REPORT OF THE CHAIR
BY JUSTIN BROWN, ESQUIRE | PEPPER HAMILTON LLP

My high school yearbook quote was from Venus Williams...“If you fail to prepare, you prepare to fail.” It was so inspiring to me that not surprisingly, I practice in an area of the law focused entirely on preparation.

Preparation is the foundation of an estates practice. Every day, we counsel our clients so that they may prepare for their family’s cash needs, their incapacities, their potential creditors, their tax consequences both during their lives and at their deaths, their businesses, their deaths, and for the contingencies for which they are not yet aware. But do we heed our own advice? Are we prepared for our future? Have we implemented our own estate plans and business succession plans in order to enable the efficient management of our finances, clients, and estates when we retire, become incapacitated, or die?

This year, our Section has placed significant emphasis on preparing our members and our Section for the future. In the next few years, our practice area and our Section will undergo monumental changes as technology and artificial intelligence transform what we do and how we do it, as baby boomers retire and plan for the transfer of their wealth, and as estate tax exemptions continue to increase.

Our Section is beginning to focus on the needs of the different generations of estate and trust practitioners. Our October quarterly meeting will be a reprisal of our Section’s successful Bench/Bar program last year. The October quarterly meeting is designed to answer one simple question – if we, as estate planners, were advising ourselves to prepare for our own futures, what would we advise ourselves to do? Whether it be planning for retirement, Social Security, Medicare, long-term care, or wrapping up our practices, many of us have a tendency to take care of our clients before we take care of ourselves. We often neglect our own planning and are therefore unprepared for our own incapacities or deaths. Our

continued on page 3
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Impact investing seeks to integrate values and investment decisions. Such values might include environmental, social, governance, and/or faith-based themes. This type of investing encompasses a variety of different investment strategies, some of which are referred to as socially responsible investing (SRI), environmental, social, and governance investing (ESG), and program related investing (PRI). Though there are a broad variety of approaches to this type of investing, and the legal implications of different strategies are beyond the scope of this article, the phrase “impact investing” is often used to describe this approach.

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IMPACT INVESTING: CONSIDERATIONS FOR TRUSTEES OF PENNSYLVANIA TRUSTS

BY JOHN F. MCCABE, ESQUIRE | GLENMEDE

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REPORT OF THE CHAIR, CONTINUED

planning procrastination could have detrimental consequences to ourselves, our families, our practices, our clients, and our Section. It is vital that our Section members have the tools necessary to sufficiently prepare for the eventualities in their lives.

Our Section’s future is also directly tied to the success of the next generation of estate and trust practitioners who must be well equipped and well prepared to fill the shoes of our more seasoned practitioners. To groom our next generation, our Young Lawyers Division Liaisons, Erica Russo and Alicia Berenson, are in the process of carefully and thoughtfully creating a new mentoring program for the Section – a mentoring program that is not designed to disappear in the next six months, but one that is crafted to have lasting impact and lasting benefit for all of our Section members. Our new mentoring program will fuse multiple generations of estate and trust practitioners so that we learn from each other, collaborate, and build mutually beneficial lasting relationships.

The mentoring program will formally roll out in the summer/fall. Our mentoring program will use mentoring groups designed to foster multi-generational participation. Each group will be comprised of approximately eight attorneys of varying ages, abilities, and expertise. From “senior” lawyers to junior partners to young associates, there is a place for everyone in a mentoring group because all of us, to varying degrees, can serve as both mentors and mentees. We all bring our unique experiences and perspectives to a mentoring relationship, regardless of our age or legal expertise.

I am eager to kick off our mentoring program and to develop a framework for sustainable, multi-generational training. Please be on the lookout for the formal roll out of our Section’s mentoring program. If you are interested in participating or if you have suggestions as to how our mentoring groups can be successful, please do not hesitate to contact Erica (erusso@htts.com), Alicia (berenson@ballardspahr.com), or me (brownjh@pepperlaw.com).

As I have said many times before, it is such an exciting time for our Section and our practice area. We may not know what lies ahead of us, but we are taking our own advice and preparing for the futures of ourselves, our practice area, and our Section.

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As more and more investors look to implement impact investment strategies, interesting questions are raised in the area of impact investing by fiduciaries. Consider the following request that a beneficiary may submit to a trustee of a multi-generational, non-charitable, Pennsylvania trust. The current beneficiary is interested in integrating her values with the types of investments held in her own portfolio and asks the trustee to do the same in a trust established for her benefit. How should a trustee presented with such a request go about determining whether such investment actions would be consistent with the trustee’s duties under the Prudent Investor Rule?

Impact Investing

First, let’s take a closer look at what constitutes impact investing. The desire to integrate values and investment decisions is not a new phenomenon. It is, in fact, a type of investing that has existed for centuries, originating with religious organizations, whose values called for avoidance of products or services deemed unethical or immoral.

Over time, restricting certain types of investments became known as “negative screening.” One of the most powerful tools of negative screening is divestment — the intentional withdrawal of capital to effect social change. As impact investing has evolved, investor focus has shifted to emphasize companies with positive or improving ESG initiatives. The advent of positive screening marks an important shift in the impact investing story and provides investors with the opportunity to obtain competitive returns while aligning their values with their investment portfolios.

As a result of these progressions, the impact investing landscape has transformed from a single lens — divestment — to a broad range of impact investing options. With the proliferation of data providers available, impact investing strategies are increasingly expanding their approaches to include both negative and positive screening techniques. In this realm, companies are assigned a score or rating based on criteria particular to each of the respective ESG disciplines. Scores are aggregated into a single overall value, and capital is allocated to the companies that perform the highest within their relative industries. Two common techniques for integrating ESG factors include “ESG Tilt,” which overweights stocks with high ESG scores, and “ESG Momentum,” which overweights companies with improving ESG scores and underweights companies with deteriorating ratings.

The Prudent Investor Rule

The general rule under Pennsylvania’s prudent investor statute provides that “[a] fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust and by pursuing an overall investment strategy reasonably suited to the trust.” This general rule is supplemented by more specific factors that a trustee must consider in making investment decisions, as well as more specific duties that the trustee must carry out, such as the duty to diversify. These rules, modeled on the Uniform Prudent Investor Act, provide trustees with the rules of the road.

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2 See id. This section of this article has been adapted from Impact Investing for Trustees, as published in the June 2015 issue of Trusts & Estates.
3 20 Pa. C. S. §7203.
4 20 Pa. C. S. §7203(c).
5 20 Pa. C. S. §7204.
IMPACT INVESTING, CONTINUED

so to speak, in carrying out their fiduciary investment responsibilities. (For simplicity, Pennsylvania’s Prudent Investor Rule will be referred to throughout this article as the “Prudent Investor Rule” and references to the Uniform Act will be so noted.)

