PHILADELPHIA BAR ASSOCIATION

Probate and Trust Law Section Newsletter

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REPORT OF THE CHAIR

BY HEIKE K. SULLIVAN | BALLARD SPAHR, LLP

Despite the isolated ways in which we have been living and working in this global pandemic, there is much to celebrate in the recent activities of our Section. I am happy to report that we have continued to work together to better educate ourselves and others, and to make the world a slightly better place. The Probate Section is shining bright. Below I highlight the efforts of just a few of our Section leaders and members. As we all enjoy the Summer sun and perhaps some renewed in-person interactions, I hope you'll consider renewing your connection with the Probate Section—and in particular the ideas below.

The Elder Law and Guardianship Committee, led by co-Chairs Bess Collier and Roz Karlin, has had a busy 2021. In addition to its always-informative regular meetings, they have been working on several special projects. In June, on World Elder Abuse Awareness Day, the Committee facilitated a program designed to inform and educate participants on issues related to elder abuse. Special thanks must go to Scott Small for being a driving force behind the program, as well as to the esteemed panelists (the Honorable Sheila Woods-Skipper, Administrative Judge of Philadelphia County Court of Common Pleas, Orphans' Court Division, Brendan Corbalis, Assistant Director of Victim Services, SeniorLAW Center, and Najja Orr, President and CEO of Philadelphia Corporation for Aging) for taking the time to share their experience, knowledge and insight.

The Education Committee, led by co-Chairs Amy Quigg and Devin Fox, continues to impress with top-notch CLE programming. The June program in particular highlighted the breadth of topics relevant to our Section members. The program, which was exceptionally well attended, began with an in-depth review of the state of affairs in the offices of the Registers of Wills of Philadelphia and its surrounding counties as COVID restrictions are eased. In the second part of the program speakers discussed recent planning, fiduciary litigation and administration successes and

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NEWSLETTER ARTICLES

Would you like to see something in future issues of the Probate and Trust Law Section Newsletter? Then, why don't you write it? If you are interested, please contact the Editor:

Michael Breslow
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REPORT OF THE CHAIR, CONTINUED

challenges. The third part of the program addressed current tax proposals and ideas for planning despite the uncertainty of tax law changes. I look forward to this fall's program, a collaboration with the Family Law and Tax Sections that will delve into the intricacies of prenuptial agreements.

Finally, I am thrilled to report that the Section's program, E-wills in Pennsylvania: The Positives, Problems, and Potential, will be presented at the 2021 Virtual Bench Bar & Annual Conference in Philadelphia on October 1st. The speakers will be the Honorable Matthew D. Carrafiello, Judge of Philadelphia County Court of Common Pleas, Orphans' Court Division, past Chair Justin H. Brown, and my fellow officer, Ross Bruch. I encourage you all to attend the Bench Bar conference, and specifically to attend this timely program.

And now my promised "call to arms"…

First, this content-rich newsletter has for decades provided our members with timely and relevant information about all facets of the practice in our probate and trust practices. The ideas for these articles come from those practicing. Three times a year, the Publications Committee, which is chaired by Michael Breslow, meets to brainstorm to come up with articles that you will find of interest. If you have ideas for articles, please either attend one of these Publications Committee meetings or reach out to Michael Breslow (mbreslow@htts.com). I note that coming to the table with an idea does not obligate you to author the article.

Second, I ask you all to engage with or re-engage with our Section's mentoring program. Several years ago, the Section established a mentoring program designed to connect practitioners of all levels. The feedback on that program was overwhelmingly positive. During the pandemic, participation has waned as we have been unable to meet in person. Several leaders have sought to continue to meet virtually. As we (hopefully) step away from the restrictions preventing us from meeting in person, I ask you each to renew your commitment to the program. If you are unsure of which group you are in, please reach out to Alicia Berenson (berensona@ballardspahr.com) or Erica Russo (erusso@htts.com).

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I close with some good news. The Section will be hosting its annual meeting in November or December in person! Details will follow, but we hope to see everyone who feels comfortable attending in person so we can get back to enjoying one another's company.

JOIN A COMMITTEE

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

Contact the Section Chair:

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CONSIDERATIONS FOR CUSTODIANS UNDER THE PENNSYLVANIA UNIFORM TRANSFERS TO MINORS ACT

BY JASON P. SUSINI, ESQUIRE[1] | THE GLENMEDE TRUST COMPANY, N.A.

The Pennsylvania Uniform Transfers to Minors Act (PUTMA) allows for the establishment of an account for a minor child to receive gifts or other transfers of property. This can be a useful arrangement for accumulating wealth on behalf of a minor. Often times, an individual is selected as custodian for the account based on their relationship to the donor or the minor. Some individuals may not be familiar with the details of PUTMA because they may not have previously served in this capacity. However, it is important that a custodian understand the provisions of PUTMA to ensure proper administration and compliance under the law.

A transfer to a PUTMA account is irrevocable and the vesting of the custodial property in the minor cannot be undone.[2] Furthermore, the intent of the donor is irrelevant in determining the validity of a gift. In *Sternlicht v. Sternlicht*,[3] a mother and father created an account for their daughter, and the father served as the sole custodian. The father deposited additional funds into the account, which were used to purchase stock. The father later sold stock in the account and withdrew the proceeds to pay for his daughter's tuition and to put a down payment on a home. The mother filed a petition for an accounting of the account following her concern that the father had improperly liquidated stock from the account. The father argued that the transfer of additional funds into the account did not meet the common law requirements for a valid gift because of a lack of donative intent. The Supreme Court of Pennsylvania held that PUTMA supersedes the common law requirement for donative intent for a gift to be valid.

A custodian has several duties with respect to the custodial property. They must take control of the property, ensure that it is properly recorded, and manage and invest the property.[4] The custodian must keep the custodial property separate from other property at all times and in a manner that clearly identifies it as custodial property for the minor.[5] In addition, a custodian must keep records of all transactions with respect to custodial property and make them available for inspection by the minor's parent or legal representative or by the minor if he or she has attained age 14.[6] Custodians have a fiduciary duty to use custodial property for the minor's benefit and in their interest. The standard of care a custodian must use in carrying out their fiduciary

1 The writer would like to thank Gianna Tomeo for her contributions to this article.

2 20 Pa.C.S. § 5311

3 583 Pa. 149, 876 A.2d 904 (2005).

