REPORT OF THE CHAIR

BY SCOTT SMALL, ESQUIRE | WELLS FARGO PRIVATE BANK

It used to be that change in the probate and trust law world occurred gradually over time like the waters that carved the Pine Creek Gorge a/k/a the Grand Canyon of Pennsylvania. (If you haven’t visited, take a day trip to Tioga County!) In 2020, technology is a leading force in dramatically altering the way we practice probate and trust law. People are downloading forms from the Internet at a higher rate than ever before to handle their own Wills and Trusts. As probate and trust practitioners, we are under constant pressure to remain relevant amid powerful market forces.

How does the Probate and Trust Law Section fit into this picture? In my opinion, the Section stands as a lookout point over the seas of change, watching from an advantageous position for signs of major developments as they roll in like a wave that crashes on the shore. Through vigilance, our Section can both respond to and prepare for the future.

For example, the National Conference of Commissioners of Uniform State Laws (a/k/a the Uniform Law Commission) recently promulgated a Uniform Electronic Wills Act (UEWA) that has been released to the states for consideration of enactment. Concerned by a flurry of legislative activity on this topic in several influential states (e.g., Florida, Nevada), the Commission concluded that a uniform law on the topic would reduce confusion and unintended consequences if separate states modified their will execution statutes inconsistently. Furthermore, traditional execution requirements that tend to prevent courts from recognizing and enforcing the terms of electronic wills are becoming anomalous in the internet age when electronic legal documents and signatures are common. I know we will be hearing much more about UEWA from the learned commentators within our Section during the course of 2020 and beyond.

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In addition, effective January 1st, the State of Florida now allows remote notarization of important documents via audio-video communication technology. Remote Online Notaries (or RONs) will not be able to notarize testamentary documents in Florida until July 1st, but that date is not far off and does not provide much time for notaries and attorneys to prepare for a fundamental change in will execution, acknowledgment and proof. At least five other states allow remote online notarization which is a clue that this wave of change is bearing down on Pennsylvania. More to come on this topic, too, so stay tuned.

Third (and certainly not finally), Pennsylvania is one of the last states to adopt a fiduciary access to digital assets act. Much has been written on this topic in our Newsletter and elsewhere; readers of this column will recall that the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) was a significant part of the discussion at last June’s quarterly Section luncheon seminar, entitled Getting Your Head Out of the Cloud: Digital Assets in Estate Planning and Estate Administration. Pennsylvania’s version of RUFADAA, currently known as Senate Bill 320, was unanimously passed by the Senate on October 28, 2019; the Bill has been referred to the House but it neither has passed yet in the House nor has it been finalized for signature by the Governor as of this writing.

Your mighty mighty Probate and Trust Law Section is nimble enough – and its metaphorical bench strength is deep enough – that we can identify and issue-spot and then provide informational seminars and programs to educate our members of the rising tide and how to prepare for it. Our Section is a leader of change in the Philadelphia Bar Association. We will not – we cannot – try to stop the tide, but we should rise with it.

Finally, a note of warning lest we wade into waters too deep: while the changes discussed in this column are imminent and important – for example, e-wills and remote notarizations address access-to-justice challenges faced by a growing portion of the general populace – I predict members of our Section will be called upon to protect their clients from the unethical and the unscrupulous who would prey upon those individuals trying to use these new-fangled forms. I am old enough to think of “trust mills” every time I read or hear about these upcoming changes in our practice, and I admit to shuddering just a little bit. Please join me in meeting the challenges head-on and contributing to the provision of innovative solutions with the expertise, scope, resources, perspective and judgment available to us as individual practitioners and as members of the Section.
THE SECURE ACT
BY KEVIN P. GILBOY, ESQUIRE, BRIAN R. GILBOY, ESQUIRE, AND GEORGE C. DEENEY, ESQUIRE | GILBOY & GILBOY LLP

The Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”) was signed into law on December 20, 2019 and became effective on January 1, 2020.

The SECURE Act significantly changed the Internal Revenue Code of 1986, as amended (the “Code”) with regards to Individual Retirement Accounts as defined in Section 408 of the Code; a Roth IRAs as defined in Section 408A of the Code; “deemed” IRAs or Roth IRAs under Section 408(q) of the Code; annuities or mutual fund custodial accounts under Section 403(b) of the Code; or pensions, profit sharing, stock bonus or other qualified plans that are qualified under Section 401(a) (collectively, “Retirement Assets”).

From an estate planning perspective, the SECURE Act has impacted, in some cases drastically, how certain types of Retirement Assets integrate with our clients’ larger estate planning goals and may, in some cases, require immediate updates to estate plans. Clients who favored outright distributions to young beneficiaries for simplicity who accepted minimum income tax deferral may now want to consider trust beneficiaries. Other clients who elected so called “conduit trusts” as beneficiaries for income tax deferral reasons may want to consider outright beneficiary designations or so called “accumulation trusts”. Practitioners should be on alert for such impacts and may wish to review their will boxes.

A few SECURE Act highlights are that:

1) The required beginning date (the “RBD”) by which required minimum distributions (“RMDs”) from some accounts consisting of Retirement Assets must be taken has changed. For individuals attaining 70 ½ after the effective date of the SECURE Act, RMDs are not required to be taken until April 1 of the year after such individual attains 72.

2) The maximum age a Retirement Assets account participant may make contributions to a traditional IRA is repealed. An individual with earned income can continue to contribute to any IRA regardless of age.

3) Penalty free withdrawals from some Retirement Assets accounts are now available for adoption/childbirth under certain circumstances.

From an estate planning standpoint, the most significant SECURE Act changes are those relating to requirements to withdraw assets from Retirement Assets accounts. Prior to the SECURE Act, both the original Retirement Assets account owner (the “Original Owner”) and those beneficiaries inheriting Retirement Assets accounts if such beneficiary was a Designated Beneficiary (defined below) (the “Qualifying Inheriting Owner”) were able to withdraw the RMD over a “Stretch” period.

The Stretch period consisted of the owner’s life expectancy beginning on the RBD (previously 70 ½ as stated above) in the case of the Original Owner and beginning upon the death of the Original Owner in the case of the Qualifying Inheriting Owner (the spousal rollover rules are generally set aside for purposes of this article and Non-Designated Beneficiary (defined below) treatment is discussed below). The amount of the annual distribution over the Stretch period was based upon the beneficiary’s age and his or her life expectancy in accordance with IRS actuarial tables.

The SECURE Act largely has done away with a Qualifying Inheriting Owner’s ability to make use of the Stretch period over his or her lifetime and instead requires, with certain exceptions, that such account must be distributed within 10 years following the Original Owner’s death (or the death of

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THE SECURE ACT, CONTINUED

a spouse of the original account owner in the event of a spousal rollover). During such 10 year period, there are no annual RMDs; however, the entire balance of the Retirement Assets account must be withdrawn within the 10 years. The reduction in the time period within which a Qualifying Inheriting Owner may withdraw the balance of the account could have significant income tax consequences, especially if the 10 year period aligns with such owner’s peak earning years. Roth type Retirement Assets accounts are not spared this change in the time for distribution and the viability of “stretch Roth” type planning is in question (Roth asset withdrawals are not subject to income tax, however, so long as they are withdrawn within the appropriate time frame and are otherwise qualifying).