At the outset, it is worth highlighting that the text of the Prudent Investor Rule does not directly address the permissibility of impact investing by a trustee of a non-charitable trust, though there is a reference to “social investing” in a comment to the Uniform Act, as will be noted below. Section 7203(c)(6) of the Prudent Investor Rule does require the trustee to consider “an asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary’s activities with the community where that asset is located.” The effect of this statutory provision on charitable trusts is beyond the scope of this article but, with respect to non-charitable trusts, the requirement that a trustee consider “an asset’s … special value … to one or more of the beneficiaries…” may be relevant in the context of considering a beneficiary’s request that the trustee engage in impact investing. This provision does not seem, however, in and of itself, to be determinative of whether a trustee may implement an impact investment program.

The Duty of Loyalty

Discussions by commentators on impact investing by trustees focus heavily on the duty of loyalty. The duty of loyalty provision of the Uniform Prudent Investor Act states that “[a] trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.”

Pennsylvania’s prudent investor statute does not contain this provision but the duty of loyalty is included in the Pennsylvania Probate, Estates and Fiduciaries Code (the “PEF Code”) under Section 7772(a) which provides that “[a] trustee shall administer the trust solely in the interests of the beneficiaries.” It is reasonable not to read too much into the absence of the duty of loyalty provision from the Uniform Act in Pennsylvania’s prudent investor statute. The PEF Code Official Comments to the Prudent Investor Rule note that “Section 5 of the uniform act requires a trustee to invest solely in the interest of the beneficiaries. This simply codifies the general duty of loyalty which pervades trust law. It seems inappropriate to single out by statute the investment duty as being subject to the duty of loyalty.”

The duty of loyalty, of course, predates the Uniform Prudent Investor Act (1994) and, in a 1980 article addressing “social investing” by trustees, John Langbein and Richard Posner concluded that “a trustee who sacrifices the beneficiary’s financial well-being for any other object breaches both his duty of loyalty to the beneficiary and his duty of prudence in investment.”

They further stated that “[t]he duty of prudent investing … reinforces the duty of loyalty in forbidding the trustee to invest for any object other than the highest return consistent with the preferred level of portfolio risk.” The focus of Langbein and Posner’s analysis was on social

6 UPIA (1994).
7 0 Pa. C. S. §7772(a).
10 See id. at p. 98.
investing by pension trustees, but they reached their conclusions under the law applicable to trustees of private trusts. Notably, Langbein and Posner defined “social investing” to mean excluding securities that are otherwise attractive investments and including securities that are otherwise unattractive if those companies are socially irresponsible or laudable, respectively.11

A comment to the Uniform Prudent Investor Act notes that “[n]o form of ‘social investing’ is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries-for example, by accepting below-market returns-in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause.”12

More recently, Professors Max Schanzenbach (Northwestern Law) and Robert Sitkoff (Harvard Law) wrote in the opinion pages of The Wall Street Journal that “a trustee must abide by fiduciary duties of loyalty and prudence, and therefore act for the ‘exclusive’ benefit of the beneficiaries, considering ‘solely’ their interests, without regard for collateral benefits, such as advancing social or environmental causes.”13 In a separate article, Professors Schanzenbach and Sitkoff draw a distinction between what they refer to as “risk-return” investing and “collateral benefits” investing.14 They argue that ESG investing is permissible if 1) the fiduciary believes in good faith that the ESG investment program will benefit the beneficiary directly by improving risk-adjusted returns, and 2) the fiduciary’s exclusive motive for adopting the ESG investment program is to obtain this direct benefit.15 Collateral benefits ESG investing “entails consideration of interests other than the sole interest of the beneficiary” and is “generally not consistent with fiduciary duty.”16

The determination of what is in the “interests” of the beneficiaries is a significant question. In 1980, Langbein and Posner commented, as noted above, that the duty of loyalty required the trustee to seek the highest financial returns, without the ability to incorporate the beneficiaries’ non-financial values. A more recent commentator has noted that “nothing in the duty of loyalty requires the trustee to exclude consideration of a beneficiary’s non-financial interests.”17 Additionally, the author of the present article has commented that “interesting questions would be raised by a legal standard that requires the trustee to make investments that are inconsistent with the values of one or more of the beneficiaries.”18

At least one other state has modified its law to address this issue. Delaware has incorporated the concept of impact investing into its statute governing trusts.

11 See id. at p. 73.
12 See UPIA, comment to section 5.
15 See id.
16 See id.
18 See McCabe & Farran, supra note 1.
Specifically, under 12 Del. C. §3302, when considering the needs of the beneficiaries in making investment decisions, “the fiduciary may take into account the financial needs of the beneficiaries as well as the beneficiaries’ personal values, including the beneficiaries’ desire to engage in sustainable investing strategies that align with the beneficiaries’ social, environmental, governance or other values or beliefs of the beneficiaries.” Additionally, under 12 Del. C. §3303, “the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts and trust administration, including, but not limited to, any such laws pertaining to … the manner in which a fiduciary should invest assets, including whether to engage in 1 or more sustainable or socially responsible investment strategies....”

**Practical Applications**

Returning to our initial question, how might a trustee of a multi-generational non-charitable Pennsylvania trust proceed with a request by a current beneficiary to implement an impact investment program? The first place to look is the governing instrument for the trust. Under Section 7202 of the PEF Code, the general rule under the prudent investor statute applies “[e]xcept as otherwise provided in the governing instrument...” which suggests that a settlor may include language in a trust instrument explicitly permitting or directing the trustee to pursue such investment strategies.

Where the governing instrument is silent, there is support for the position that “risk-return” investing, as defined by Professors Sitkoff and Schanzenbach, is permissible under trust law. Other alternatives that a trustee might consider include obtaining beneficiary consent under Section 7789 (though consideration would need to be given to the virtual representative rules), and/or proceeding under a nonjudicial settlement agreement under Section 7710.1 of the PEF Code. As interest in impact investing by grantors and beneficiaries of non-charitable trusts grows, practitioners should anticipate that the law in this area will continue to develop.

This article is not intended as personalized advice. The author takes sole responsibility for the views expressed herein and these view do not necessarily reflect the views of the author’s employer or any other organization, group or individual. This material has been prepared for general informational purposes only, and is not intended to provide, and should not be relied on for, tax, legal or accounting advice. Readers should consult their own tax, legal and accounting advisors to seek advice on individual circumstances.