4 20 Pa.C.S. § 5312

5 *Id.*

6 *Id.*

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CONSIDERATIONS FOR CUSTODIANS UNDER UTMA, CONTINUED

duties is that of a prudent person dealing with another person's property.[7] Regardless of the source, custodial property is the property of the minor child, and the custodian must not use custodial property to benefit themselves.[8]

Several Pennsylvania cases have addressed the duties and responsibilities of parents who also served as custodians for their minor's accounts. In *Sutliff v. Sutliff*,[9] the custodians, one of whom was the father of the minors, transferred assets from the minors' accounts in order to meet a portion of the father's support obligations. The Pennsylvania Supreme Court held that a parent's obligation to support their minor children is independent from the minor's assets. They also noted that such assets may not be used to fulfill a parent's support obligation where the parent has sufficient means to discharge it themself.

In *In Re Gumpher*,[10] the custodian mother liquidated the PUTMA account and retained the proceeds instead of distributing them to her daughter. The mother argued that she was within her right to keep the funds as reimbursement for expenses she incurred caring for the daughter long before the liquidation. The Superior Court agreed with the trial court that the liquidation of the account was for the mother's benefit, which resulted in a breach of her custodial responsibilities. In addition, the mother failed to present evidence to show that she did not have resources outside of the PUTMA account to maintain her daughter's lifestyle or explain why she could have fronted the expenses for several years prior to the account's liquidation.

More recently, in *Werner v. Werner*,[11] the custodian mother withdrew the funds held in her children's PUTMA accounts and used the funds to purchase a home titled in her name alone. The Superior Court agreed with the Orphans' Court findings that the mother's actions were a breach of her fiduciary duties as custodian and that the home purchase was neither a necessary expenditure nor for the primary use and benefit of the children.

A custodian should also be mindful of the relationships they establish with third parties as well as their representations to such parties. Under PUTMA, a third party may in good faith act on the instructions of any person purporting to act in the capacity of a custodian.[12] Additionally, a third party is not responsible for determining the custodian's authority or designation, the validity of any instrument or instructions received, or the application of any property delivered to the purported custodian.[13]

While PUTMA provides third parties with protection from liability, there could be instances when a party

7 *Id.*

8 20 Pa.C.S. § 5314

9 515 Pa. 393, 528 A.2d. 1318 (1987).

10 2003 Pa. Super. 493, 840 A.2d 318 (2003).

11 2016 Pa. Super. 221, 149 A.3d 338 (2016).

12 20 Pa.C.S. § 5316.

13 *Id.*

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CONSIDERATIONS FOR CUSTODIANS UNDER UTMA, CONTINUED

has the ability to bring an action against a third party. For example, in *Richards v. Seattle Metro Credit Union*[14], a father was given a check to deposit into a guardianship account for his daughter with the credit union listed as the payee. The father presented the check to the credit union, received $100 and had the remaining funds deposited into his personal account. Three days later, the father withdrew the funds and opened a Uniform Transfer to Minors Act (UTMA) account at another bank. He later misappropriated the funds. In addition to suing her father for breach of fiduciary duty, the daughter brought a separate action against the credit union for allowing her father to deposit the funds into his personal account. The court noted that a bank may be liable for allowing a fiduciary to cash a check intended for their beneficiary, or for allowing a fiduciary to deposit a beneficiary's check into their personal account. In this case, the court determined that the credit union had notice of the father's fiduciary status given that the credit union was listed as payee and the daughter was listed as purchaser on the check. Although the court found that the credit union was subject to an action for conversion, the amount of liability was limited to the $100 the father withdrew at the time of deposit given his subsequent withdrawal of the funds and deposit in an UTMA account.

Generally, a custodian is required to transfer custodial property to the minor when the minor attains age 21.[15] The time to transfer may be delayed until a specified time after the minor attains age 21, but that time cannot be delayed beyond the minor's 25th birthday.[16] The delay in transfer must be noted at the time a custodian is nominated to receive property for the minor, upon exercise of a power of appointment, or upon a transfer authorized by a will or trust.[17] The delayed time must be specified at the time of transfer.[18] If no age for transfer is specified, the minor shall receive the property at age 21.[19]

It is important for a custodian to recognize their fiduciary duties under PUTMA to avoid potential liability. While some custodians may have the best of intentions, they may fail to distinguish the different roles they have in the minor's life. As noted in the cited cases, this often occurs when a parent serves as custodian. It is also important for donors to identify a custodian who they believe will be able to handle these responsibilities and act in the best interest of the minor. Thoughtful planning and selection should help to ensure proper oversight of the assets and the transfer of funds to the minor at their age attainment.

14 117 Wn. App. 30, 68 P.3d 1109 (2003).

15 For certain types of transfers, the custodial property must be transferred when the minor attains age 18 (*See,* 20 Pa.C.S. § 5320(4)).

16 *See,* 20 Pa.C.S. § 5321.

17 *See,* 20 Pa.C.S. §5321(a) (Indicating that the age of transfer may be delayed beyond age 21 for custodial property created pursuant to §§ 5303, 5304, 5305; however, note that §5321(e) indicates that the age of transfer for custodial property created by irrevocable gift under §5304 may not be delayed).

18 20 Pa.C.S. § 5321(b).

19 20 Pa.C.S. § 5321(f).

CONGRESS PASSES CORPORATE TRANSPARENCY ACT TO COMBAT THE ABUSE OF ANONYMOUS SHELL COMPANIES

BY MICHAEL A. BRESLOW, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

On December 28, 2020, the House of Representatives, and on January 1, 2021, the Senate, passed the National Defense Authorization Act (the "NDAA")[1] over President Trump's veto. Title LXIV of the NDAA includes the adoption of the Corporate Transparency Act (the "CTA"). Through the CTA, the United States joins the vast majority of nations involved in the global financial community in developing a legal and regulatory framework to combat the use of anonymous entities, such as corporations and limited liability companies (also referred to as "shell companies"), for money laundering, tax evasion and the financing of terrorism.

The two key substantive aspects of the CTA are first, the requirement for certain entities to disclose identifying information about (i) the individual owners of the entity and (ii) those who control an entity (the "beneficial owners") upon creation and upon a change of ownership, and second, provisions relating to the creation of a national registry of entities and their owners required under the CTA. At this stage, the CTA is largely a legislative authorization; importantly the detail of the beneficial ownership reporting requirements and the national registry will be outlined in regulations promulgated in the coming months and years by the Treasury Department.

