above analysis indicates that states do not need to change their statutes to expressly authorize the personal representative to donate a conservation easement. However, amendments will be useful in clarifying this authority, especially in those states where title does not vest immediately in the heirs and devisees. At the very least, a specific grant of power to donate a conservation easement will reassure the cautious personal representative. In addition, amendments would certainly help streamline the process in those states where such donations are possible but require court approval or testamentary authorization.

Amending the state law to specifically authorize a fiduciary to donate or sell a conservation easement should not be very difficult. To date, three states (Virginia, Colorado, and Maryland) have attempted to amend the relevant law, and all have been successful. In Colorado, a statewide land trust coalition initiated the process. The coalition quickly won legislators' support by explaining that the amendment would be helpful in allowing Colorado citizens to take advantage of significant federal estate tax savings. In Maryland, the Maryland Environmental Trust worked with the state Bar Association's Trusts and Estates Committee to craft the appropriate language. Passage in the legislature was relatively easy.

VI. Authorization in the Will

Despite the general legal soundness of post-mortem conservation easement donations, it is nevertheless a good idea for the testator to include a specific authorization clause in his will for his personal representative and devisees to make such a donation. Every estate plan should have boilerplate language to this effect, including two distinct provisions: (1) a clause authorizing the personal representative

and/or heirs and devisees to donate or sell an easement, and (2) a clause authorizing the personal representative and/or heirs and devisees to amend an existing easement to terminate any remaining development rights on a property. This second clause is important because section 2031(c)(5)(B) allows interested parties to extinguish these development rights to further conserve the property and reduce the estate tax liability. The second clause would thus explicitly authorize such a post-mortem amendment of an existing conservation easement.

VII. Conclusion

Although the post-mortem donation of a conservation easement is a relatively new planning opportunity, such transactions have been successfully completed in a variety of states. While a post-mortem donation will not be an option in the typical estate administration, where it does make sense, personal representatives and other advisors should not be put off by perceived complications over the structure of the transactions. Although a donation made during an individual's lifetime or in his will is always an easier route to conservation, the post-mortem option remains a valid and effective way to prevent unprepared heirs and devisees from having to sell of their family lands to pay the estate tax liabilities.