The Probate and Trust Law Section has a hashtag:

#phillyprobatatrust

Please use the hashtag #phillyprobatatrust when posting on social media about news or events that might be interesting to section members!
Griggs Revocable Trust examined the rights and responsibilities a removed trustee has with respect to the trust’s assets, including the trustee’s rights to be released and discharged for its services as trustee and the trustee’s right to receive compensation until the trustee is released and discharged.¹

Paul D. Griggs (“Settlor”) created a Revocable Trust dated November 12, 2008, which he amended on February 4, 2010 (collectively, the “Revocable Trust”). Following Settlor’s death, a portion of the Revocable Trust was held in a continuing trust for the benefit of Settlor’s spouse, Charlotte N. Griggs, which was subsequently divided into two trusts (the “Trusts”), one trust that was exempt from GST tax and one trust that was not exempt from GST tax.

During Charlotte’s lifetime, the net income of the Trust was distributable to her; following Charlotte’s death, the remaining assets were to be held in continuing trusts (the “Family Trusts”) for the benefit of Settlor’s son, Jason Griggs, and his descendants.

Jason was to receive the net income from the Family Trusts, and principal may be distributed to Jason Griggs “as determined in the sole discretion of the Trustees other than Settlor’s son, JASON D. GRIGGS, as shall be necessary or advisable from time to time for the medical care, maintenance, and support, of Settlor’s son, JASON D. GRIGGS, and his issue[,]”²

Following certain unrelated litigation concerning the Revocable Trust, Wilmington Trust was appointed as sole trustee of the Trusts by Charlotte and her descendants, with such appointment to be “at will,” pursuant to a 2013 agreement appointing Wilmington Trust as the trustee. The Revocable Trust was silent with respect to the appointment of successor trustees if the corporate trustee was unwilling or unable to serve, although it provided that Charlotte was prohibited from serving as a trustee.

In May 2018, following certain differences between Wilmington Trust on the one hand, and the Griggs family on the other, Settlor’s son, Jason D. Griggs, provided Wilmington Trust with a document removing it signed by the sui juris members of the Griggs family. Although Wilmington Trust questioned whether the document was sufficient to remove it, it stated that it was willing to resign upon the appointment of a successor trustee. Thereafter, the Griggs family presented Wilmington Trust with a document appointing Jason as successor trustee pursuant to 20 Pa. C.S. §7764 (which provides that if the governing instrument is silent, the “qualified beneficiaries” of the trust may appoint a successor trustee).

Wilmington Trust advised that it would file Accounts and Petitions for Adjudication for the Trusts wherein it would pose as a question for adjudication the issue of whether Jason Griggs could serve as sole trustee.

In June 2018, shortly after Wilmington Trust was presented with the removal and appointment documents, Charlotte Griggs died, and the Trusts were to terminate, with the assets to be distributed to the trustee of

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

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³ The author represented Wilmington Trust in this matter.

continued on page 9
the resultant Family Trusts for the benefit of Jason Griggs and his descendants.

Wilmington Trust filed accounts of its administration of the Trusts in September 2018 and raised as a question for adjudication whether Jason Griggs could serve as sole trustee of the resultant Family Trusts. The Griggs family filed multiple objections to the accounts, alleging, inter alia, that: (i) it was improper for Wilmington Trust to raise as a question for adjudication whether Jason Griggs could serve as sole trustee of the Trust because, without an adjudication form the court, it would be making distributions at “its own peril.”

The Court then held that it “was entirely proper” for Wilmington Trust to raise as a question for adjudication whether Jason Griggs could serve as sole trustee of the Trust because, without an adjudication form the court, it would be making distributions at “its own peril.”

The Court also concluded that it was not necessary for Wilmington Trust to make an immediate distribution of the assets of the Trusts following its removal, for it “is through the process of audit and adjudication of an account that a trustee is released and discharged for its services as trustee, with the court directing the distribution of the assets to the proper recipients.”

In examining whether Wilmington Trust filed the accounts within a reasonable time, the Court examined both 20 Pa. C.S. §7767(b), which provides that a trustee who ceases to serve “shall proceed expeditiously to deliver the trust property within the trustee’s possession to the . . . person entitled to it” and 20 Pa. C.S. §7780.7, which requires that upon the “occurrence of an event terminating or partially terminating a trust, the trustee shall proceed to distribute the trust property within a reasonable time to the persons entitled to it[].” The Court read both provisions “in pari materia. The only distinction is the use of the words ‘within a reasonable time’ rather than ‘expeditiously.’ The court discerns no difference whatsoever. What is reasonable is certainly expeditious, and what is expeditious cannot be unreasonable” (emphasis in original). The Court then concluded that Wilmington Trust acted expeditiously by filing the accounts 3.5 months after its removal and 2.5 months after Charlotte Griggs’s death.

Finally, the Court examined whether Wilmington Trust was entitled to receive compensation following its removal. The Court concluded that a “trustee who has resigned or has been removed still has the duties of a trustee and the powers necessary to protect the trust property until the trust property is delivered to a successor trustee or other person entitled to it” pursuant to 20 Pa. C.S. §7767(a). Thus, the Court held that “until the accounts are adjudicated and distribution is directed by the court, Wilmington Trust continues to bear the duties of trustee and is entitled to receive compensation for its services[].”
PROPOSED TREASURY/IRS REGULATIONS

Proposed Regulation relating to ESBT Taxation

In REG-117062-18, Treasury and the IRS proposed regulations to modify address the division of income between the S portion and the non-S portion of an electing small business trust (ESBT). The proposed regulation would require that a trust’s S-corporation income that would otherwise be allocated to a nonresident alien deemed owner under the grantor trust rules must be included in the S portion of the trust income. The regulation is drafted to ensure that such income remains taxable to a U.S. person. It would apply to all ESBTs after December 31, 2017.

Proposed Regulation Relating to Reporting Obligations for Sale of Life Insurance Policy

In REG-103083-18, Treasury and the IRS proposed regulations addressing reporting obligations under Code Section 6050Y. The proposed regulations address payments of life insurance death benefits, including what can be excluded from gross income after a reportable sale, and, more generally, what sales must be reported.

LEGISLATIVE HAPPENINGS

The “Setting Every Community Up for Retirement Enhancement (Secure) Act of 2019”

Rep. Richard Neal recently introduced the “Setting Every Community Up for Retirement Enhancement (Secure) Act of 2019,” which seeks to expand certain rules on retirement plan benefits. Among the provisions of the bill are:

1) repealing the current 70-1/2 years maximum age for contributions to regular IRAs and increase the RMD beginning date from 70 1/2 years of age to 72 years of age;

2) changing the 5-year rule to a 10-year rule for distribution;

3) permit penalty-free withdrawals of up to $5,000 free of the early withdrawal penalty for “qualified birth or adoption” distributions;

4) expanding allowable withdrawals from 529 plans to include expenses for fees, books, supplies, and equipment required for the participation of a designated beneficiary in an apprenticeship program, up to $10,000 a year of certain expenses in connection with a home school, up to $10,000 for principal or interest of a qualified education loan; and qualifying expenses on behalf of designated beneficiaries attending elementary or secondary school.