Corporate Transparency Act

Versions of the Corporate Transparency Act had been introduced into Congress in various forms over the last decade by Representative Carolyn Maloney (D-NY),[2] and by Senator Ron Wyden (D-OR). In the CTA, Congress acknowledged the current deficiency in the United States' legal and regulatory framework relating to beneficial ownership reporting requirements, stating in Section 6402 of the NDAA, entitled, the "Sense of Congress," that "most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State," that "malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity" and therefore the CTA is necessary to "set a clear Federal standard" and "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."

Beneficial Ownership Reporting Requirements

Section 6403 of the NDAA sets forth the beneficial ownership reporting requirements. Certain corporations and limited liability companies, with a number of exceptions, will be required to disclose their beneficial owners to Financial Crimes Enforcement Network (FinCEN) when the entity is formed.[3] For this purpose, a beneficial owner is (a) an

1 H.R. 6395 (116TH Congress): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, available at https://www.govtrack.us/congress/bills/116/hr6395/text [hereinafter, the "NDAA"].

2 *Maloney Celebrates Inclusion of Corporate Transparency Act in FY2021 NDAA.* Press Release (Nov. 19, 2020), available at https://maloney.house.gov/media-center/press-releases/maloney-celebrates-inclusion-of-corporate-transparency-act-in-fy2021

3 Sec. 6403(b)(1)(C) of the NDAA.

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individual who exercises substantial control over the entity or (b) an individual who owns or controls not less than 25% of the ownership interests of the entity.[4] This definition tracks largely with the definition from the existing customer due diligence (CDD) regulations issued by FinCEN in 2016, which went into effect in 2018 and which require financial institutions to gather beneficial ownership information when opening accounts for entities.[5] The CTA does not mention trusts that own interests in an entity, but the author predicts that FinCEN, in adopting regulations to implement the CTA, will adopt a similar rule to the existing CDD Regulations, requiring that the trustee (and not the individual beneficiaries) is deemed the beneficial owner with respect to a trust that owns 25% or more of the ownership interests in an entity.[6] The beneficial ownership information required to be reported will be each beneficial owner's name, date of birth, address and unique identifying number.[7] The companies must report any changes in beneficial owners that occurred during the previous year.[8]

Generally, the entities that will be required to report (referred to as a "reporting company" in the CTA) are any corporations, limited liability companies, or other similar entities that are created by the filing of a document with a secretary of state or a similar office of the law of a State or Indian Tribe, or is formed under the law of a country and registered to do business in the United States through the filing of a document with a State or Indian Tribe.[9] Most trusts are not created by filing documents with any state office. Accordingly, trusts would not fit within the definition of a "reporting company" and are not required to report beneficial ownership information under this statute. Other explicitly stated exceptions to the definition of reporting company include entities that do not pose significant risk of transparency related concerns, such as certain operating businesses with a physical presence in the United States, charitable organizations, banks, credit unions, insurance companies and other regulated businesses.[10]

Newly formed reporting companies will be required to report the beneficial ownership information, and existing reporting companies will have two years after the effective date of regulations issued by the Treasury Department to submit a report containing beneficial ownership information to FinCEN.[11] The CTA also imposes civil and criminal penalties for providing false information, or willfully failing to complete or update beneficial ownership information, and there are also penalties for knowingly disclosing or using beneficial

4 Sec. 6403(a)(1)(a) (3) of the NDAA.

5 81 F.R. 29397, available at https://www.federalregister.gov/articles/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions

6 31 C.F.R. §1010.230(d)(3).

7 Sec. 6403(b)(2) of the NDAA.

8 Sec. 6403(b)(1)(D) of the NDAA.

9 Sec. 6403(a)(11)(A) of the NDAA.

10 Sec. 6403(a)(11)(B) of the NDAA.

11 Sec. 6403(b)(1)(B)-(C) of the NDAA.

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ownership information submitted to FinCEN, except under certain circumstances and with proper authorization.[12]

Beneficial Ownership Register

The CTA requires FinCEN to create a national registry and to maintain beneficial ownership information on reporting companies for not fewer than five years after the reporting company terminates.[13] The CTA also requires FinCEN to establish protocols to protect the security and confidentiality of beneficial ownership information, subject to the authorities permitted to access the information contained in the registry. The CTA outlines who will be permitted to access the beneficial ownership information reported to FinCEN. It is available upon request to federal law enforcement (including federal agencies acting on behalf of law enforcement of another country), state law enforcement with a judicial order, financial institutions subject to CDD requirements with the consent of the reporting companies, and other federal regulators.[14]

Regulatory Implementation

The CTA also contains a broad authorization to the Secretary of the Treasury to implement regulations.[15] However, given the overlap of the CTA with the existing CDD Regulations, Congress directed FinCEN to conform the CDD Regulations with the CTA and to eliminate unnecessary or duplicative burdens on financial institutions and legal entity customers. Congress also mandated that the Secretary of the Treasury will "use risk-based principles for requiring reports of beneficial ownership information."

Concluding Thoughts

The CTA represents an important step forward for the United States for increasing transparency and reducing the risk that anonymous entities may be used for money laundering, tax evasion or the financing of terrorism. The United States, although belatedly, has joined the international community in creating a legal framework for identifying the individuals behind a broad class of legal entities, and to make anonymously accessing the United States' financial system that much more difficult.

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12 *See*, 20 Pa.C.S. § 5321.

13 *See*, 20 Pa.C.S. §5321(a) (Indicating that the age of transfer may be delayed beyond age 21 for custodial property created pursuant to §§ 5303, 5304, 5305; however, note that §5321(e) indicates that the age of transfer for custodial property created by irrevocable gift under §5304 may not be delayed).

14 20 Pa.C.S. § 5321(b).

15 20 Pa.C.S. § 5321(f).

INTRODUCTION TO INTERNATIONAL ESTATE & TAX PLANNING[1]

BY DAVID R. ELWELL, ESQUIRE AND BRITTANY A. YODIS, ESQUIRE | STONEHAGE FLEMING LAW US

INCOME AND TRANSFER TAX & RESIDENCY

Unlike most countries, the United States ("US") taxes income earned by its citizens and residents (referred to as "US persons") on a worldwide basis – all income is included without regard to its source. Noncitizen nonresidents are subject to US income tax only on certain income sourced in the US. Similarly, US persons are subject to the US estate, gift, and generation-skipping transfer ("GST") taxes (collectively referred to as "transfer" taxes) on a worldwide basis – on all transfers of property without regard to the location of the property. Noncitizen nonresidents are subject to transfer taxes only on transfers of certain property deemed to be "situated" in the US ("US-situs property").