The SECURE Act contains exceptions to the above-described 10 year withdrawal requirement for inherited Retirement Account assets. Specifically it creates a limited sub-category of Qualifying Inheriting Owners as “Eligible Designated Beneficiaries”, and provides that Eligible Designated Beneficiaries can elect to receive inherited benefits over their own life expectancy (with certain rules for specific classes of such beneficiaries).

Examples of Eligible Designated Beneficiaries include: 1) the account holder’s surviving spouse, 2) a child – but not grandchild - of the account holder who has not yet reached majority, 3) a chronically ill beneficiary (as defined in Section 7702B(c) (2) of the Code), 4) a disabled beneficiary (as defined in section 72(m)(7) of the Code), and 5) a beneficiary who is not more than 10 years younger than the account holder. The definitions of Eligible Designated Beneficiaries appear narrow and as of yet, we have no IRS guidance so planning based on these exceptions remains quite limited.

Of note, the stretch exception for minor children of the Original Owner is of limited duration; a required minimum distribution is taken over the child’s life expectancy while the child is a minor. Once the child attain majority, the 10 year countdown begins as though he or she was no longer an Eligible Designated Beneficiary.

Beyond the limited Eligible Designated Beneficiaries grouping, the SECURE Act continues to classify the owner of an inherited Retirement Assets account as either a “Designated Beneficiary” or a “Non-Designated Beneficiary.”

A Designated Beneficiary continues to be a Qualifying Inheriting Owner who is either an individual for whom a life expectancy can be calculated or a type of qualifying trust (described more below). The Designated Beneficiary class is the group most affected by the reduction in Stretch opportunities and are now subject to the 10 year withdrawal period unless subject to an Eligible Designated Beneficiary exception.

The rules governing distributions to a Non-Designated Beneficiary (for example, a charity or a trust that does not qualify for Designated Beneficiary status) have not changed under the SECURE Act in a manner affecting the subject matter of this article. A Non-Designated Beneficiary must withdraw the balance of the inherited Retirement Assets account either within 5 years after the Original Owner’s death (if the Original Owner died before his or her RBD) or over the remaining life expectancy of the Original Owner (with RMDs being taken yearly) if the Original Owner attained the RBD prior to death.

The SECURE Act also significantly impacts trust planning as it relates to Retirement Asset accounts. Generally, there are two types of “see-through” trusts which qualify as Designated Beneficiary trusts and hold retirement accounts: 1) “Accumulation Trusts”, and 2) “Conduit Trusts”.

In an Accumulation trust, a trustee has discretion whether to pay the RMDs to the beneficiary(ies) or retain them in the trust. In a Conduit Trust, the RMDs are paid to the trust and then paid right from the trust to the beneficiaries.
Under the SECURE Act, Conduit Trusts lose substantial utility. Most often, a trust substantially funded with Retirement Assets is in place because directly naming an individual was a suboptimal result (for creditor protection reasons, spendthrift reasons, etc.). Since the Retirement Assets account must be completely withdrawn within 10 years of the Original Owner’s death (as opposed to making use of the Stretch provisions), the post SECURE Act Conduit Trust beneficiary is likely to receive more funds more quickly than what was intended thus defeating the protections the Conduit Trust might have otherwise offered. Another potential pitfall with a post SECURE Act Conduit Trust is if it had been drafted to allow only RMD distributions and does not give the trustee the ability to make other distributions to beneficiaries. In such a scenario, Retirement Assets might become trapped in the Conduit Trust and be subject to more income tax (in light of compressed trust brackets and NIIT surcharge) or at least prevent the spread of taxable income over a manageable time.

Of note, the Conduit Trust issues described above are partially or fully avoided if the Conduit Trust beneficiary is also an Eligible Designated Beneficiary. If the beneficiary of the Conduit Trust qualifies as an Eligible Designated Beneficiary, the Stretch provisions are still applicable as discussed above and the benefits of the Conduit Trust remain as before (so long as they worked before).

The SECURE Act generally eliminates Stretch periods in Accumulation Trusts as well, which will reduce the income tax deferral benefits in a manner similar to the reduction of deferral benefits in Conduit Trusts. In addition Accumulation Trust income is more likely to be paid at the trust’s higher tax rate (absent trustee exercise of discretion). But clients may be willing to incur the higher tax rate if the non-tax reasons for accumulations are more important.

It is worth noting that no guidance has yet been provided in the forms of regulations or otherwise about the SECURE Act and so many items remain subject to interpretation.

The SECURE Act has made substantial changes to the efficacy of tax deferrals on inherited Retirement Assets. By substantially reducing opportunities to “stretch” RMDs over the lifetime of a Qualifying Inheriting Owner, income tax benefits are lost. Reviewing existing and in-process Retirement Assets planning will help to ensure that it meets your clients’ larger estate planning goals. You may consider reviewing options such as ROTH conversions and charitable planning among other possibilities.

JOIN A COMMITTEE

The Section’s committees depend on the steady flow of people, energy and ideas. Join one!

Contact the Section Chair:

Scott S. Small, Esquire
One South Broad Street
Philadelphia, PA 19107
267.321.7122
Scott.Small@wellsfargo.com
Charitable Remainder Trusts ("CRTs") are a well-known and well-established planning technique. While CRTs are more popular in high interest rate environments, the rules governing CRTs make them an ideal planning technique for clients who are philanthropically inclined but are also interested in providing a continuing income stream for themselves or others. In addition, since the passage of the SECURE Act in December 2019, CRTs have been the focus of renewed attention as planners look for creative solutions to make up for the loss of the stretch payout.

This article will revisit CRTs in light of the SECURE Act, including some of the key advantages and disadvantages of this planning technique, as well as possible alternative planning strategies.

Charitable Remainder Trusts

A CRT is also known as a "split interest" trust, in which an individual beneficiary (or beneficiaries) receives an "income" interest for lifetime or a term of years. The "income" interest can take the form of an annuity (in the case of a "CRAT") or a unitrust interest (in the case of a "CRUT"). At the end of that period, the remainder interest passes to charity.

CRTs, while attractive vehicles for philanthropic planning, are subject to a large number of rules that must be strictly followed to ensure that a charitable deduction for the actuarial value of the remainder interest and ongoing income tax benefits are available. For example: 1) CRTs must be payable for the life or lives of one or more individuals living at the time of the creation of the trust or for a term of years, not in excess of 20 years; 2) the payment amount from both unitrusts and annuity trusts must be at least 5% but not more than 50%; and 3) the actuarial value of the remainder interest (determined under section 7520 of the Internal Revenue Code) must be at least 10% of the initial fair market value of the property placed in the trust.

The income tax rules for CRTs are unique in the Internal Revenue Code. The CRT itself is exempt from federal income tax (but note that CRTs are not exempt from Pennsylvania income tax). However, the non-charitable beneficiary’s income stream is not tax free – rather, that income stream is categorized into four tiers and distributed on a “worst-in, first-out” basis in the following order: [i] ordinary income and qualified dividends; [ii] capital gains; [iii] other income (including tax-exempt income) and, finally, [iv] return of principal.

SECURE Act

The SECURE Act, which was signed into law on December 20, 2019, is the most significant legislation affecting retirement planning in a generation. One positive development under the SECURE Act is the increase in the age at which required minimum distributions ("RMDs") must be taken from 70½ years to 72 years. However, excitement over this development has been tempered by the negative effect that the loss of the so-called “stretch payout” will have on many individuals’ attempt to transfer wealth to future generations. The "stretch payout" was so named because it allowed the individually named beneficiary of an inherited retirement account to “stretch” the payout over the beneficiary’s lifetime, allowing the undistributed assets to appreciate in value tax-free in the interim.

