Jack Straw Fortnightly*

rounding error

For some years, back in the stone age, in connection with his work on committees of the state and local bar associations, your correspondent had a steady gig, unpaid, writing up summaries of recent decisions of Missouri appellate courts having to do with trusts and/or decedents' estates.

And delivering brief analyses of these decisions from the lectern at state bar conferences and bar-sponsored continuing legal education seminars three, four times a year.

Which he mentions here by way of saying that although it has been twenty years since he was in active practice in Missouri, and though he has since resided for some years in Oregon and more recently Arizona, he does still participate in listservs with other Missouri probate and trust lawyers, and has recently rejoined a couple of committees.

And he still reads these appellate court decisions as they come down.

There are a few other states whose appellate courts he also monitors -- Arizona, of course, and Oregon, New Hampshire, Massachusetts, California, Texas --, but somehow he still feels invested in the development of Missouri caselaw and legislation in these subject areas.

Probably in part because some of his more enduring consulting relationships are with lawyers who practice there.

too much is not enough

All of which is by way of introduction to a discussion of a recent decision of the Missouri appeals court for the western district, Kansas City, styled *Alexander v. UMB Bank*, affirming a judgment of the probate court in Jackson County, which had allowed the appellant, Ms. Alexander, to recover from an irrevocable trust only a little over half the lawyers' fees and expenses she had incurred in pursuing a petition to construe the trust, of which she was among those ultimately determined to be the remaindermen.

There is no real question that the probate court was correct in its assessment, and the appeal was correctly decided, for reasons we will get into in a moment. But the history of this case is interesting, and it provides some insight into how

it happened that Ms. Alexander ended up spending so much money pursuing this matter.

She was asking the probate court to award her not quite $241k in lawyers' fees and close to $12k in expenses. The court allowed a bit over $131k in fees and something short of $9k in expenses.

To put those numbers in some perspective, the entire trust corpus, net of about $63k in lawyers' fees incurred by the corporate trustee, which were not disputed, was just under $450k, of which the appellant's gross distributive share worked out to be one-sixth,[1] not quite $75k.

If the probate court had allowed the requested fees and expenses in full, Ms. Alexander's net share would have been reduced to just under $33k, and not quite $211k would have been borne by the other shares.

But unless she is able to work something out with her lawyers, the fees and expenses the court disallowed, and which therefore have to come out of her own pocket, will more than consume her distributive share.

how did we get here

What makes this story the more poignant is that the probate court was itself at fault in causing Ms. Alexander to incur a large portion of the fees and expenses it did end up allowing.

We get the background from another, earlier decision of the western district appeals court, also styled *Alexander v. UMB Bank*.

Back in 1947, Ms. Alexander's great aunt Darthea set up what was then probably a revocable trust with a predecessor of UMB Bank, the corporate trustee. After her death in 1962, when Ms. Alexander would have been maybe seven years old, Darthea's son William succeeded her as income beneficiary until his death in 2013, more than fifty years later.

The trust instrument provided that the remainder was to be distributed to William's descendants, if any, otherwise to Darthea's two brothers or their respective "children."

William had no descendants. The brothers had of course long since died, and although each of them did have children, that entire generation had also predeceased William.

There were something like eight grandchildren -- that is to say, grandnieces and grandnephews of Darthea --, including Ms. Alexander, descended through four lines.

And here is where things started to go south.

The trustee was concerned about that word "children." Were those interests vested, so that the share that would have been distributed to each child of each of Darthea's brothers should instead be distributed among his or her respective heirs or legatees?

or was there an implied condition that each child survive William, so that the trust could be said to have "failed," reverting to the settlor, and the remainder should be distributed through an intestate estate for Darthea?

The trustee filed a petition for instructions with the probate court in Jackson County, because that is where the trustee was administering the trust. But the probate court literally refused the petition, telling the trustee's lawyers in a letter that there was nothing for the court to decide, the trust had simply "failed." The trustee moved to amend the petition. The court rejected the filing.

We do not even need to invoke Jack here to say this was simply wrong.

By saying the trust had "failed," the court was in fact ruling on the merits of petition for instructions, in effect saying that the remainder had reverted to the settlor's estate. But without having given the interested parties notice or an opportunity to argue their case.

Due process or whatnot.

the journey of a thousand miles

But the trustee still needed instructions, so it filed another petition, this time in a probate court in Johnson County, Kansas, where Darthea had resided at the time of her death, to determine who should be the distributees of her intestate estate.[2]

As it happened, the same folks who would have been entitled to notice had the petition for instructions in Jackson County, Missouri gone forward were also entitled to notice of the proceedings in Johnson County, Kansas, as the descendants of Darthea's two brothers were also her only heirs. But the method of determining shares was a bit different.[3] And this is probably why Ms. Alexander got so deeply involved.

In either case you start with the two shares, one for each brother, and descend through each line.