The test for determining income tax residency differs from the test for determining transfer tax residency. The income tax test is an objective test. A noncitizen is deemed to be a "resident" for US income tax purposes (and therefore subject to US income tax on worldwide income) if: (i) he has been admitted to the US under US immigration laws as a lawful permanent resident ("LPR") (i.e., green card holder) or (ii) he is physically present in the US for a certain number of days under the "substantial presence test." Under the substantial presence test, an individual is treated as a US resident for a particular calendar year if he is physically present in the US for 31 days or more in that year and 183 days or more during the three-year period that includes the year in question and the two years immediately before that. The three-year total is derived by counting all the individual's days of physical presence in the US for the current calendar year (the year in question), one-third of the days of presence in the preceding calendar year, and one-sixth of the days of presence in the year before that.[2]

The test for determining residency for US transfer tax purposes differs; it is partially subjective, depending in large part on the state of mind of the person in question. A resident for US transfer taxes is a person who has his "domicile" in the US. The US Treasury Regulations provide that "a person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom." A person's intent in this regard is determined by considering all relevant facts and circumstances. Important factors include the person's status for immigration purposes; the country(ies) that have issued the person a passport; the country where the person is registered to vote; the location of the person's assets; the location of the person's family and close friends; and the location of the person's personal property, particularly valuables.

US SOURCE INCOME

In general, nonresidents are subject to US income tax only on some types of US-source income, which generally falls into two categories: (1) income that is "effectively connected" with the conduct of a trade or business in the US – referred to as "effectively-connected income" or "ECI," and (2) certain US-source income that is "fixed,

2 For example, an individual who was present in the US for 50 days in 2019, 240 days in 2018, and 360 days in 2017 would be a resident for 2019 under the substantial presence test because he was present for more than 31 days in 2019 and more than 183 days under the three-year count (counting one-sixth of the days for 2017, or 60, one-third of the days for 2018, or 80, and all 50 of the days for 2019; 60 + 80 + 50 = 190).

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determinable, annual or periodical" – referred to as "FDAP" income.

If an individual is engaged in a US trade or business, generally all income from sources within the US connected with that trade or business is ECI. Whether an activity constitutes a US trade or business is a facts-and-circumstances determination. ECI is subject to net-basis taxation (i.e., deductions are allowed) at graduated rates from 15% to 37%. Generally, a nonresident with ECI will have a US tax return filing requirement.

FDAP income generally includes income of a passive nature (but not exclusively passive) and is subject to gross-basis withholding tax of 30%, which may be lower under the terms of a treaty between the US and the individual's country of residence. The tax on FDAP income generally is withheld at the source and remitted directly to the IRS, with the result that FDAP income generally does not, by itself, create a US tax return filing requirement for the individual. Examples include dividends, interest, and passive real property income (rents). Income that otherwise would be FDAP income but that is effectively connected with the conduct of a US trade or business is taxed as ECI and not as FDAP. For example, interest on loans that is effectively connected with a US trade or business is ECI.

It is important to note that, generally, nonresidents are not subject to tax on capital gains from sources in the US (such as gains on the sale of stock of a US corporation), subject to certain exceptions. Capital gains that are effectively connected with a US trade or business are taxed as ECI (which includes gain on the sale of a US real property interest or an interest in a US real property holding company).

US-SITUS PROPERTY

US transfer taxes (US estate, gift, and GST taxes) are taxes imposed on the privilege of transferring ownership of property. The tax is imposed on the transferor – not the transferee. In general, nonresidents are subject to US transfer taxes only to the extent that the property transferred is US-situs property. Very small exemptions and deductions are available to nonresidents. The definition of US-situs property differs for purposes of the US estate and gift taxes.

US-situs property for estate tax purposes includes (but is not limited to) real property located in the US; tangible personal property located in the US; stock in a US corporation; debt obligations of US resident, corporation or governmental unit (but excluding certain "portfolio" debt); cash surrender value of domestic life insurance policy. US-situs property for estate tax purposes does not include real property located outside the US or in a US possession; tangible personal property located outside of the US; debt obligations of a non-US person, corporation or governmental unit; portfolio debt; cash deposits in a US bank (unless effectively connected with a US trade or business).

US-situs property for gift tax purposes generally includes only real property located in the US; tangible personal property located in the US; and cash deposits in a US bank account Currency in a US safe deposit box is considered tangible personal property located in the US. US-situs property for gift tax purposes does not include stock in a US corporation, debt obligations of the US government or debt obligations of a US person.

PLANNING CONSIDERATIONS

The US income tax and transfer tax regimes can be exceedingly complex for noncitizen nonresidents with substantial US investments. The following are a few common planning considerations:

(a) Treaty Relief. Individuals who live in a country that has one or more tax treaties with the US should check the terms of the treaty(ies). On the income tax side, FDAP income is often subject to a reduced withholding rate (or no withholding) under the terms of an income tax treaty between

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the US and another country. On the transfer tax side, the treaty may increase the amount of gift or estate tax exclusion available to the nonresident.

(b) US Tax Return Filing Requirements.

(i) FDAP income generally does not give rise to a US income tax return filing requirement for the nonresident who earns it because tax is withheld at the source and remitted to the IRS. However, if the withholding agent under withholds or over withholds, the non-resident will have to file a return to pay the deficiency or to obtain a refund of the overpayment.

(ii) ECI does give rise to an income tax return filing requirement for the non-resident who earns it. Many nonresidents are leery of filing anything with the IRS and therefore ignore Schedules K-1 they receive from US investments on the theory that they report only losses (which is often the case with investments in US real estate partnerships). Even in the case of losses, a tax return must be filed, particularly to preserve the losses to offset future gains.

(c) Transfer Taxes. US estate and gift taxes are essentially elective taxes for nonresidents. Unlike income tax on FDAP and ECI, US estate and gift taxes are easily avoided for a well-informed non-resident.

(i) In the case of the gift tax cash in a foreign bank account, or US treasuries for large gifts, are clearly not US-situs property for gift tax purposes. Nonresidents seeking to make gifts to US family members simply need to make the gift in the proper form to avoid the tax.