The “American Housing and Economic Mobility Act of 2019”

Senator Elizabeth Warren recently introduced the “American Housing and Economic Mobility Act of 2019,” the tax provisions of which would:

1) reduce the estate, gift, and GST exemptions to $3.5 million and eliminate the GST exemption for transfers to a trust with a termination date 50 years or greater from its creation;

2) require GRATs have terms that are 10-years or greater;

3) require grantor trust assets be included in the deemed owner’s estate for estate tax purposes, and that distributions from the trust be treated as gifts by the grantor for gift tax purposes;

4) raise to 55% estate, gift, and GST tax rate on transfers of $3.5 million to $13 million, 60% on estates, gifts, and transfers of over $13 million and not over $93 million, 65% on estates, gifts, and transfers of over $93 million and not over $1 billion, and 75% the rate on estates, gifts, and transfers of more than $1 billion; and

continued on page 11
TAX UPDATE, CONTINUED

5) limit the total gift tax annual exclusion for all transfers made in trust or through a pass-through entity or subject to a prohibition on sale or liquidation, made in a calendar year to twice the annual exclusion.

Sanders Estate Tax Reform Bill Would Liberalize Some Estate Tax Benefits and Restrict or Eliminate Many Popular Estate Planning Techniques

Senator Bernie Sanders recently introduced the “For the 99.8 Percent Act,” which would:

1) reduce the estate, gift, and GST exemptions to $3.5 million;

2) raise to 45% estate, gift, and GST tax rate on transfers of $3.5 million to $10 million, 50% the rate on estates, gifts, and transfers of over $10 million and not over $50 million, 55% the rate on estates, gifts, and transfers of over $50 million and not over $1 billion, and 77% the rate on estates, gifts, and transfers of more than $1 billion;

3) increase (from $750,000 to $3,000,000) Code Sec. 2032A’s ability to reduce the value of farm and closely-held business real estate;

4) increase the Code Section 2031(c) estate tax deduction for land subject to certain conservation easements to permit a reduction in value of $2,000,000 and permit a reduction of up to 60% of the gross estate;

5) require that a donee’s basis in contributed property not exceed the value on which a gift tax has been imposed;

6) eliminate valuation discounts for nonbusiness assets held by an entity and eliminate control discounts where the transferor, the transferee, and members of the family of the transferor and transferee control the business;

7) require GRATs have terms that are 10-years or greater;

8) require that assets of a grantor trust be included in the deemed owner’s estate for estate tax purposes;

9) eliminate the GST exemption for transfers to a trust with a termination date 50 years or greater from its creation;

10) limit the total gift tax annual exclusion for all transfers made in trust or through a pass-through entity or subject to a prohibition on sale or liquidation, made in a calendar year to twice the annual exclusion.

JOIN A COMMITTEE

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

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"There are no complaints in the Orphans’ Court!” is the catechism of those coming to our court from trial division for the first time, and woe betide the attorney who tries to file one. But why is that so? It is proscribed by 20 Pa.C.S. § 761 and Pa. O.C. Rule 3.1, but that has been the case at least as far back as 1832¹ so that only sidesteps the question.

The answer may be found in the historical language of the procedure of in rem (“real”) actions (which determine title to property) versus in personam (“personal”) actions (which determine the parties’ rights as to each other). The difference lies in the nature of the relief requested. A petition (in Latin, petitio) initiates an action in rem because the moving party seeks (in Latin, petere; French, demander) title to the subject property. A complaint (in Latin, querela) initiates an action in personam because the moving party complains (in Latin, queri; French, se plaindre) of something adverse to him, and requests money damages (or other punishment) as the court sees fit, and not any particular thing. Pollock and Maitland describe the difference as: “The querela, as distinct from the petitio, often comes from one who is with difficulty persuaded to accept money instead of vengeance, while the petens [petitioner] may have no worse to say of his opponent than that he has unfortunately purchased from one who could not give a good title.”²

Of course, even historically, this is a major oversimplification of actual practice, and many actions that were in spirit real actions began with a complaint, and vice versa. But while the bright line between in rem and in personam actions has faded, and while the Orphans’ Court certainly has jurisdiction over the persons within its sphere, most of the business of the court is still conceptually in rem, and so it seems likely that this ancient distinction is the source of our modern catechism.

¹ See Act of March 29, 1832, Article 57, § 1 (P.L. 190) (“Relating to Orphans’ Courts, their Organization, Powers, and Scope of Jurisdiction”).
² 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. 571 (1899). See generally id. for a discussion of the procedure and terminology of these actions.
Pennsylvania’s trust and estate practice remains fluid as we advance toward the end of the second decade in the 21st century. We see increasing demands for innovative solutions in the planning and administration world – requiring us to be nimble in responding to the latest call for relief – whether it is the unpredictability of our tax environment, the certainty of galloping advances in technology, or the disappointing obsolescence of irrevocable documents that were, once-upon-a-time, modern. What we seem to be facing is the development of new traditions in trust management, the creation of new routines and customs to govern trust activities.

It is good to know that various solutions are now being considered by professionals in both the banking and legal communities, with the hope of having new laws adopted in Pennsylvania. This article focuses on three areas of interest, although none has yet led to enactment: Digital Assets, Directed Trusts, and Decanting.

Digital Assets. The digital age has been here a while now, changing the way we conduct our daily lives both professionally and personally. Thanks to Senator Killian, its inevitable impact on the trust and estates field may be acknowledged during the current legislative session in Harrisburg. Senate Bill 320 (Printer’s Number 324) or “SB 320” would amend Title 20 to Pennsylvania Consolidated Statutes (also known as “Pennsylvania’s Probate Estates and Fiduciaries Code” or “PEF Code”) by adding a new Chapter 39 called the “Revised Uniform Fiduciary Access to Digital Assets Act” (“RUFADAA”), which pertains to executors and administrators, trustees, agents under powers of attorney, and guardians (“Fiduciaries”).