If you are passing a reversion from a failed trust remainder through Darthea's intestate estate you just make per stirpital divisions at each generation until you reach the survivors.[4] It does not matter if any of her brother's children wrote a will, because none of them was vested.

Under that approach, Ms. Alexander would have been in for a one-eighth share.

But if you are vesting shares of the trust remainder itself in the children of each of Darthea's brothers, you look to see who would be the takers of each child's estate.

Ms. Alexander being one of three children of a daughter of one of the brothers would have been in for one-twelfth, except

except that one of her siblings had also predeceased William without descendants. So she would again be in for one-eighth, except

except that her mother, Anne, had left her estate in trust for Ms. Alexander and her brother in disproportionate shares, two-thirds to one-third.

But this had been accomplished through lifetime transfers to a revocable trust, with no express reference to Darthea's trust, which

Anne probably knew nothing about, and there had been no probate of Anne's pourover will.

In brief, Ms. Alexander calculated that she would be better off taking as the transferee of a vested remainder beneficiary of Darthea's trust than as a remote heir of Darthea's probate estate.[5]

So she moved to stay the Kansas probate proceedings and sought to reopen the Missouri proceeding to construe the trust. Again the probate court in Jackson County, Missouri ruled summarily -- again without notice or hearing -- that the trust had "failed," and dismissed the petition.

Ms. Alexander appealed. The appeals court reversed, ruling that the trust remainder had vested in shares in each of Darthea's brothers' children, with no condition that any of them survive to distribution. On remand, the case was assigned to a different commissioner.

back to square two

The trustee moved to dismiss the Kansas probate altogether, and that motion was granted.

Ms. Alexander proposed a settlement of the Missouri proceeding, under which Anne's one-quarter share would be distributed through her revocable trust -- as noted above, two-thirds to Ms. Alexander and one-third to her brother.

The trustee balked, arguing that as Anne's pourover will had not been probated, her share should descend by intestacy in equal shares to Ms. Alexander and her brother.

Ms. Alexander then hired someone to track down the lawyer, since retired, who had drafted her mother's trust, and to secure an affidavit from him that Anne had intended her assignment of assets to her revocable trust to include anything that would otherwise have been subject to probate.

She filed a petition to approve distribution according to her proposed settlement and at the commissioner's direction sent notice to all interested parties. No one showed up to object. At the hearing, Ms. Alexander produced a document executed by her brother agreeing to the distribution of Anne's share through her revocable trust.

Which brings us back to where we started.

The commissioner did enter an order consistent with Ms. Alexander's petition, but denied a large part of Ms. Alexander's request for fees and expenses, some on the ground that they had been incurred for her own benefit rather than for the benefit of the trust beneficiaries collectively, and some as simply excessive.

The commissioner did allow, in full, the fees Ms. Alexander had incurred through the conclusion of the earlier appeal, but only a portion of the fees she incurred thereafter in what the commissioner viewed as an "uncontested" proceeding on remand, which had been complicated only by Ms. Alexander's efforts to increase her share at the expense of her brother's share.

And as we noted at the top, this result was affirmed on appeal.

one step beyond

Some readers will recall we had a lawsuit last year in a federal court in California where a couple named Fairbairn, who had contributed a sizeable chunk -- fifty, sixty million -- of publicly traded small cap tech stock to a donor advised fund at Fidelity the day after a huge runup in the share price,

ended up suing Fidelity for the loss in value to their income tax charitable deduction, and to the fund from which they could advise distributions, after Fidelity dumped the stock the same day as the contribution, during a strong downdraft in the share price.

We covered the early stages of this litigation in Jack Straw three comma three, suggesting at the time that the trial court might have an imperfect understanding of what remedies were actually available to the plaintiffs.

And we followed up briefly in three comma nine after the trial court had taken the case under submission, linking the trial briefs and noting that a central issue in the case was **whether the Fairbairns had standing** to pursue these claims at all.

With a very brief mention of the result in four comma three, "adverse to the plaintiff, no real surprises." The Fairbairns did not appeal.

The lurking concern here is whether the courts might recognize a right of action by a contributor to a donor advised fund against a fund sponsor **with respect to the management of the contributed property**.

Depending how such a right of action was defined, and what remedies might be available, **this could amount to a condition subsequent, rendering the gift incomplete**, at least until distributions were actually made from the account to ultimate grantees.

And now we have another case moving up through another division of the same California federal district court, calibrated to elicit an opinion from the 9th Circuit federal appeals court.

The amended complaint in *Pinkert v. Schwab Charitable* is framed as a class action on behalf of anyone who has had a donor advised fund open with the defendant since October 2016, four years before the date the initial complaint was filed, *i.e.*, the limitations period for an action alleging breach of a fiduciary duty.

Tl;dr, the claim is that Schwab Charitable has been investing these accounts in mutual funds with higher administrative fees and lower returns than they might have, with the "parent" brokerage reaping profits.

Standing is premised on the plaintiffs' "robust" advisory privileges, **characterized as "contract rights,"** and on their **"reputational and expressive interests"** in advising distributions from accounts associated with their names.