(ii) Avoiding the US estate tax may be somewhat more involved but it is equally straightforward. Nonresidents can avoid US estate tax by simply holding US-situs property in a foreign corporation or a properly-structured trust.

THE PEPC INVITES THE PHILADELPHIA BAR ASSOCIATION PROBATE AND TRUST LAW SECTION TO JOIN OUR COUNCIL FOR MEMBERSHIP AND PROGRAMMING

Golf & Tennis Outing
Monday, August 16, 2021
The Union League Golf Club at Torresdale
3801 Grant Avenue, Philadelphia, PA

September Luncheon Program
Tuesday, September 21, 2021
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: "Demystifying Distributable Net Income"
Speaker: Jeremiah W. Doyle

October Luncheon Program
Tuesday, October 19, 2021
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: "'Dirty Words' No More:
Lawyer's Perspective on Why Life Insurance May Be Your
Clients' Best Option After D.C. Changes the Tax Rules (Again)"
Speaker: Michael Amoia, J.D., LL.M (Tax), CLU®, ChFC®

FOR MORE INFORMATION ON JOINING THE PHILADELPHIA ESTATE PLANNING COUNCIL OR TO REGISTER FOR ANY UPCOMING PROGRAMS, PLEASE VISIT WWW.PHILAEPC.ORG.

ORPHANS' COURT CORNER

BY THE HONORABLE SHEILA WOODS-SKIPPER, ADMINISTRATIVE JUDGE OF ORPHANS' COURT

The Orphans Court Division of the Court of Common Pleas welcomes you to our first ever Orphans' Court Corner! As our Division adapts to changes brought on by the COVID-19 pandemic, many time honored processes have fallen by the wayside and, of necessity, new processes have emerged. What new things will stay? What tried and true processes will return? It's anyone's guess. Regardless, the Court is committed to promoting open and frequent communication between the Bar and the Orphans' Court Division with a focus on service and best practices.

The pandemic and the resultant quarantine, made remote hearings common place in our Orphans Court, particularly for guardianship hearings. Remote guardianship hearings have practically eliminated the inability of the alleged incapacitated person to attend. Another type of hearing particularly amenable to being conducted remotely are the monthly audits. There is some concern about the ability to file objections on the day of the audit, but for the most part, audits conducted remotely have proven to be advantageous. This may not be a concern going forward, however.

For those anxiously awaiting a return to some semblance of normalcy, we are pleased to announce that, as of July 6, 2021, the courts are open for in-person judicial proceedings. Courtrooms remain fully equipped to address health and safety concerns through the use of plexiglass partitions, socially distant seating, and for the time being, masks will continue to be required. In addition, all courtrooms have been equipped to handle hybrid proceedings, allowing in-person and remote attendees to participate simultaneously through the use of chrome book laptops. Arrangements for hybrid hearings must be made in advance.

Additionally, COVID having made it abundantly clear that the process of physically coming in to room 415 City Hall to pick up citations is archaic, the Court, in conjunction with the Clerk's Office, is exploring the feasibility of an electronic sealing and transmission process as an alternative to sending and sealing Orphans' Court notices through physical mail. Testing should be completed in the weeks ahead. Look forward to the upcoming announcement!

On another front, to ensure that information is easily accessible and up to date, the Orphans Court Division is in the process of updating the Orphans' Court website. The Guardianship Manual and some guardianship forms will be made readily available on the site along with general guidance on their usage. To further promote accessibility, we plan to provide translated versions of various documents on the website in the future. Input and suggestions from the Section on what should be included on the website is welcomed.

The Orphans' Court is also working with the Guardianship Tracking Governance Committee of the Office of Elder Justice to improve the Guardianship Tracking System (GTS) to provide consistent and reliable notifications that ensure compliance with GTS reporting requirements. As we phase out some pandemic protocols, we are hopeful that the Elder Justice and Civil Resource Center (Center) will increase its assistance to the most vulnerable populations, providing services and referrals to appropriate resources, including GTS training. The Center, located in room 278 City Hall, was established in response to the Pennsylvania Supreme Court's Elder Justice Task Force Commission, to assist our population age sixty and older, to navigate the court system more effectively.

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TAX UPDATE

BY GEORGE C. DEENEY, ESQUIRE | GILBOY & GILBOY LLP

GUIDANCE FROM THE IRS

Revenue Ruling 2021-12, July 2021 Rates

- Section 7520 Rate: 1.2%
- Short Term AFR (0-3 years): 0.12%
- Mid Term AFR (3-9 years): 1.00%
- Long Term AFR (over 9 years): 2.07%

Extension of Period of Acceptance of Emailed Documents/Digital Signatures

The IRS has extended the timeframe in which it will accept emailed documents and digital signatures through December 31, 2021. In March of 2020, the IRS had initially announced that it would accept images and digital signatures; however, such acceptance was set to expire on July 15, 2020. It has been repeatedly extended and will now expire at the end of 2021.

LEGISLATION

President Biden's Proposed Changes to Transfer at Death Rules and Capital Gain Treatment

President Biden has proposed significant changes which, if passed in their current form, would have significant impact on estate, gift and generation-skipping transfer tax rates and capital gain treatment. The recently released "Green Book" contains the following proposals:

- Capital income taxed at ordinary rates for high income earners: The Green Book proposes to treat long term capital gains and qualified dividends of taxpayers with an AGI of more than $1 million at ordinary income tax rates, but only to the extent that the income exceeds $1 million ($500,000 for married filing separately), indexed for inflation.

- Treating gifting of property and death of property owner as a realization event: Under the proposal, the donor or decedent would recognize the gain of appreciated property at the time of the transfer of the property/interest (with various exclusions/exceptions, including, but not limited to, transfers to charities, small business stock and transfers of some tangible

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ORPHANS' COURT CORNER, CONTINUED

Suzan Chau, Esquire, Director and Supervising Attorney for the Center, in conjunction with various stakeholders like Senior Law Center, VIP and CARIE, provide much needed information and services to the target population. The Center is staffed by volunteer attorneys and, post-COVID, may be accessed with or without an appointment. Please consider volunteering a few hours a month.