By contrast, under the SECURE Act (effective for accounts inherited after December 31, 2019), the vast majority of individual beneficiaries who inherit retirement accounts must withdraw the entire retirement account within 10 years of the original account owner’s death. This shortened period will accelerate income taxes that would previously have been payable over the life expectancy of the beneficiary, thereby significantly reducing

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the size of the account before it has an opportunity to grow inside the tax-advantaged account. Generally speaking, for beneficiaries other than “Eligible Designated Beneficiaries” (“EDBs”)\(^1\), the new rules will significantly diminish the post-death after-tax value of retirement accounts.

**Naming CRTs as the Beneficiary of Retirement Assets**

The harsh reduction in the time period over which inherited retirement assets may be withdrawn has sparked a renewed interest in naming CRTs as beneficiaries of retirement plans as a means of deferring taxable income for a period that exceeds ten years.

Under the SECURE Act, when retirement assets pass to the CRT, the income is not subject to tax at that time. Rather, as described above, the income tax regime of a CRT will mean that the ordinary income attributable to the retirement assets will pass out over the term of the CRT each time a distribution is made to the non-charitable beneficiary. Over time (especially if the interest is spread over the lifetime of the non-charitable beneficiary), the character of the income may change from ordinary income to capital gains or other income taxed at more favorable rates, depending on the assets in which the CRT is invested and the nature of the income earned. As to the amounts actually received by the non-charitable beneficiary, whether the CRT can outperform a 10-year distribution will depend on multiple factors including the non-charitable beneficiary’s age and actual lifespan.

The CRT will need to utilize a payout rate that meets the 5% minimum but also results in a charitable remainder of at least 10%. Sticking with the 5% payout rate is a safe bet, but the CRT could also be drafted to provide the highest permissible rate at the time of the account owner’s death. It should be noted, however, that in a low interest rate environment, depending on the age of the non-charitable beneficiary, it may not be possible to meet the 10% test.

As a planning strategy, the CRT can be a “win” for the philanthropically minded client, because the taxable income can be spread out over a longer period of time than ten years and a favored charity can receive its share when the CRT terminates. However, there are some other factors that need to be considered before heading down the CRT path. For example, other assets must be available to pay any estate tax owed on the value of that portion of the CRT that passes to the non-charitable beneficiary. In addition, for some clients, the idea that the distribution percentage is “locked in” may be unappealing, particularly where there is a concern that the individual beneficiary might need access to an amount beyond the required minimum distribution in a given year.

Clients also need to apprise carefully the available tax savings strategies in the wake of the SECURE Act’s passage, as not all techniques mix well together. For example, many advisors have urged their clients to consider converting existing IRAs into Roth IRAs, with the goal of this reducing future tax bills. The potential success of this strategy depends in part on the tax rates expected to be paid by retirement account owners or their beneficiaries down the line. However, a CRT is not an appropriate beneficiary of a Roth IRA since the tax savings associated with a CRT would be entirely lost in such a transfer.

In all cases, clients should seek the advice of a skilled tax professional who can provide comparisons of the pros and cons of the array of available options.

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\(^1\) EDBs include (1) the surviving spouse of the deceased account owner, (2) a minor child of the deceased account owner (but not a grandchild), (3) a beneficiary who is no more than 10 years younger than the deceased account owner, or (4) a chronically ill individual.
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Kevin P. Gilboy
Brian R. Gilboy
George C. Deeney

Two Logan Square
100 N. 18th St.
Suite 730
Philadelphia, PA 19103
Phone: (267) 861-0531
Fax: (267) 861-0563
POWERS OF APPOINTMENT IN PENNSYLVANIA

BY ROBERT M. MAXWELL, ESQUIRE, MANAGING DIRECTOR | THE GLENMEDE TRUST COMPANY, N.A

Attorneys draft powers of appointment into estate planning documents for a host of reasons—from qualifying a trust for the marital deduction to minimizing generation-skipping transfer tax to generating a step up in basis of trust assets by including that trust in a beneficiary’s estate.

But what language is needed in Pennsylvania to exercise that power of appointment, and how is that power of appointment interpreted when it is exercised?

Test yourself with this fact pattern:

Mary establishes the Article IV Trust for her son, Jim, with the following terms:

Article IV Trust: …I give my son, Jim, the power to appoint the principal of this trust to any person, other than Jim, Jim’s creditors, Jim’s estate, or the creditors of Jim’s estate.

What language below signed by Jim, effectively exercises Jim’s power of appointment over the trust?

(a) Under the Article IV Trust of my mother, Mary, dated 01/01/2020, I am given the power to appoint trust principal to anyone other than myself, my creditors, my estate, or the creditors of my estate. I hereby appoint the trust principal to my daughter, Jenny.

(b) I exercise any and all powers of appointment that I have in favor of my daughter Jenny to be distributed outright and free of trust.

(c) I hereby appoint the trust principal to my daughter, Jenny.

If you answered “yes” to all three answers, you get a gold star. But if you did not answer “yes” to all three, how would you know where to start?

The answers lie in Chapter 76, Powers of Appointment of Title 20 Pa.C.S.A. Decedents, Estates and Fiduciaries. This chapter addresses the exercise of powers of appointment in Pennsylvania. Chapter 76 applies to all powers of appointment created before, on or after the effective date of January 1, 2017.

Unlike the Internal Revenue Code that distinguishes between “general powers of appointment” and “limited powers of appointment”, the Pennsylvania statute separates powers of appointment into two categories: (1) “broad powers of appointment” and (2) “limited powers of appointment”. Pennsylvania’s classification system is ostensibly to follow the intent of the donor of the power. [Under Internal Revenue Code §2041(b) (1) a “general power of appointment” is a power “exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate”. A general power of appointment created after October 21, 1942, is included in a powerholder’s gross estate for federal estate tax purposes under §2041(a)(2) whether or not the powerholder exercises or releases the power. A “limited power of appointment” for federal estate tax purposes is the power to appoint to anyone other than “the decedent, his estate, his creditors, or the creditors of his estate”. A limited power of appointment allows a beneficiary to appoint trust funds but does not cause the trust to be included in the beneficiary’s gross estate for federal estate tax purposes.]

A “broad power of appointment” under 20 Pa.C.S.A. §2061(a) is one that can be exercised in favor of any one or combination of: (1) one or more persons selected by the donee; (2) the donee; (3) the donee’s estate; (4) every other person other than the donee, the donee’s creditors, the donee’s estate or the creditors of the donee’s estate.

Going back to the beginning example, since Jim can appoint to anyone except for himself, his creditors, his estate or the creditors of his estate, Jim’s power is a “broad power of appointment” under §2061.

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POWERS OF APPOINTMENT, CONTINUED

20 Pa.C.S.A. §2602(a) governs how a “broad power of appointment” can be exercised. In the absence of contrary language in the instrument creating a broad power of appointment, or in the powerholder’s instrument), a “broad power of appointment” can be exercised by: (1) specific reference to the power; (2) general reference to any powers held by the donee; (3) a testamentary or inter vivos gift describing the appointive property; (4) to the extent needed to fund an insufficiently funded testamentary pecuniary legacy; (5) a general testamentary gift; or (6) a testamentary residuary gift.