The case was decided at the trial level on motions to dismiss, which were thoroughly briefed on both sides. Total elapsed time from the filing of the initial complaint to the order dismissing the amended complaint just over seven months.

Proceeding in an orderly fashion to the appeals court.

The amended complaint, the briefs filed separately by Schwab and Schwab Charitable in support of their respective motions to dismiss, the plaintiffs' responses to each, the reply briefs filed by each, and the court's ruling dismissing the amended complaint -- eight items total -- are posted to the Jack Straw landing page, so the interested reader need not go behind a paywall. Enjoy.

your membership dues at work

Readers who are members of the NACGP and/or the ACGA will have received an e-mail message the other day linking to what amounts to a joint press release in which those two orgs announce (to whom?)[6]

their opposition to the proposal included in the Biden administration's "greenbook" for fiscal 2022 that would treat the funding of a charitable remainder trust with appreciated property as a realization event, to the extent of the present value of the noncharitable interest.

We discussed this proposal at some length in Jack Straw four comma four, and we will not rehearse the substantive commentary here -- which does, however, diverge from the party line in what your correspondent will assert are somewhat nuanced particulars.

Instead, your correspondent wants to ask, yet again, what exactly is the mechanism by which NACGP develops its policy positions. This is, after all, an org that purports to speak on his behalf.

Apparently there is a "government relations" committee that drafts positions that may then be adopted by the board of directors. Who all is on that committee, how they go about forming policy positions to submit to the board, and what criteria the board uses to evaluate these are not anywhere disclosed.

In preparing a talk several years ago for the Minnesota regional conference, your correspondent asked [redacted], who said they were working to bring some clarity to the process. Which has not yet happened. Not to complain.

And it is not as though your correspondent would expect his views to prevail if the process were more open. He does self-identify as a contrarian, after all.

But his experience with orgs that have at least attempted to embrace consensus decisionmaking tells him that actively listening to divergent perspectives can improve the framing and articulation even of the dominant view -- can give it, that word again, "nuance."

To take the specific case.

The press release states as a premise that "federal tax law should encourage rather than discourage charitable giving," tying this back to a claim that if taxpayers were to "lose" the existing tax benefit, "an enormous pipeline of charitable gifts" would simply "dry up."[7]

This reduces to an argument that the existing incentives should remain in place because the sector has come

to depend on them. And it creates an appearance that the sector has identified itself with the interests of the donor class. Not a good look.

Any org advocating for the status quo ought to be prepared to argue from first principles. Suppose the existing incentives were not already in place. What would be the policy rationales for installing them?

Begin by justifying the premise that tax law "should" provide incentives, and then ask how those incentives "should" be structured, who should benefit, relative to whom, and in what degree.

You might not arrive at the same place.

As Jack pointed out in four comma four, even the Biden "greenbook" does not "skewer the sacred cow itself" and would continue to allow a deduction at fair market value for the outright contribution of appreciated property, offsetting ordinary income, while treating that transfer as a nonrecognition event.

Which as Jack said is "at least as obvious a 'loophole' as the basis adjustment at death."

But, but, the objection comes back, we are not starting with a clean slate. We are talking about the immediate, deleterious effects of altering existing, strong incentives.

Jack says you gotta begin somewhere. Much change can happen quickly, but only if you start.

If we ever had actual, comprehensive tax "reform" worthy of that noun, these questions would be on the table.

thin slices

[1]

Assuming your correspondent has correctly understood the facts recited in the two appeals court decisions mentioned in the main text.

[2]

On the next to last page of the opinion in the earlier appeal, we learn that Darthea did have a will, but it left everything to her spouse and her son, or the descendants of her son.

Which means as a practical matter that she had died intestate with respect to a reversionary interest in the trust.

[3]

The statute controlling descent and distribution of an intestate estate in Kansas provides that if the decedent is not survived by a spouse or descendants or parents or siblings, her estate is to be distributed to those persons who would have been the heirs of her parents had each of them held the property in equal shares and had died, not survived by the other.

In the particular case, half the trust remainder would then descend through each of Darthea's brothers, with per stirpital division at each succeeding generation.

[4]

If we were looking at a Missouri intestacy, we would not make the division until we reached the first generation with survivors, which here would mean division into eight equal shares, rather than two one-quarter shares over here, two one-eighth shares over there (including Ms. Alexander), and four one-sixteenth shares over there.

This is not how the Kansas intestacy statute works, however.

[5]

But how much better off? With a distributable net of $450k, a one-eighth share would be $56.25k, while a one-sixth share would be $75k.

And even if we assumed fees and expenses would be allowed, a not insignificant portion of these would be charged to Ms. Alexander's share.

Jack suggests that Ms. Alexander's lawyer should have kept the rather modest spread in mind as they made decisions to incur additional fees and expenses.

[6]

Interesting re-use of a URL, incidentally.

[7]

No data are cited for this claim, but we will take is as a given.

Jack says, assume a can opener