Based on the uniform law promulgated by the National Conference of Commissioners on Uniform State Laws in 2015, RUFADAA seeks to give fiduciaries the legal authority under certain circumstances to manage and access a user’s electronic records, including emails, and provide a structure whereby third party providers who carry, maintain, process, receive or store electronic records may legally divulge the electronic records to the fiduciary on behalf of the user. SB 320 reflects a slight change to the uniform act, stemming from multiple meetings with representatives from the Uniform Law Commission, the PA Bar Association’s Real Property Probate Trust Section, the PA Bankers Association, the Joint State Government Commission Decedent’s Estates Advisory Committee, and the Administrative Office of Courts, as well as Apple, Google, NetChoice and Amazon. There were concerns that third party providers would require a court order before providing an executor with a catalogue of the emails of a deceased user (a catalogue being information which identifies the person who has had an electronic communication with the user, the person’s email address, and the date and time of the electronic communication). Under proposed Section 3908, if the executor or administrator provides certain information about the deceased user’s email when applying for Letters of Administration or Letters of Testamentary, the third party provider may disclose the electronic records without a court order.
Testamentary, the issuance of Letters by the Register of Wills will have the same force and effect as a finding of the court for purposes of authorizing access, so that the submission of Letters to the third party provider should be sufficient to obtain a catalogue. SB 320 is currently in the Pennsylvania Senate Judiciary Committee. One hopes Pennsylvania will soon join the other 41 states that have adopted the uniform act on this important subject.

Directed Trusts: For those with long memories, naming one or more trustees to be in charge of the entire trust was so common as to be unquestioned. No one conceived of anything different. At most, the designation of three trustees was likely seen as an attempt to provide balance in decision-making rather than allocate duties over discrete components of the trust to a particular trustee. Each co-trustee remained responsible for the proper administration of the whole trust. In the 1960s, the concept of giving responsibility to someone other than the trustee crept into the employee benefits world, which permitted a “trust adviser” to handle investments of a pension fund otherwise held by a corporate trustee. This innovation has now migrated to personal trusts. Over recent years, even without the support of detailed legislation addressing important issues related to the concept, some practitioners have begun drafting “directed trusts” whereby certain trust activities, like investments or distributions, would be the responsibility of a “trust director” rather than the trustee. The Pennsylvania legislature recognized directed trusts when it passed the Uniform Trust Act in 2006, which included provisions regarding the power to direct under PEF Code § 7778. See also PEF Code § 7763 (regarding co-trustees) and § 7777 (regarding delegation). However, more is needed, particularly in the area of scope of liability, standard of care, and fiduciary duty. The Uniform Directed Trust Act was promulgated in 2017, and seven states have adopted it while three more states have introduced it to their respective legislatures. It may help to inspire the practical guidance that is much needed in Pennsylvania. The good news is that efforts are underway to propose legislation in this area so that we may soon see the path ahead more clearly and confidently.

Decanting: The ability to modify irrevocable trust documents currently finds structure to a limited extent in the PEF Code (20 Pa. C.S.A. §§ 7740 – 7740.6 and 7710.1). In addition, some practitioners draft trust documents to include the authority to modify the trust terms, exercisable by certain persons under certain circumstances. However, there is a growing interest in having even greater flexibility for modification in Pennsylvania, such as that afforded by decanting. The Uniform Law Commissioners promulgated the Uniform Trust Decanting Act (“UTDA”) in 2015, which has been
adopted by seven states to date and has been introduced by two other states. While decanting has not been introduced as a bill in the Pennsylvania legislature currently, it is clear that permitting some form of decanting would bring Pennsylvania in line with more than half of the country. Decanting may be perceived as an extension of a trustee’s discretionary authority over the trust’s principal. For example, if the trustee has the power to invade principal for a beneficiary by making a distribution to or for the beneficiary, the trustee may be regarded as having the attending power to make distribution to a newly created trust for the beneficiary. The assets from the first trust would be distributed to a second trust (hence, the elegant term “decanting”). However, as stated in the Prefatory Notes to the UTDA, the Act views the decanting power “as a power to modify the first trust, either by changing the terms of the first trust or by distributing property from the first trust to the second trust.” This means that decanting does not necessarily require a transfer of assets to a second trust. It means that decanting can be a way to modify or amend the first trust without any need for transfer of assets. The second trust is simply the first trust, as amended or modified. Among other things, the UTDA provides limitations on the scope of the fiduciary’s power to decant, depending on the scope of the fiduciary’s discretion over distributions in the first trust, and requires the exercise of the power in good faith. The tool of decanting has been available to citizens of 28 states so far. Perhaps Pennsylvania will be the 29th.


TECHNOLOGY UPDATE
BY ROSS BRUCH, ESQUIRE | BROWN BROTHERS HARRIMAN & CO.

On May 2, 2019, the Florida Legislature approved the use of video technology and remote notarization for the online execution of wills and other legal documents. The proposal will now head to Governor Ron DeSantis’s desk for his signature. At the time of this writing, the bill has not yet been signed, but it is expected (though not guaranteed) that Governor DeSantis will approve the bill.

A text of the bill is available at: https://www.flsenate.gov/Session/Bill/2019/409/BillText/er/PDF

The bill allows notaries to affix their seal and signature to legal documents (including wills, trusts, health care directives, and powers of attorney) that are not signed in their physical presence, provided they witness the signature via live, two-way video links. Third-party witnesses may also appear remotely. Two years ago, former Governor Rick Scott vetoed “The Electronic Wills Act,” saying it failed to strike the proper balance between convenience and safety. The latest bill modifies the authentication requirements and provides the following limitations (among others) to remote notarizations:

continued on page 16

POTENTIAL ENHANCEMENTS, CONTINUED
• “Vulnerable Adults”—defined in part by Florida law as a person impaired by “a mental emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging”—are prohibited from remotely executing documents.

• At the request of the Florida Real Property, Probate & Trust Law Section, the bill’s sponsors agreed to prohibit the use of video technology to execute “super powers-of-attorney”—documents that give the holder the ability to amend wills, trusts, estates and other documents.

While Florida legislation is not a typical focus of this newsletter, this bill is noteworthy even for local attorneys due to the prevalence of “snowbird” clients—Florida residents that spend summers in the Philadelphia region—who may inquire about the use of remote notarization if it is signed into law. Additionally, and perhaps more importantly, this is the latest development in a state trend towards permitting remote notarization that began with Virginia’s Electronic Notaries Act of 2011. Since that original enactment, states passing some form of online notarization legislation now include: Montana (2015), Nevada (2017), Texas (2017), Indiana (2018), Tennessee (2018), Minnesota (2018), Michigan (2018), Vermont (2018), Ohio (2018), North Dakota (2019), South Dakota (2019), Idaho (2019), Kentucky (2019), Utah (2019), Washington (2019), Maryland (2019), Arizona (2019), Iowa (2019), and Oklahoma (2019). However, even among this increasingly crowded field, the Florida bill stands out. If it is enacted, it will become only the second state (after Nevada) to specifically permit the online notarization for testators’ and their witnesses’ signatures.