So in the example, when John’s document makes specific reference to the power Mary gave him, that is a valid exercise and answer (a) is correct. Answer (b) is also a valid exercise of the power because a general reference to “any powers held by the donee” is a valid exercise. Finally, the general residuary clause of John’s Will is a valid exercise of the power of appointment (answer (c)).

There are different rules that govern Pennsylvania “limited power of appointments”. A “limited power of appointment” is a power of appointment that is not a broad power. A “limited power of appointment” under the Pennsylvania statute includes the power to appoint to donee’s creditors, or the creditors of the donee’s estate. 20 Pa.C.S.A. §7601

Under the Joint State Government Committee Comments from June 2010, “broad powers” give donors wide ranging discretion to appoint. Whereas, limited powers include the power to appoint to creditors because these are narrowly tailored and granted usually only to avoid generation-skipping tax.

In the absence of contrary intent in the instrument creating a limited power of appointment, or in the donee’s instrument, a limited power may be exercised in the donee’s instrument by making: (i) specific reference to the power; (ii) a testamentary or inter vivos gift specifically describing the appointive property; (iii) a general testamentary gift to all, and only to all, objects of the power; or (iv) a testamentary residuary gift to all, and only to all, the objections of the power. 20 Pa.C.S.A. §7602(b).

For both “broad” and “limited” powers, the creator of the power can still provide requirements for the powerholder to exercise that power. Under 20 Pa.C.S.A. §7602(c), a power of appointment can only be exercised by specific reference to the power if the instrument creating the power requires specific reference to the power. Sample language might be as follows:

Article IV of Dad’s Trust dated 2/2/2020: Upon the death of my son, Jeremy, the principal and any accrued and undistributed income of the trust shall be distributed to Jeremy’s issue, either outright or in further trust, in such proportions as Jeremy determines, by a valid will making specific reference to this power of appointment.

Jeremy’s Will: Under Article IV of Dad’s Trust dated 2/2/2020, I am given a power to appoint the remaining principal and accrued and undistributed income at my death to a class consisting of my issue. I hereby exercise that power of appointment by directing that all principal, accrued and undistributed income be distributed outright to my issue per stirpes.

20 Pa. C.S.A. §7602(e) provides some rules regarding the exercise of testamentary powers of appointment. A testamentary power of appointment is not exercisable in favor of the donee or the donee’s creditors. A testamentary power to appoint to the donee’s creditors is construed as a power to appoint to the creditors of the donee’s estate. These provisions make logical sense, since the donee is dead at the time a testamentary power would take effect, and the donee’s creditors would become the creditors of his/her estate. Similarly, a testamentary power that denies the right to appoint to donee’s creditors will be construed to deny the right to appoint to creditors of the donee’s estate. An attempted exercise of a testamentary power of appointment to donee’s creditors shall be considered an exercise in favor of

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POWERS OF APPOINTMENT, CONTINUED

the creditors of donee’s estate who were donee’s creditors at the time of his/her death.

If a power of appointment is not presently exercisable by a donee, the donee cannot contract to exercise that power unless the donor and donee are the same person. 20 Pa. C.S.A. §7603

What about the manner of exercising a power of appointment? Can it be exercised outright, or in further trust, and to whom? Unless there are restrictions in the instrument creating the power of appointment, 20 Pa. C.S.A. §7604 provides that the donee of the power can appoint outright or in trust as follows:

1. Outright to one or more objects of the power.

2. To hold the property in trust for one or more objects of the power and specifying the trust terms. The trustees do not need to be objects of the power.

3. To create a “broad” or “limited” power exercisable by one or more of the objects of the original power to whom the donee could have appointed outright even if some of the objects of the new power are not among objects of the original power. If the original power is a “limited” power, other than a power to appoint to donee’s creditors or the creditors of donee’s estate the new power must meet the following requirements:

   a. All objects of the original power are among the objects of the new power.

   b. All takers in default of exercise of the new power are among the objects of the original power.

To illustrate, if mother Mary gives son John a limited power to appoint to his issue either outright, or in further trust, John must be careful not to violate this provision. If John has two children, Bart and Lilith, he can grant Bart a power of appointment over the trust, but Bart’s power of appointment must include ALL of John’s issue – namely Bart’s issue, Lilith and Lilith’s issue. John cannot restrict Bart’s power of appointment only to Bart’s issue, because that would not meet the requirement that “all of the objects of the original power [John’s issue] are objects of the new power”.

In exercising a power of appointment, a donee has the power to exclude any object of the power, unless the instrument creating the power of appointment expressly specifies a minimum share, minimum pecuniary amount or particular item of property to be appointed to the object of the power. 20 Pa. C.S.A. §7604(b).

What if John has a testamentary power of appointment in favor of his daughter, Lilith, which John exercises in his Will? John dies, his will is probated, but Lilith predeceased John. What happens? Absent contrary intent in the donor or donee’s instrument, under the anti-lapse provisions of §7605, John’s power of appointment does not fail and the appointed property passes to Lilith’s issue per stirpes that are living at the time that the appointment becomes effective. This anti-lapse rule applies to powers exercised in favor of donee’s children, issue, siblings or nieces and nephews. A special rule of §7605(a)(3) provides that a power of appointment to a sibling, niece, or nephew will fail if the property would pass to the spouse or issue of the donee if the appointment had lapsed.

Lastly, a partially effective exercise of a power (absent contrary intent in the donor or donee’s instrument) does not invalidate the effective portion of the exercise, unless the “appointment regarded as a whole constitutes such an integrated plan that the parts cannot be separated without defeating the plan.” 20 Pa. C.S.A. §7606

As you draft your documents granting powers of appointment and exercising powers of appointment, pay careful attention to the statute and the impact on your drafting.
The PEPC invites the Philadelphia Bar Association Probate and Trust Law Section to join our Council for membership and programming

March Luncheon Program
Tuesday, March 17, 2020
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Current Issues in Estate and Gift Tax Audits and Litigation”
Speaker: John W. Porter, Baker Botts

Ethics Forum
Thursday, April 23, 2020
8:00 a.m. – 10:30 a.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “The Ethics of Trust Modification Revisited”
Panel Discussion

2020 Annual Meeting, Seminar & Reception
Tuesday, May 12, 2020
3:00 p.m. – 8:00 p.m.
National Constitution Center
525 Arch Street, Philadelphia, PA
Speaker: Samuel A. Donaldson, JD, LLM, AEP

For more information on joining the Philadelphia Estate Planning Council or to register for any upcoming programs, please visit www.philaepc.org.
LEGISLATION

Congress Passes the SECURE Act

The Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”) was signed into law on December 20, 2019 and became effective on January 1, 2020. The SECURE Act significantly changes various aspects of how retirement assets are treated. For further discussion, please see the more detailed articles in this newsletter.

Congress Repeals 2017 Kiddie Tax Changes

The Further Consolidated Appropriations Act was signed into law on December 20, 2019 and included a repeal of the kiddie tax changes enacted in 2017 as part of the Tax Cut and Jobs Act, effectively reinstating the former kiddie tax rules beginning in 2020.