Finally, we are committed to promoting open and frequent communication between the Probate and Trust Law Section of the Philadelphia Bar Association and the Orphans' Court Division. To that end, we encourage you to share your thoughts and ideas that will improve service to both the practitioner, as well as the client. It is the Court's intent to use this forum to keep the section and the Bar abreast of new developments in policy or procedure, any nuances or changes that will remain as a result of COVID, and to provide food for thought and action going forward.

On behalf of the Orphans' Court Division, a special thanks to the Probate and Trust Law Section of the Philadelphia Bar Association and its members for their continued support.

IT'S A FAMILY AFFAIR: THE SERPENT'S TOOTH OF THE IMPATIENT HEIR

How sharper than a serpent's tooth it is to have a thankless child! -- King Lear, Act 1 Scene 4

BY BRENDAN CORBALIS, ESQUIRE, ASSISTANT DIRECTOR, VICTIM SERVICES | SENIORLAW CENTER

Shortly before his death in 2019, the late Harold Bloom, described as "probably the most famous literary critic in the English-speaking world", wrote, "Incessantly I reread King Lear, and find what takes my apprehension to its limits. Nature dwindles to nothing. Familial love turns destructive. Intergenerational strife becomes murderous. In this bad autumn I echo Lear: 'We cry that we are come unto this great stage of fools.'"

Controversial, alternately venerated and condemned, Bloom was raised an Orthodox Jew in a Yiddish-speaking household. His father was a garment worker from Odessa, his mother a dutiful wife and homemaker from Brest. He knew first-hand about intergenerational strife, about the darker side of familial love, about the poison of the serpent's tooth.

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TAX UPDATE, CONTINUED

personal property and a principal residence).

Senator Bernie Sanders Introduces the "For the 99.5 Percent Act"

Senator Bernie Sanders recently introduced the "For the 99.5 Percent Act", which proposes significant changes to the estate, gift and generation-skipping transfer tax exemption amounts. The proposal includes reducing the basic exclusion amount to $3,500,000 and would create graduated tax brackets beginning from 39% and increasing up to 65% (for estates over $1 billion). The proposed legislation would also eliminate the step up in basis for certain grantor trusts (which assets are not includable in the grantor's estate), impose a minimum term limit of ten years from GRATs, provide that the remainder interest for a GRAT must exceed the greater of 25% or $500,000, would imposed a limit of two donees for annual exclusion gifts and would apply an inclusion rate of zero to any GST trust that is longer than 50 years.

Senator Elizabeth Warren Introduces the "American Housing and Economic Mobility Act of 2021"

Senator Elizabeth Warren recently reintroduced the "American Hosing and Economic Mobility Act of 2021, which primarily deals with housing affordability. In order to pay for its programs, the bill proposes to make significant changes to the laws surrounding estate, gift and generation-skipping transfer tax. The proposal includes reducing the basic exclusion amount to $3,500,000 and would create the following tax brackets: 55% for estates or transfers not over $13 million, 60% for estates or transfers over $13 million but not exceeding $93 million and 65% for estates or transfers over $93 million. The proposal also includes additional provisions, such as a) 10% surplus tax on estates over $1 billion, b) disallowing GST exemption to be used on trusts that do not terminate within 50 years of the date of creation, c) requiring GRATs have a minimum 10 year term, and d) imposing a $20,000 limit on the annual exclusion for all gifts from a donor by transfers in trust, transfers of interests in a pass through entity and transfers that create no present interest (ignoring withdrawal powers).

THE IMPATIENT HEIR, CONTINUED

What do King Lear, a working-class literary genius, and the serpent's tooth have to do with elder abuse? Everything.

In 2015, then United Nations Secretary-General, Ban Ki-moon gave a speech on World Elder Abuse Awareness Day (June 15th). He noted that for many, elder abuse "conjures an image of a heartless caregiver who is not well-known to the victim. While this deplorable problem does persist, more often it is family members who perpetrate the violations, which include neglect as well as psychological, financial and physical abuse."

The insightful Secretary-General may not have mentioned the serpent's tooth of the impatient heir – yet his words serve as a warning to those who care to hear them.

As a society, we adamantly hold onto our denial about the extent and nature of elder abuse. This collective fog of denial falls even more thickly when it comes to the most often ignored form of abuse – financial exploitation.

We may shake our heads and cluck our tongues at those horrible fraud artists who have turned financial exploitation of the elderly into a billion-dollar global industry. But those heartless and calculating thieves remain anonymous – difficult to trace, impossible to prosecute, immune to civil remedies.

The fact remains that we would rather look at the speck of sawdust in these strangers' eyes than pay attention to the plank in our own.

Over twenty years ago, the National Center for Elder Abuse conducted extensive research about financial exploitation. It concluded that domestic settings remain the predominant setting for this abuse. It further noted that the presence of complex family dynamics and deep-seated conflicts tend to make identifying and addressing financial exploitation "particularly challenging." The problem has only worsened.

According to a January 2021 National Center for Victims of Crime report, "family members are responsible for 60% of elder abuse and neglect incidents. Adult children and spouses account for □ of perpetrators."

Elder abuse has traditionally been broken down into six major categories: physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment, and financial abuse. Even though financial elder abuse has resulted in losses of $2.9 billion per year, it continues to receive limited attention. We would do well before casting stones at anonymous scammers – we are all of us living in glass houses.

One study of a California county's Adult Protective Services (APS) reports of financial exploitation found that 40% of the perpetrators were the victim's adult children or grandchildren. Many of these perpetrators depend on the elderly victim for housing or other assistance, and struggle with untreated mental health and substance abuse disorders.

Difficult to detect and immune to vaccination, financial exploitation at the hands of adult children represents one of the most virulent strains of elder abuse. Not merely hyperbole, it can also be deadly. Masks, quarantines, herd immunity – all useless to protect them against its infection. Financial abuse may lead to depression, hopelessness, or even suicide. Make no mistake, the serpent tooth's of the impatient heir contains venom.

APS workers know financial exploitation cases pose far greater investigatory challenges than cases of physical abuse or neglect. They experience first-hand the reluctance of private attorneys and prosecutors to take on cases involving financial exploitation. In turn, this makes them less inclined to vigorously pursue these cases.

Before even beginning to discuss solutions, we must first commit ourselves and our resources to lifting the fog and face the harsh reality that financial exploitation is a family

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THE IMPATIENT HEIR, CONTINUED

affair. Unseen bogeymen aside, the most dangerous monsters are not only closer to home – they live inside it.