The rapidly evolving field of remote notarization and e-wills has the potential to significantly disrupt the way clients create and execute their planning documents. In addition to being potential tools for practitioners to use to make their practice more efficient, they also both come with the potential for fraud and abuse and pave the way for third-party online providers to insert themselves between clients and attorneys, for better or worse. The Technology Committee will continue to monitor notable developments around the country to keep Section members informed.

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DIVERSITY: MORE THAN JUST A NUMBERS GAME
BY SHABREI M. PARKER, ESQUIRE | PARTNER | MINCEY FITZPATRICK ROSS, LLC

To truly connect with someone different, we should try to identify shared interests, be empathetic, and find ways to relate to one another. But what does that really mean?

We’ve all been there. You’re invited to a ‘thing’ (wedding, shower, birthday party) and the only person you really know is the guest of honor. As you encounter other guests at the event, you’re met with looks from people who recognize that they don’t recognize you, ignored altogether and/or approached with small talk that somehow centers on how new, unfamiliar, or different you are from the other people in attendance. Similarly, we’ve all been that well-to-do attendee, trying our best to make a new person feel welcome, but finding ourselves doing so by asking them—pleasantly, of course—who they are and what brought them there.

We mean well. We don’t mean to be awkward or uncomfortable, and we surely don’t want others to feel that way. We want to meet new people, make connections and develop relationships across the lines that seemingly divide us. However, while we are constantly reminded of the need to be more diverse and more inclusive, we aren’t often taught the best ways to actually do it. The ways to actually get to know people we don’t know, or people who may feel like our polar opposites.

To actually integrate new people, to be inclusive, we need to receive one another with open arms. Arms that embrace ways that we are the same, rather than the ways we are different.

We have to find ways to be relatable.

Remember being the young lawyer intimidated by stature and seniority? Remember being the new person at work trying to figure out the office anything, or even the tag-along friend of a friend? Because we need to be the people we need in those moments, I’ve created a list of conversation tricks to help bridge the gaps.

**Small Talk Tips for Inclusion**

**Start with a joke.** Even the corniest of jokes make great icebreakers. A shared laugh is often the beginning of a friendship.

**Talk about things that come naturally.** What are the non-work things you like—travel, sports, pets, cars, etc.?

**Stay away from taboo topics.** Politics, family, religion—all are always off the table. Even when they are, they aren’t.

**Put yourself in their shoes.** If you were the new person in the room, what would you want? A smile, a cheat code to where the good snacks are located or where the restrooms might be?

**Don’t lead with what makes a person different.** If racial, gender, age, etc. diversity distinguishes you, use the mosaic of your personality to find a common denominator that doesn’t include that factor.

Learn something new. If the person you’re speaking to speaks another language, have them teach you a word or phrase. If they love to cook, have them share their favorite recipe. If you have a love of travel, share tips and tricks for picking great destinations or deals.

Connecting with people is only difficult when you look at it as a chore that’s being forced upon you, rather than an opportunity to stretch you. Making genuine connections is human nature, but sometimes we need help realigning our system for optimal performance. Using these tips, you’ll be better equipped to make real connections, send better follow up notes, and expand your personal and professional networks. You’ll feel less anxiety when you go somewhere new, and you’ll be a more comforting and engaging conversationalist while you’re there. I’m confident that you’ll leave the next encounter feeling more fulfilled and more connected to a new person than ever before.

Here’s to more intentional inclusion!
INTRODUCTION

Every estate and trust practitioner is familiar with both the efficiencies and the landmines of jointly representing two spouses. With our culture’s increasing reliance on the Internet to conduct business and provide entertainment, I suspect that many clients have digital assets which they do not want a spouse to discover. Consider this case study:

Husband and Wife engage an estate planning attorney to prepare their Wills and Trusts. H and W have been married for over 30 years. During a meeting to assist H and W with their decisions on several matters, Attorney explains to H and W the law related to access to digital assets. Both spouses decide to give access to the other’s digital assets, and documents are prepared and signed to reflect such. Several weeks later, H calls Attorney to tell her that he does not want W to have access to his digital assets. H tells Attorney that he has fathered at least one child out of wedlock and that among his digital assets are the passwords to a bank account and a brokerage account that he has set up for that child.

We will come back to this case study later in this article after some background on digital assets and the current state of the law applicable to access to this growing form of property interest.

BACKGROUND

Did you ever hear about the person who sold virtual real estate in a multiplayer universe online game for over $600,000 of very real dollars? Or the decedent who owned a domain name that was sold for over $13 million dollars? A steadily increasing number of clients are involved in online banking, investing, bill paying and tax filing, as well as engaging in gaming and social business networking sites.

As of August, 2017, Go-Globe reported that the following transactions occur on the Internet every 60 seconds: 80 new domain names are registered, 24,000 transactions occur on Amazon.com, 25,000 posts occur on Tumblr, 210,000 photos are shared on Snapchat, 350,000 tweets are sent on Twitter, 1 million swipes are made on Tinder, 3.8 million searches occur on Google, and 156 million e-mails are sent. And this data is almost 2 years old!

Overlooking a client’s digital assets can lead to financial loss for beneficiaries and fiduciary risk for executors and trustees, but gaining information and access to those assets is a challenge. Some

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1 The opinions and views expressed in this material are those of Mr. Small and do not constitute any representation of the opinions or views of his employer, Wells Fargo Bank.

2 Planet Calypso Player Sells Virtual Resort for $635,000 USD, PR NEWSWIRE (Nov. 12, 2010) (Entropia Universe was the game).

3 Sex.com was sold in 2010 by Escom LLC (then in bankruptcy) to Clover Holdings LLC. Escom LLC was the alter ego of Gary Kremen, who died in 2006.


5 The term “digital asset” is defined in Section 2(10) of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) as an “electronic record”. In turn, the term “electronic record” consists of two words each of which is defined in the Act: “electronic”, which means technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities; and “record”, which means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Id. §§ 2(11), 2(22).

continued on page 20
digital property has little or no financial value, but those items of digital property with financial value must be included in state and federal inheritance and estate tax returns, and in the inventory and accountings of guardianships, conservatorships, decedents’ estates or trust administration. Simply stated, digital assets such as domain names, advertising revenue from Web pages and blogs have financial value. Even video game characters and the virtual weapons and currency used in multiplayer universe games have financial value which must be counted by the user’s fiduciary.