Romney/Bennett Proposed Bill

Senators Mitt Romney and Michael Bennett proposed a bill which would replace the step-up of basis at death with a carryover basis and provide for a $1.6 million carryover basis exemption for individuals and a $3.7 million carryover basis exemption for property passing to a surviving spouse. The revenue generated by the bill would be used to repeal the medical device excise tax, expand the child tax credit and make technical corrections to the Tax Cut and Jobs Act.

GUIDANCE FROM THE IRS

IRS Issues Updated Revenue Procedure Listing Issues That It Will Not Address By Way of Letter Rulings or Determinations

Revenue Procedure 2020-3 sets forth the issues that the IRS’s Associate Chief Counsel will not issue letter ruling or determination letters. Two new additions to the 2020 list that impact estate planning are:

1) The IRS will not issue PLRs to address the income tax treatment of non-grantor incomplete gift trusts, and specifically will not address the grantor trust status when distributions are made at the direction of either an adverse party or parties (or with the consent thereof) or a committee that has fewer than two individuals other than the grantor and the grantor’s spouse or acts on less than majority agreement; and

2) Section 4947’s application on split interest charitable trusts that are non-exempt if the parties indicate they have not taken (and do not plan to take) an income tax deduction.

Final Regulations Addressing Clawback

Treasury and the IRS have issued final regulations addressing the use of an individual’s basic exclusion amount on lifetime transfers before January 1, 2026 and have clarified that the use of such exclusion amount will have no impact on the individual’s future estate or gift taxes. The regulations also confirm that gifts made between 2017 and 2026 are deemed to first come from the basic exclusion amount and, once such amount is exhausted, from the increased basic exclusion amount. It was further clarified that the increased basic exclusion amount of a deceased spouse that is part of DSUE for portability purposes does not drop in 2026.

IRS Proposed Regulations Provide Additional Guidance Limiting SALT Work Around

Treasury and the IRS have proposed regulations further limiting agreements used to circumvent the $10,000 limitation state and local taxes. The proposed regulations outline how the quid pro quo application applies to benefits received or expected to be received by the donor from a party other than the donee, revise the regulations governing business expense deductions to allow certain designated businesses to deduct certain charitable contributions even continued on page 14
DEATH WITH DIGNITY IN NEW JERSEY: THE MEDICAL AID IN DYING FOR THE TERMINALLY ILL ACT

BY ERICA A. RUSSO, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

The New Jersey Medical Aid in Dying for the Terminally Ill Act (the “Act”) was approved by Governor Phil Murphy on April 12, 2019, and became effective on August 1, 2019. By approving the Act, New Jersey became the eighth jurisdiction to give mentally competent, terminally-ill adult residents the statutory right to request a prescription for life-ending medication.1 The Act largely mirrors the existing “death with dignity” statutes, which originated in Oregon in 1994; however, it is important to review New Jersey’s specific eligibility requirements.

Those who are eligible to seek relief under the Act are New Jersey residents who are eighteen years or older, capable of making their own health care decisions and communicating them to a health care provider, determined to be terminally ill (having received a prognosis of six months or less to live) and have voluntarily asked to receive life-ending medication.2 Patients must be determined to be capable and terminally ill by both their attending physician (the doctor with primary responsibility over the patient’s care) and a consulting physician.3 If there is a disagreement between the attending physician and consulting physician regarding the patient’s capacity, the attending physician must refer the patient to a mental health care professional to make a final determination.4 After establishing eligibility, the patient must make two oral requests, with at least fifteen days between requests, and one written request in the form required by the Act.5 At the time of the initial oral request, the attending physician must recommend that the patient participate in a consultation regarding concurrent or additional treatment opportunities, hospice care and the like.6 At the time of the second oral request, the attending physician must inform the patient of his or her right to rescind the request.7 The written request can be submitted at the time of the initial oral request or any time thereafter; however, forty-eight hours must elapse between the submission of the written request and the doctor writing the prescription for life-ending medication.8 Therefore, it can take as little as fifteen days for a person to receive life-ending medication under the Act.

The Act addresses estate planning in two sections: (1) with respect to provisions in certain documents restricting a request for medication and (2) with respect to persons not authorized to take action on behalf of an eligible person. First, a provision in a will (or any other agreement) signed on or after August 1, 2019, is not valid to the extent an individual agrees to

TAX UPDATE, CONTINUED

if they anticipate receiving a state income tax credit and confirming that an individual who does itemize but does not have $10,000 of state and local tax deductions may treat part of the contribution as a state or local tax payment.

Opportunity Zone Regulations Finalized

The new final regulations governing Opportunity Zones and investments in a Qualified Opportunity Fund include provisions that classify gifts (except those made to a grantor trust) as an inclusion event and excluding the death of the investment owner from being an inclusion event. Additionally, if the owner of a qualifying investment in a Qualified Opportunity Fund dies prior to an inclusion event and the deferred gain is not included in his or her gross income, the deferred income is treated as IRD.

continued on page 15
restrict his or her right to make or rescind a request for life-ending medication pursuant to the Act.\textsuperscript{9} However, any such provision in a will (or other agreement) executed before the Act’s effective date will remain effective.\textsuperscript{10} In addition, life insurance providers cannot deny coverage or change premiums for existing policies based on the insured’s agreement to make or rescind a request for medication pursuant to the Act.\textsuperscript{11}

Second, the Act specifically provides that a person designated as guardian, conservator or health care representative of a patient is not authorized to take any action on behalf of the patient for the purposes of the Act.\textsuperscript{12} The patient’s capability of making his or her own health care decisions is vital for eligibility for relief under the Act. Therefore, if a patient relies on a guardian or health care representative to make such decisions, the patient would be inherently ineligible.

From a medical perspective, New Jersey doctors can opt out of prescribing patients life-ending medication pursuant to the Act for any reason.\textsuperscript{13} The only requirement is that a doctor who is unable or unwilling to carry out a patient’s request for such medication transfer the patient’s medical records to another health care professional upon the patient’s request.\textsuperscript{14} Despite the Act’s specified voluntary participation, nine days after the Act became effective, a New Jersey doctor challenged the Act with an eleven-count complaint. Most of the complaints were based in constitutional law for which the doctor did not have standing because the complaints did not personally affect him. However, the New Jersey Superior Court found merit in the doctor’s complaint that failure to promulgate regulations\textsuperscript{15} would cause the doctor immediate and irreparable injury.\textsuperscript{16} Therefore, by Order dated August 14, 2019, the New Jersey Superior Court imposed a temporary restraining order against the Act (thus deferring any patients who may have sought relief on the Act’s effective date from receiving life-ending medication within the fifteen day minimum waiting period).\textsuperscript{17}

The New Jersey Attorney General’s Office immediately appealed the ruling. By Order dated August 23, 2019, the New Jersey Appellate Court lifted the restraining order, concluding that the lower court abused its discretion.\textsuperscript{18} That same day, the New Jersey Supreme Court denied the doctor’s appeal of the Appellate Court ruling.\textsuperscript{19} Therefore, eligible New Jersey residents remain capable of choosing to end their lives on their own terms.

\textbf{DEATH WITH DIGNITY IN NEW JERSEY, CONTINUED}
DEATH WITH DIGNITY IN NEW JERSEY, CONTINUED

1 Oregon, Washington, Vermont, California, Colorado, the District of Columbia and Hawaii have death with dignity statutes that were passed between 1994 and 2018. One month after New Jersey approved the Act, Maine approved its own death with dignity statute, which will become effective on September 19, 2019. See Death with Dignity Acts, Death with Dignity, https://www.deathwithdignity.org/learn/death-with-dignity-acts/ (last visited February 21, 2020). Section 11061 of the Tax Cut and Jobs Act of 2017 amended IRC2010(c)(3).