The National Center for Victims of Crime study mentioned above found that caregiver neglect, the most common elder abuse, is the most unreported type of abuse, with 1 out of every 57 cases being reported.

We can safely estimate that well over 50% of those caregivers are adult children and grandchildren, living with the victim and dependent upon his or her financial support. If the proportion of elder abuse remains constant, the study concludes that the number of victims will reach 320 million by 2050.

So, what of this impatient heir – how do families, law enforcement, the judiciary, and elder law attorneys recognize him or her?

Though they may identify him or her by other names, most families know full well who deserves the moniker. Families of all kinds usually have at least one – even the British Royal Family. In 2012, Prince Charles made some remarks regarding his patience and waiting for the throne. "Impatient? Me? What a thing to suggest! Yes of course I am," he quipped during a recording for a documentary.

The impatient heir need not have royal blood or stand to inherit a throne. The impatient heir is an ancient trope found in countless cultures across millennia. This entitled and selfish archetype exists in the Babylonian creation epic, in Mesopotamian, Greek, and Norse Greek mythology, in the Mahabharata, and, of course, in Shakespeare's King Lear, among others.

In 21st century America, indeed right here in 21st century Philadelphia, the impatient heir tends to be one of two types. Those who work with older victims will instantly recognize both. They know, too, that financial exploitation often occurs in conjunction with other forms of elder abuse

In its groundbreaking 2003 report, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America, the National Research Council's Committee on Law and Justice, Division of Behavioral and Social Sciences and Education introduced these two types of the impatient heir.

The first type consists of dysfunctional individuals with low self-esteem. This type often struggles with substance abuse and varying degrees of psychosocial stress. Opportunists, they tend to passively take advantage of the parent or grandparent only when they see the chance to do so without discovery.

The theft or misappropriation of resources remains systematic if nothing else.

The report goes on to describe what it calls the second, more aggressive type. These abusers methodically exercise power and control over the parent or grandparent. They obtain the victim's assets "by using deceit, intimidation, and other forms of psychological abuse. Such individuals may have an antisocial personality disorder and have little regard for the rights of others."

The preferred weapon of this second type remains agency under power of attorney. They take, use and misuse assets without the victim's knowledge or permission. They forge victim's signature, abuse joint signature authority on bank and retirement accounts, and use deception, coercion or undue influence to force the victim to sign fraudulent deeds and other legal documents.

During the COVID-19 pandemic, these types illegally cashed stimulus checks sent to the victim. They pocketed the cash and never once looked over their shoulder. They knew they would never be called to task.

Because no one is watching. As agents under power of attorney, they have zero oversight. They write one check after another until the well runs dry.

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THE IMPATIENT HEIR, CONTINUED

The costs of private attorneys and civil litigation are prohibitive. Remedies found in tort law such as fraud, conversion, negligence, and civil theft must meet the ambiguous "clear and convincing" burden of proof. When the parties are parent and adult children or grandchildren, cold hard evidence can rarely be discovered. Victims cannot afford or won't seek out legal representation or the costs of handwriting experts or forensic accountants.

Likewise, actions in Orphans' Court often pose surprising and onerous procedural hurdles unfamiliar to lawyers who do not practice there regularly – imagine the bewildering landscape of Orphans' Court Rules to a non-attorney. Victims who must proceed pro se face numerous barriers to justice. Overburdened and unsupported, many in law enforcement cannot pursue investigate financial exploitation of older victims. Some think it a purely civil matter. Others believe it's a family affair.

Pennsylvania does not require any type of registration by an agent. No mechanism exists to ensure the principal has mental capacity at the time of signing or has not signed under threat or coercion. Victims often feel protected because the signing was witnessed by a notary.

Once the document is signed and notarized, the impatient heir as agent may exercise unbridled dominion over the principal's assets. Agents have no duty or obligation to notify the principal when they exercise the power of attorney. They post no bond. No third-party monitoring or reporting occurs as a general rule. A victimized principal seeking justice must pursue civil remedies in Orphans' Court. The right to enter freely into a contract – even a bad one - remains a sacred cow in the pantheon of American jurisprudence. Chalk one up for the impatient heir.

In June 2018, responding in part to financial exploitation committed by guardians against incapacitated person, the Pennsylvania Supreme Court adopted new Orphans' Court rules for guardianship proceedings. Effective June 1, 2019, the new rules brought both substantive and procedural changes. Among other issues, they addressed waiver of bond, clarification of the role of counsel, transactions related to real property and the adjudication of incapacity. They created and revised rules, to define a guardian's responsibilities regarding reporting, monitoring, review, and compliance. There is still more to do, including instituting a right to counsel for all facing or under guardianship and formalizing least restrictive alternatives to promote individual rights and dignity to the greatest extent possible.

Certainly, a court appointed guardian and a privately appointed agent under power of attorney remain two distinct and unrelated things – yet they are both fiduciaries and carry duties of care subject to exploitation. In theory, they share similar goals – the well-being of the incapacitated person or principal. We might begin our conversation about potential safeguards and legal remedies regarding financial exploitation by the impatient heir as agent under power of attorney by using the recent guardianships reforms as a starting point.

Financial abuse of older victims at the hands of adult children and grandchildren and relatives is a national crisis.

SeniorLAW Center is proud to seek justice for older people, including diverse victims of elder abuse, exploitation and other forms of crime using the power of the law, to promote independence and dignity, educate the community, and advocate on local, state and national levels for systems which respond to their needs. Join us in this work.

Without immediate and collaborative efforts of the bar and the judiciary to find an antidote to venom of the serpent's tooth, we may find ourselves, like Lear – facing a bad autumn and finding that we ourselves have come upon this great stage of fools.

RULES AND PRACTICE UPDATE

Proposed Change to Orphans' Court Rule 10.5

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

A change to Orphans' Court Rule 10.5, which governs notice of the grant of letters, is pending before the Supreme Court Orphans' Court Procedural Rules Committee. The comment period closed on May 7.

The present rule provides in part:

> (a) Within three (3) months after the grant of letters, the personal representative to whom original letters have been granted or the personal representative's counsel shall send a written notice of estate administration in the form approved by the Supreme Court to. . .

The proposed changes are as follows:

> (a) Within three (3) months after the grant of letters, **a** personal representative to whom ~~**original**~~ letters have been granted or the personal representative's counsel shall send a written notice of estate administration in the form approved by the Supreme Court to. . .