Still further, consider the unique sentimental value of digital assets to the family and friends of an incapacitated or deceased person. Many people now store their photographs, diaries and letters in a computer instead of in a shoebox or in albums stored on a bookshelf. Family trees are created and stored in online genealogical accounts such as Ancestry.com or 23andMe.com. Blogs have replaced diaries. A decedent’s life story could be lost if family members or fiduciaries cannot access these digital assets. On the flip side, access to digital assets may either lead to or prevent the disclosure of secrets or hurtful information (affairs, addictions, etc.). By designating appropriate people to take care of or delete certain information or accounts, the digital services user can avoid the exposure of such private details.

Fiduciaries therefore need access to an incapacitated or deceased person’s electronically stored information, e-mail accounts, and other online accounts to fully accomplish their fiduciary duties to an incapacitated or deceased person. Fiduciaries often need to act quickly to meet federal and state tax filing requirements and the requirements of state courts and state fiduciary laws to promptly inventory and protect the person’s property. Acting quickly is especially important for online accounts because service providers may close the person’s account and delete the person’s data if the account has not been accessed for several months. In addition, federal or state criminal laws related to the unauthorized access to computers have a significant chilling effect on fiduciaries who may want to use the person’s username and password to directly access the person’s online accounts and retrieve the account contents. Clear authority for fiduciary access to online accounts and digital property is needed to keep administration costs down, to provide for a smooth administration, to avoid committing a crime, and to ensure no valuable or significant property is overlooked.

**THE IMPEDIMENTS TO FIDUCIARY ACCESS**

Traditionally, after a person became incapacitated or died, the duly-appointed fiduciaries would go to the person’s home; look through the person’s U.S. mail for bills, account statements, and other important information needed for the administration process. If a client’s bills and account statements are delivered by e-mail, and her

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6 But see Greene, Passing Down Digital Assets, WALL STREET JOURNAL (Aug. 31, 2012)(according to survey from McAfee, consumers value their digital assets on average at more than $35,000). Determining the value of digital property may be difficult. Comparables may be hard to find. Market conditions can change quickly as technology evolves and is replaced, as fads come and go, and as lifestyles change. For a person’s Web pages and blogs that receive advertising revenues, those cash flows can be used to establish value. Those cash flows may fluctuate significantly from one year to the next, however, and may be worth little to no money if the person dies.


8 One online site predicts that by next year, the average person will have 200 online accounts. Editor, 68 Million Reasons Why Your Small Business Needs a Password, Blog.Dashlane.com (Jan. 6, 2017).
checkbook registers and tax returns are saved only in a digital format, the first challenge is finding that person’s valuable or significant digital property. The second challenge is finding the passwords that allow access to those accounts and records. A third challenge is the federal and state criminal and data privacy laws that threaten to fine or incarcerate a fiduciary or the custodian producing a beneficiary’s or decedent’s digital property. But the greatest impediment by far to fiduciary access to digital assets is the Term of Service Agreement (TOSA). Every provider of digital services has a TOSA. Most users breeze by the terms of the TOSA and click “I Accept” when prompted to do so.9 Yahoo’s TOSA lays it out plainly: “Upon receipt of a death certificate, your account may be terminated and all contents therein permanently deleted.”

The cover page of the first Wall Street Journal Weekend issue of 2013 contained a lengthy report about the family of a deceased Canadian teenager and their efforts to gain access to and control her digital legacy memorialized inside Facebook, Twitter, Tumblr, Yahoo and Hotmail accounts. None of the services would allow the family to retrieve the passwords or any other information of the deceased because it would violate the decedent’s privacy. All of the companies cited their TOSA and state and federal criminal laws in support for their position.10

In similar fashion, the United States District Court for the Northern District of California11 prevented the estate of British fashion model Sahar Daftary in September, 2012 from compelling Facebook to turn over the decedent’s Facebook account contents as part of a coroner’s inquest to determine her cause of death.12 The court cited both Facebook’s TOSA and federal electronics privacy law in arriving at its conclusion. Notably, the final sentence of the court’s opinion stated, “Of course, nothing prevents Facebook from concluding on its own that Applicants have standing to consent on Sahar’s behalf and providing the requested materials voluntarily.”13

Making matters worse, federal and state privacy laws exist that criminalize the unauthorized access of computers and digital accounts. Those same laws prohibit providers of digital accounts from disclosing account information to anyone without the account holder’s consent. These laws are intended to provide consumer protection against fraud and identity theft,14 but they have a chilling effect on fiduciaries who are trying to carry out their duties of marshalling, valuation and distribution.

In 1986, Congress passed a law (the Electronic Communications Privacy Act of 1986) (ECPA)

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9 Lamm, Study Shows Users Don’t Read Terms of Services Agreements, Blog.digitalpassing.com (July 14, 2016) (98% of users missed “gotcha clauses” planted in a fictional TOSA).
10 Fowler, Life and Death Online: Who Controls a Digital Legacy?, WSJ WEEKEND A1, A12 (Jan. 5-6, 2013).
11 The United States District Court for the Northern District of California is the chosen court having jurisdiction over any disputes arising under the Terms of Service Agreements for Facebook, Apple, Google, LinkedIn, Twitter, WordPress, Yahoo and YouTube. Microsoft selected Washington State for its dispute resolution forum. Lamm, Kunz and Riehl, Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud, 47th Annual Heckerling Institute on Estate Planning at Ill-E-(11)-16 (Jan. 2013).
12 The issuer of insurance on Sahar’s life declined to pay out death proceeds, alleging the model had committed suicide. The personal representative of Sahar’s estate wanted access to her online accounts to refute that allegation.
14 Pennsylvania’s statutory law against computer hacking and unauthorized access can be found at 18 Pa. C.S.A. §§ 7601 – 7616.

continued on page 22
forbidding consumer electronic-communications companies from disclosing content without its owner’s consent or a government order like a search warrant. Courts and companies largely have interpreted this law to mean that families and fiduciaries are unable to force companies to allow access to the deceased’s data or to their accounts. For example, e-mail accounts provided to the public by Google, Microsoft and Yahoo!, and social networking accounts provided to the public by Facebook, Google+ and MySpace, enjoy the statutory privacy protections under the ECPA.

Although a “lawful consent” exception exists in the ECPA, without a law that authorizes fiduciaries to access the digital assets of a decedent or a principal, the lawful consent exception has meant that the online account service provider may choose to voluntarily disclose the contents of the electronic communications and files, but you cannot compel the service provider to disclose that information even by bringing a civil action against the service provider. The practical reality is that providers are unwilling to supply digital information to the fiduciary of an individual for fear of violating federal and state criminal law.