3 Id.

4 Id. at §26:16-8.a.

5 Id. at §§ 26:16-5, 26:16-10.

6 Id. at §26:16-10.

7 Id.

8 Id.

9 Id. at §26:16-14.a.

10 Id. at §26:16-14.b.

11 Id. at §26:16-14.c.

12 Id. at §26:16-16.

13 Id. at §26:16-17.c.

14 Id.

15 The Act requires that six state agencies and boards “adopt such rules and regulations as are necessary.” Id. at §§ 52:17B:139.13, 45:9-5.3, 45:14-47.1, 45:14B-48, 45:1588-11.2 and 52:14B-1 et seq.


17 See id.

18 See id.

RULES AND PRACTICE UPDATE

BY NEAL G. WILEY, ESQUIRE | ALEXANDER & PELLI, LLC

The New Year brought with it a bounty of revised Supreme Court Orphans’ Court forms. These forms were improved and updated in a number of ways, and one thing they have in common is that where a signature is called for, the new forms are configured to accept electronic signatures.

This is unprecedented, and it came with no warning to the bar. The Supreme Court Orphans’ Court Procedural Rules Committee’s report only indicated that the changes to the forms included “updating online form completion functions.” The sample forms promulgated for comment had no “online form completion functions” enabled at all.

The need to evaluate electronic signatures will present problems, especially for those offices, like our own Philadelphia County Register of Wills, which do not permit electronic filing for most of the forms in question. More worrisome though, is the implication for form RW-03, the Oath of Subscribing Witness. At the bottom of this form, the following note is printed: “Please have present the original or copy of instrument(s) at time of notarization.” Presumably, this is so that the witness can review the signatures on the will, and so that the officer administering the oath can compare the witness’s signature on the form to the signature on the will. An electronic signature would render any such comparison impossible.

It is not clear if the addition of electronic signature capacity was intentional. After all, there was no mention in the Committee report of what amounts to a substantial change to the forms. We will have to see whether electronic signatures are retained on the forms, and if so, how they affect our practice.

The Probate and Trust Law Section has a hashtag:

#phillyprobate

Please use the hashtag #phillyprobate when posting on social media about news or events that might be interesting to section members!
TECHNOLOGY UPDATE
BY KIM A. FAHRNER, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

Our discussions during our Technology Committee meetings this year have seen robust, practical and interesting, and you are welcome to attend future meetings virtually. While, as originally conceived, the topic of this article relates to Internal Revenue Service announcements regarding virtual currency, a special topic is briefly added in recognition of the current struggles of practitioners regarding the signing of estate planning documents while maintaining social distancing amidst the current pandemic. We wish everyone to stay safe and well in these extraordinary times.

Electronic Signatures

The technological resources for the signing of estate planning documents are receiving increased scrutiny in light of the current pandemic. New Jersey has pending legislation regarding remote notarization. The Florida Supreme Court has issued an Emergency Order regarding remote notarization. However, Pennsylvania has not adopted remote notarization or electronic wills. During our Technology Committee meeting on March 19, 2020, our discussion included the following:

1. A Will cannot be signed by a testator with an electronic signature in Pennsylvania. The PA Electronic Transactions Act expressly states that the Act does not apply to wills or testamentary trusts. 73 P.S. §2260.104(b)(1).

2. The PA Revised Uniform Law on Notarial Acts allows a notary to affix an electronic signature but the individual is still required to personally appear before the notary. 57 P.S. §306. See Dept. of State FAQ. https://www.dos.pa.gov/OtherServices/Notaries/E-Notary/Documents/information_for_notaries.pdf.

Our Committee will continue its discussions on this important subject.

IRS Announcements regarding Virtual Currency

Because the use of virtual currency is, while not commonplace, growing in popularity, questions arise regarding the treatment of this monetary monster in the marketplace. Vendors are becoming more familiar with the concept and the market place is responding with greater confidence in its usage. Nonetheless, further questions remain about its character. Is it like cash? Or is it like some other asset? The Internal Revenue Service (“IRS”) produced its views on the subject in 2014. See Notice 2014-21, 2014-16 I.R.B. 938 (“Notice 2014-21”).

Notice 2014-21 stated the IRS’ intention to describe “how existing general tax principles apply to transactions using virtual currency.” Id. Section 1. In general, the IRS determined that, for tax purposes, virtual currency is not characterized as “currency” but is deemed to be “property.” Id. Section 2. It acknowledged the possibility that virtual currency could be held for investment or used to pay for goods or services.2 While virtual currency can operate as coin or paper money issued by a particular country, Notice 2014-21 specifically defined virtual currency as “... a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” Notice 2014-21 also stated its intention to apply only to “convertible virtual currencies,” recognizing that there are some virtual currencies having an equivalent value in what it calls “real currency” (e.g., they act as a

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substitute for “real currency”). Id. As an example, the Notice identified “bitcoin” as a “convertible virtual currency” inasmuch as it can be digitally traded between users and can be purchased for or changed into U.S. dollars or other types of currency whether real or virtual.\(^3\) Id.

When published in 2014, the Notice provided a list of sixteen “Frequently Asked Questions” (“FAQs”), and attempted to clarify that, regardless of the treatment by the parties to the transaction as the equivalent of traditional money, virtual currency is treated for federal tax purposes as property. Id. Q&A: 1. Not all FAQs are examined here but, by way of illustration, Notice 2014-21 clarified that a taxpayer who receives virtual currency as payment for goods or services must include in the taxpayer’s gross income the fair market value of the virtual currency, measured in U.S. Dollars, as of the date of receipt. Id. Q&A: 3. As with any other property, virtual currency is subject to the gain or loss provisions of the Internal Revenue Code (“Code”). Id. Q&A 6. In addition, to the extent virtual currency is used for payment to an independent contractor, the payer is subject to the information and reporting requirements of the Code. Id. Q&A 13 and 14. As invited by IRS Notice 2014-21, the IRS received comments from the public, including comments and interesting insights from the American Institute of CPAs\(^4\) and the Taxation Section of the American Bar Association.\(^5\) Several things have happened since then.

First, the IRS made a series of announcements. On March 23, 2018, the IRS issued a news release reminding taxpayers to report virtual currency transactions.\(^6\) On July 2, 2018, the IRS Large Business and International division announced the identification and selection of five campaigns with the goal to improve return selection, identify issues representing a risk of non-compliance, and make the greatest use of limited resources. Its compliance campaign included virtual currency, urging taxpayers with unreported virtual currency transactions to correct their returns as soon as practical.\(^7\)

Second, the IRS issued Revenue Ruling 2019-24 (“Rev. Rul. 2019-24”), which dealt with questions related to hard forks and airdrops in the virtual currency context. While not abandoning its definition of virtual currency, the IRS introduced the term “cryptocurrency” in this ruling, defining it as “a type of virtual currency that utilizes cryptography to secure transactions that are digitally recorded on a distributed ledger, such as a blockchain.” Id. Rev. Rul. 2019-24 also defined two other terms as used in this ruling:

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\(^3\) An example of a nonconvertible virtual currency (sometimes called “closed currency”) is tender used in games that cannot be converted to dollars. In addition, “points” via certain credit cards may not be convertible.