This change would eliminate the ambiguity in the present text surrounding the word "original," which is not defined in the Rules. For example, it is unclear whether an administrator d.b.n or d.b.n.c.t.a. is currently required to send written notice to the parties in interest enumerated in the rule, since arguably their letters are not the "original letters." The parties in interest certainly would be well served to know who is responsible for the administration under those circumstances, but the current rule does not clearly impose that obligation. The proposed text clearly does. This is confirmed by a new note official note, which says that "subparagraph (a) applies to all personal representative, including a successor personal representative."

CASE SUMMARY FROM THE ORPHANS' COURT LITIGATION COMMITTEE[1]

Harrison Trust, 11 Fid. Rep. 3d 116 (O.C. Bucks 2021)

BY BRADLEY D. TEREBELO, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.[2]

Harrison Trust, 11 Fid. Rep. 3d 116 (O.C. Bucks 2021) examined the limits under Florida law of a beneficiary to request an account and the limits of a trustee's discretion to withhold distributions. In Harrison Trust, the settlors created a trust for their grandson, Michael, naming their son, Theodore, as trustee. Theodore also made contributions to the Trust. The Trust was governed by Florida law (it is not clear from the opinion how the Bucks County Orphans' Court exercised jurisdiction over the trust, although Theodore, the trustee, appeared to be a Bucks County resident). At the time of the litigation, the value of the trust was approximately $540,000.

Pursuant to the terms of the Trust, Michael had the ability to withdraw 1/3 of the Trust when he turned 30, provided that "any property distributable to a beneficiary who is under a disability may be retained" by the trustee. The Trust provided that a beneficiary would be considered under a disability "when such beneficiary shall in the opinion of our Trustee be unable by reason of illness or other condition to properly manage his or her affairs."

When Michael turned 30 in 2017, he exercised his power to withdraw 1/3 of the Trust, but Theodore refused to making the distribution, claiming that Michael was under a disability because he "suffers from a disability of Attention Deficit Hyperactivity Disorder ('ADHD'), which is aggravated by his use of marijuana.

In 2019, Michael filed a petition in the Bucks County Orphans' Court to compel Theodore to account for his administration of the Trust from inception through the present and to compel Theodore to distribute 1/3 of the Trust to Michael.[3] As mentioned above, the Trust was governed by Florida law, so the judge analyzed both requests pursuant to Florida law.

With respect to Michael's request that Theodore prepare an account, the judge noted that Florida requires that a trustee provide an "annual trust accounting" to certain beneficiaries, which Theodore apparently did not do.[4] However, Florida law also provides that "because an action for an accounting seeking to enforce a breach of trust or fiduciary duty entitles a beneficiary to damages, the application of section 95.11(6) [Florida's laches statute] bars an action seeking an accounting from a trustee more than four years before the action is filed" – that is, as long as the beneficiary knew of the existence of the trust, if a trustee fails to fulfill the annual accounting requirement, the beneficiary has four years in which to file an action compelling him to file an account for that period.[5]

Michael argued that he was unaware of the existence of the Trust until 2017, when he learned

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

2

3 The opinion also mentions in passing that there was federal litigation concerning the Trust, pursuant to which Theodore prepared an informal account, although the opinion does not discuss the matters at issue in the federal litigation, the procedural posture or how it was resolved.

4 Pennsylvania does not have any such annual account requirement.

5 Pennsylvania's laws concerning limitations of actions against trustees (which would include limitations on the ability to seek an account) can be found at 20 Pa. C.S. §7785.

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CASE SUMMARY, CONTINUED

through the family's financial advisor of its existence in connection with his personal tax returns (which was the same year he turned 30 and requested his 1/3 distribution), and therefore he was entitled to an account since inception. Theodore argued that Michael was aware of the Trust since inception, and therefore he could only request an account going back four years. Theodore testified that Michael's grandmother had a discussion with Michael about the existence of the Trust after it was created, and Theodore produced a letter from Michael's prior attorney in 2018 stating that Michael "knew of the existence of the trust, having been informed by his grandparents before their death."

Accordingly, the court held that Michael was aware of the Trust since 2006 "and thus, had the opportunity to file an action against [Theodore] several years before commencement of this matter. Therefore, the affirmative defense of laches applies in this case" and would only require Theodore to account since 2015. However, Theodore agreed to prepare an account going back to 2013, and the court stated that "this would be an appropriate starting point for an accounting."

With respect to whether Theodore's refusal to distribute 1/3 of the Trust to Michael was appropriate, Theodore argued that Michael suffered from ADHD that was compounded by marijuana use. He testified that he observed Michael using marijuana, he saw Michael growing marijuana plants behind their house, that Michael stole Theodore's prescription pad and later sold it and that he was dealing drugs, including marijuana and Adderall.

The court stated that under Florida law, "while the grant of absolute discretion to a fiduciary is very broad, 'a trustee is always subject to accountability to remaindermen where discretion is improperly, arbitrarily or capriciously exercised' . . . [and that d]espite the amount of discretion that is granted to a trustee, a trustee is not relived 'from the exercise of good faith or from being judicious in his administration of the trust, which administration is always subject to review by the court in appropriate instances.'" (Citations omitted.)

Here, the court stated that the power Theodore had to withhold distributions must be exercised "in good faith and in accordance with the terms of the trust. If the Settlor[s] had wished the trustee to have unbridled discretion with respect to the one-third distribution provision, the disability clause would not have been placed in the trust agreement as there would have been no need for it."

The court found that Theodore failed to demonstrate how Michael's childhood ADHD and later marijuana use rendered Michael unable to manage his affairs when he made the withdrawal request in 2017. The court noted that it "was not presented with an expert report or testimony regarding [Michael's] current medical status, or a recent diagnosis of ADHD, nor was any testimony presented concerning the effect of marijuana use on [Michael's] cognition. [Theodore] merely offered anecdotal testimony regarding [Michael's] lifestyle and impulsivity[,]" which did not rise to the level of a disabling condition under the Trust. Furthermore, given that Michael and Theodore had been estranged since 2017, Theodore was unable to give any examples of current disability. To the contrary, Theodore demonstrated that he was "able to function as a young adult" given that he graduated from college with a degree in finance and was living with his girlfriend in New York.

Accordingly, the court held that Theodore abused his discretion by withholding the distribution and directed him to distribute 1/3 of the principal of the Trust to Michael.