

Successor Trustee Cannot Litigate in Tax Court

Quick-Take: Individuals often use a revocable trust to avoid probate on their death. Surprisingly, having a successor trustee is not enough if there is litigation in the Tax Court.

Background: While individuals often create and fund revocable trusts to avoid probate on their death, that may not be enough when it comes to the Tax Court's rules, when a successor trustee, but not a personal representative, seeks to participate in pending litigation. Such was the situation in a recent Tax Court decision.

Verlyn L'Heureux v. Commissioner, Tax Court, Docket No. 10086-20, April 25, 2025

Facts: Verlyn died with a revocable trust. A Tax Court proceeding was pending. On Verlyn's death, the executor in his Will (i.e., personal representative) took charge, but he did not seek to formally probate Verlyn's Will. The Will is a simple a pour-over Will to Verlyn's now irrevocable trust. Apparently, the trust was fully funded before Verlyn's death. The successor trustee then sought to step into Verlyn's shoes in a Tax Court proceeding.

Tax Court: The Tax Court refused to permit the successor trustee to proceed on behalf of Verlyn's probate estate, relying on Rule 60(c).

"To the extent Mr. K seeks, in his capacity as successor trustee, to represent the decedent's estate, we must deny his motion, as we have held that the successor trustee of a trust established during a decedent's lifetime is not legal authorized to represent a decedent's estate before this Court."

Rule 60: Rule 60(c) provides that the capacity of a fiduciary or other representative to litigate in the Tax Court must be determined in accordance with the law of the jurisdiction from which such person's authority is derived. Accordingly, state law determines rights. Federal law (or federal court rules) determines how those rights will be treated for tax purposes. The Tax Court Judge directed the executor and the IRS to discuss whether the Will is going to be probated after all, or an administrator is appointed for the estate, or whether the heirs at law will take up the litigation.

Sander Decision: In a previous Tax Court decision, *Sandra E. Sander v. Commissioner*, *Tax Court Memo, 2022-103, (October 6, 2022)* Leda Sander was trustee of her deceased mother's living trust. Leda never sought or received Letters of Authority from the Florida circuit court acting in its probate court capacity. After Sandra's death the IRS hit her estate with notices of deficiency. Leda then filed a petition in her late mother's name and moved to substitute in as the successor trustee of Sandra's living trust. The Tax Court judge denied Leda's attempt to substitute in the contested deficiency proceeding, telling her that she had to obtain letters of authority from the Florida 'probate' court. Rule 60(c) makes it clear that the capacity to sue is created by state law, not federal law. In this case the Tax Court judge gave Leda six months to obtain letters of authority as the personal representative of her mother's estate.

Conclusion: Norm Dacy's [How to Avoid Probate](#) was a best-selling book for decades. Apparently, the Tax Court is not impressed with the book's message on why probate should be avoided, since it refuses to look at what state law provides when it comes to the authority to act on behalf of a decedent. The Tax Court refuses to engage in complex, subjective inquiries under state law, regarding a fiduciary's authority to act on behalf of a decedent. So much, I guess, for avoiding probate with the simple use of an inter vivos revocable trust.

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