\(^5\) See https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/032415comments.authcheckdam.pdf.


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TECHNOLOGY UPDATE, CONTINUED

“hard fork”\(^9\) and “air drop”\(^10\). The important thing to know about these terms in general is that they may initiate a means by which one may acquire new cryptocurrency. When a cryptocurrency in which a taxpayer has an ownership interest experiences a hard fork that results in a new cryptocurrency that is not transferred to the taxpayer, the taxpayer has no gross income under IRC §61. If, on the other hand, the cryptocurrency in which the taxpayer has an ownership interest experiences a hard fork that results in a new cryptocurrency that is transferred to the taxpayer, the taxpayer has gross ordinary income under IRS § 61 as a result of an airdrop of the new cryptocurrency to the taxpayer following a hard fork. In the latter case, the taxpayer acquired a new asset over which the taxpayer had dominion and control (e.g., could convert it to real currency). The amount of gross income to be reported by the taxpayer is the fair market value of the new cryptocurrency on the date over which the taxpayer received it.

The basis in the new cryptocurrency is equal to the amount included in gross income. See IRC §§ 61, 1011, and IRC Regulations 1.61-2(d)(2)(i).

Third, in late 2019, the IRS expanded on the principles stated in Notice 2014-21 by refining some of the earlier FAQs and adding additional FAQs to further the education of the public about the IRS’ position (specifically, FAQ 17 through FAQ 45) (“Expanded Notice 2014-21”).\(^11\) These new FAQs address things like holding periods [FAQ 28], receipt of virtual currency as a gift [FAQ 31], basis of virtual currency received as a gift [FAQ 31]; what constitutes a realization event when there is a transfer of a capital asset for virtual currency [FAQ 18]; charitable gifting of virtual currency [FAQ 33 – 26]; and transfers of virtual currency between wallets owned by the same taxpayer [FAQ 37- 38]. Consistent with the IRS’ increased activity and focus on virtual currency, it has modified Schedule 1 to its form 1040/1040-SR regarding Additional Income and Adjustments to Income for 2019 by asking, at the top of the page (above Part 1), this question: “At any time during 2019, did you receive, sell, send, exchange, or otherwise acquire any financial interest in any virtual currency?”. However, an interesting question might remain regarding the tax treatment of virtual currency acquired in connection with various games. In the current Small Business and Self-Employed Section of the IRS webpage, an example of convertible virtual currency is stated to be “Bitcoin.”\(^12\) However, in an earlier version of the same webpage the definition of convertible virtual currency also included Roblox (which is a 3-D game involving avatars allowing but not requiring in-game purchases with “Robux” to purchase accessories, clothes and gear for the player’s avatars), and V-bucks (which is an in-game currency used in a survival game called Fortnite, which can be used to purchase outfits, emotes, and other paraphernalia in pursuit

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\(^9\) As stated in the Ruling, “[a] hard fork is unique to distributed ledger technology and occurs when a cryptocurrency on a distributed ledger undergoes a protocol change resulting in a permanent diversion from the legacy or existing distributed ledger. A hard fork may result in the creation of a new cryptocurrency on a new distributed ledger in addition to the legacy cryptocurrency on the legacy distributed ledger. Following a hard fork, transactions involving the new cryptocurrency are recorded on the new distributed ledger and transactions involving the legacy cryptocurrency continue to be recorded on the legacy distributed ledger.” Id.

\(^10\) As stated in the Ruling, “[a]n airdrop is a means of distributing units of a cryptocurrency to the distributed ledger addresses of multiple taxpayers. A hard fork followed by an airdrop results in the distribution of units of the new cryptocurrency to addresses containing the legacy cryptocurrency. However, a hard fork is not always followed by an airdrop.” Id. The term should not be confused with the same term used by Apple users whereby by one can wirelessly transfer data [including photographs] from one device to another device nearby. https://support.apple.com/en-us/HT204144.


\(^12\) https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies..
Under the leadership of its highest Court, Pennsylvania is breaking ground in a field of national importance: elder justice.

Chaired by Justice Debra Todd and formed under the tenure of Chief Justice Ron Castille, a group of 38 judges, prosecutors, attorneys, aging specialists, and advocates from across the Commonwealth convened in April 2013 in Harrisburg at the AOPC, and would spend the next year and a half studying issues of access to justice faced by one of the largest populations in our Commonwealth: older Pennsylvanians. The focus: the legal and health crisis of elder abuse – injuring well over 5 million Americans each year, costing older Americans and their families over $2.9 billion in losses to elder financial exploitation alone – and how we protect rights, minimize paternalism and ensure oversight when life-changing interventions such as guardianship are pursued. The Elder Law Task Force of Pennsylvania, perhaps the most ambitious in the nation, was launched.

As the only nonprofit in Pennsylvania solely focused on protecting the legal rights of Pennsylvania seniors, SeniorLAW Center was honored to be a member of this groundbreaking initiative and its ongoing work, which will have powerful impact on many aspects of the lives and futures Pennsylvania’s 3 million seniors -- the 4th largest percentage in the country.

The Task Force met its goal of delivering “a blueprint” for change in both the civil and criminal justice systems and other branches of government, issuing a comprehensive 284-page report with 130 detailed and often bold recommendations. Ambitious in scope, the report recommends best practices in court rules, legislation, education, and oversight, focusing on how Pennsylvania elders interact with the state court system, access legal information, assistance and protections, and calling on all branches of government, legal and community leaders, and the public to put them into practice.

Two critical recommendations were immediately implemented by the Supreme Court: 1) the creation of a new Office of Elder Justice in the Courts and 2) the formation of the enhancing the game).13

Based on the foregoing the IRS appears to continue its focus on virtual currency, and the practitioner facing clients owning virtual currency is well advised to follow that focus.

NOTE: The observations herein are intended to serve as a guide for general purposes only, and are not intended to serve as a formal legal position or opinion, or a substitute for independent legal research.

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ELDER JUSTICE, CONTINUED

of an Advisory Council on Elder Justice in the Courts, chaired by Superior Court Judge Paula F. Ott. Today the Council, whose members include key legislators, President Judges, attorneys, the Attorney General and District Attorneys, the PA Department of Aging, SeniorLAW Center, the Center for Advocacy for the Rights and Interests of the Elderly, and other strong voices for elder justice, are working to move the recommendations of the Task Force forward. The term “elder law” is well known, but “elder justice” is a newer term, focused on protecting the legal rights, safety and security of older people, preventing, responding to and prosecuting elder abuse, and protecting the autonomy, independence and dignity of elders. Why must this be a national and Pennsylvania priority? By sheer numbers and economic impact alone, issues of elder justice demand our attention as members of the legal and business communities and as those who care about Pennsylvania families.

Elder abuse, neglect or exploitation will affect each one of our extended professional and personal networks. No race, culture or economic sector is immune: elder abuse touches the lives of all, no matter how wealthy, educated, sophisticated or even famous. Film star Mickey Rooney was a victim, and testified about his ordeal to the U.S. Senate Special Committee on Aging in 2011, three years before his death. Rooney had filed a restraining order against his stepson and stepdaughter for “unbearable” financial and emotional abuse over a 10-year period, leaving him powerless over his assets and personal life. “I felt trapped, scared, used, and frustrated. But above all, I felt helpless. For years I suffered silently,” he said. Shouting from the witness table, Rooney urged Congress to confirm that elder abuse “is a crime and we will not allow it in the United States of America.”

Elder abuse is vast, pervasive and underreported: one of every 10 people 60 and older who lives at home suffers abuse, neglect of exploitation – yet it is estimated that only 1 in 24 cases is reported to authorities (1 in 44 in cases of financial exploitation). Elder abuse is devastating and deadly: victims are 3 times more likely to die prematurely. Guardianship abuse, neglect and exploitation are real concerns -- some would say, crises -- in Pennsylvania and across the United States. The prosecution of professional guardian Gloria Byars in Delaware County, who served as guardian in multiple Pennsylvania counties and is now facing 763 counts of conspiracy in the theft of over $1 million from over 100 of her wards, is just one local example.

How is Pennsylvania leading the nation in its response? With comprehensive and ambitious recommendations, which affecting financial institutions, evidentiary and prosecutorial practices, amending the slayer’s statute to preclude abusers from benefiting from their crimes, a new Elder Abuse Bench Book for all Pennsylvania judges, law school initiatives, recommendations of new legislative initiatives, and much more. The First Judicial District’s Elder Justice and Civil Resource Center in City Hall, launched by then President Judge Sheila Woods-Skipper and the FJD Elder Justice Committee, was created as a result of recommendations of the Task Force to create court-based programs or elder courts.

In the Guardianship arena, GTS (the Guardianship Tracking System) was created through a vibrant partnership between AOPC and the Council, along with new guardianship forms and practices, strengthened oversight, training and reporting for those who serve as guardians; a Bill of Rights of an Alleged Incapacitated Person," a Guardianship Bench Book, and much more.

The 2019 Advisory Council on Elder Justice in the Courts’ Progress Report details the accomplishments of the Advisory Council and OEJC since their creation in 2015. We are so proud of these accomplishments. And of what we will accomplish in the future, promoting access to justice for older Pennsylvanians in powerful ways.
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CASE SUMMARY FROM THE ORPHANS’ COURT LITIGATION COMMITTEE


BY BRADLEY D. TEREVELO, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

The October 2018 edition of the Litigation Committee Case Summaries summarized Fielding v. Commissioner of Revenue, 916 N.W.2d 323 (Minn. 2018), aff’g 2017 WL 2484593 (Minn. Tax Ct. May 31, 2017), which analyzed the constitutionality of Minnesota’s fiduciary income tax statute. Although the United States Supreme Court did not grant certiorari in Fielding, it did consider the constitutionality of North Carolina’s fiduciary income tax statute.

In Kaestner, the trust was created by a New York resident and had New York trustees. The trust’s assets were invested by a Massachusetts investment advisor. The discretionary beneficiaries were all North Carolina residents, which qualified the trust as a resident trust for North Carolina fiduciary income tax purposes.

The North Carolina Supreme Court, affirming the North Carolina Court of Appeals and North Carolina Business Court, held that “[w]hen, as here, the income of a foreign trust is subject to taxation solely based on its beneficiaries’ availing themselves of the benefits of our economy and the protections afforded by our laws, those guarantees are violated” because there were not sufficient minimum contacts to satisfy the Due Process Clause.

As an initial matter, the United States Supreme Court stated that a “tax based on the site of trust administration is constitutional.” Id. (citing Hanson v. Denckla, 357 U.S. 235, 251 (1958) and Curry v. McCanless, 307 U.S. 357, 370 (1939)). The Court then went on to set forth some controlling principles that are useful in the context of the role that trust administration plays in determining the constitutionality of a state’s fiduciary income tax statute.

The United States Supreme Court granted certiorari upon petition by the North Carolina Department of Revenue and affirmed the North Carolina Supreme Court, concluding that North Carolina’s fiduciary income tax law violated the Due Process Clause because it failed to demonstrate that there was a “definite link, some minimum connection, between [the] state and the person, property or transaction it seeks to tax.” Kaestner, 139 S. Ct. at 2220 (quoting Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), overruled on other grounds, South Dakota v. Wayfair, Inc., 138 S.Ct., 2080, 2092–2093 (2018)).

Unlike Pennsylvania’s fiduciary income tax statute, which determines whether a trust is a resident trust based on the residency of the settlor (72 P.S. §7302(a)), North Carolina determines whether a trust is a resident trust based solely on whether there is a North Carolina non-contingent beneficiary.

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1 The Orphans’ Court Litigation and Dispute Resolution Committee will provide summaries of recent litigation cases in each quarterly newsletter.

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CASE SUMMARY, CONTINUED

has “the power to impose a tax only when the taxed entity has ‘certain minimum contacts’ with the State such that the tax ‘does not offend traditional notions of fair play and substantial justice.’” Kaestner, 139 S. Ct. at 2220 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). However, “[i]f he ‘minimum contacts’ inquiry is ‘flexible’ and focuses on the reasonableness of the government’s action.” Kaestner, 139 S. Ct. at 2220 (quotation omitted). The “ultimate” inquiry is whether the trust (or party to be taxed) has received “benefits and protections” from the state. Id. (quotation omitted).

For there to be contacts sufficient for a state to tax a trust’s income, the Court noted that there must be a relationship between the state seeking to tax trust income and the party or parties who had “possession, control and enjoyment of trust property” – that is, a state may tax income if whomever possesses, controls or enjoys the trust property is a resident of that state. Id. at 2221-2222 (citing Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U.S. 83 (1929) (Virginia could not tax a trust’s income because “nobody within Virginia ha[d] a present right to [the trust property’s] control or possession, or to receive income therefrom”); Brooke v. Norfolk, 277 U.S. 27, (1928) (rejecting Virginia’s attempt to tax the trust because the trust “[wa]s not within the State, d[id] not belong to [the resident] and [wa]s not within her possession or control”); Curvy v. McCarless, 307 U.S. 357, 364-365 (1939) (Tennessee could tax trust’s income because Tennessee settlor had the “power to dispose of” the trust property)).

Based on this, the Court held that “[w]hen a tax is premised on the in-state residence of a beneficiary, the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset.” Kaestner, 139 S. Ct. at 2222. Here, the Court noted that the trust’s “administration was split between New York (where the Trust’s records were kept) and Massachusetts (where the custodians of its assets were located)” and that no administration occurred in North Carolina. Id. at 2220. Additionally, the trust made no “direct investments” in North Carolina. Id. The Court concluded that the beneficiaries of the trust in question had “no right to demand trust income or otherwise control, possess, or enjoy the trust assets in the tax years at issue. The decision of when, whether, and to whom the trustee would distribute the trust’s assets was left to the trustee’s ‘absolute discretion.’” Id. at 2222.

Because no one who could exert possession, control or enjoyment over the trust property lived within North Carolina, the United States Supreme Court concluded that North Carolina could not tax the trust’s income. Accordingly, the Court affirmed the North Carolina Supreme Court and concluded that North Carolina’s fiduciary income tax was unconstitutional as it applied to the particular facts surrounding the trust.

The impact of Kaestner in Pennsylvania (or in any other state besides North Carolina), is not yet known. However, both the decisions in Kaestner and Fielding (as well as McNeil Trusts, 67 A.3d 185 (Pa. Commw. Ct. 2013), also discussed in the October 2018 case summary) suggests that courts are leaning towards a more “beneficiary-friendly” approach when analyzing the constitutionality of state fiduciary income tax statutes.
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