THE LEGISLATIVE RESPONSE – FROM UFADAA TO RUFADAA

Beginning about fifteen years ago, commentators started lobbying for legislation on this topic because fiduciaries were finding it necessary to have access to and control over digital property and electronic communications with increasing frequency. For example, here in Pennsylvania, State Representative Tim Briggs and 12 other Pennsylvania legislators introduced a short bill (H.B. 2580) on August 23, 2012 to amend the PEF Code to provide personal representatives with the power to take control of, conduct, continue or terminate the account of a decedent found on any social networking website, microblogging or short message service website, or e-mail service website. That bill was never enacted into law.

At or about the same period of time, a group of learned attorneys and professors began drafting a “Uniform Fiduciary Access to Digital Assets Act” (UFADAA). UFADAA went through six committee drafts prior to its final reading and approval by the Uniform Law Commission on July 16, 2014. By the middle of 2015, UFADAA had been introduced by legislatures in at least 27 states. UFADAA, however, was only adopted by one state – Delaware – and that state enacted UFADAA less than one month after its final reading and approval.

It turns out that UFADAA had some very powerful adversaries opposed to its adoption. The largest Internet service providers (and their lobbying group, NetChoice) were opposed to the fundamental premise that was at the heart of UFADAA: the presumption that the fiduciary has the same authority as the account holder just as if the account holder were the one

15 18 U.S.C. §§ 2510 et seq. Title II of this law is known as the Stored Communications Act and contains the sections most relevant to this topic. (Id. §§ 2701 - 2712).
16 id. § 2702(b)(3).
17 The Pennsylvania statute was virtually identical to similar statutes that were enacted in Oklahoma (Okla. Stat. §58-269)(2010)) and Idaho (Idaho Code §15-3-715(28)(2011)).
18 The Uniform Law Commission (ULC).
20 Delaware H.B. 345 was signed by Governor Markell on Aug. 12, 2014.
exercising the authority. UFADAA had stated that any provision of a TOSA limiting third-party access or requiring notice of change in the account holder’s status may not be enforced to bar fiduciary access, and also had stated that any choice of law provision that had the effect of limiting a fiduciary’s access to digital assets was unenforceable. Finally, UFADAA flatly had stated that any provision of a TOSA that limited a fiduciary’s access to the digital assets was void as against the strong public policy of applicable state law UNLESS the account holder affirmatively agreed to restrict fiduciary access by means of an act of independent significance separate and apart from the account holder’s general assent to the other provisions of the TOSA.

Neither the major internet and tech companies, nor civil liberty organizations such as the ACLU, were in favor of this approach. Faced with such formidable opposition and the apparent defeat of the Act in every legislature save one, the Uniform Law Commission went back to work. They reversed field on the underlying presumption of UFADAA – that a user would want her or his fiduciary to have access to digital assets – and instead presumed that no user would want her or his fiduciary to have access to digital assets without proof of an affirmative consent being provided by the user. Instead of a default setting of “privacy off” for fiduciaries, the default setting became “privacy on”.

The essence of RUFADAA is the order of priority for overcoming the presumption of non-disclosure: via online tool (e.g., Facebook’s Legacy Contact or Google’s Inactive Account Manager), or via a direction in an estate planning document (e.g., Will, Power of Attorney, Trust). If no written direction exists other than the TOSA, the TOSA will control. Thus, the default rule is non-disclosure unless the user indicates otherwise through an online tool or through her or his estate planning documents. Even if one of those indicia is present – even if the user has consented to the disclosure - a custodian has the right to require a court order to protect itself from liability in the event disclosure is made.

PLANNING CONSIDERATIONS

As of this writing, RUFADAA has been adopted by 40 states, with five others (including Pennsylvania) having current, active bills. Pennsylvania’s version of RUFADAA currently is found in Senate Bill 320, which was introduced by State Senator Killion (Chester/Delaware) and eight others on February 27, 2019. The Pennsylvania Bill currently is under review by the Senate Judiciary Committee. The Pennsylvania Bill would add a new Chapter 39 to the Probate Estates and Fiduciaries Code.

21 UFADAA § 7(a)(2).
22 Id. § 7(b) – (d).
23 RUFADAA § 4.
24 For an in-depth discussion of these two online tools, see Brown & Bruch, Online Tools under RUFADAA: The Next Evolution in Estate Planning or a Flash in the Pan?, Probate & Property Vol. 33, No. 2 at 61-62 (March/April 2019).
28 S.B. 320, sec. 2.
Unfortunately, the Pennsylvania Bill has not been enacted as of this writing. Consequently, advance planning with clients is very important. Some common sense rules to be adopted by you and your clients might include:

1. Have your clients prepare a complete list of passwords, online accounts and other digital property.

2. Have accessible backups of valuable or significant electronically-stored information. Locating digital property can take a significant amount of time and effort to find and gain access. Valuable digital property may be overlooked or be inaccessible.

3. Passwords are an obstacle to fiduciary access. Most service providers won’t reveal or reset an incapacitated or deceased person’s password, even for a duly-appointed guardian, conservator, executor, trustee or agent acting under a power of attorney. Computer security and computer forensics experts are expensive. Even with expert help, however, digital property protected by strong passwords plus strong encryption may be practically impossible to access. Consequently, without knowing the passwords, a person’s fiduciaries and family members may not be able to fully access a person’s smartphone, computer, online account, or electronically stored information.

4. Conduct a digital fire drill with your clients. Ask your client: if your computer is lost, stolen or destroyed in a fire, flood, tornado or hurricane today, what valuable or significant digital property would you lose? Similarly, if you were in an accident today or died today, how would your family and fiduciaries access your valuable or significant digital property?

5. Minnesota Attorney Jim Lamm is one of the most savvy commentators on this evolving area of our practice. He has prepared a template for use as a “Digital Audit”, which can be downloaded at http://www.digitalpassing.com/digitalaudit.pdf.

6. Written lists are inherently insecure: advise your client to store their password lists in a safe deposit box, home safe or with their attorney. Passwords also require frequent updating, and frequent updates don’t work well with written lists. Electronic methods of storage probably are preferable to just a written list. An electronic list of passwords can be kept on a client’s smartphone, computer, zip drive or Web site. Free and commercial software is available to keep track of passwords, and popular software or Web-based services to keep electronic lists of accounts and passwords include Dashlane, LastPass, 1Password, EnPass, KeePass and Keeper.

7. Web-based services such as AfterSteps, E-Z-Safe and SecureSafe can store an electronic list of passwords, online account information and other digital property and also provide a mechanism for authorized fiduciaries or family members to access the list. The user tells the company in advance which key people can unlock this information at the appropriate time and, after being contacted by that fiduciary or family member, the

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29 Passwords are supposed to be an obstacle to unauthorized access. Clifford Stoll is reputed to have said, “Treat your password like your toothbrush. Don’t let anybody else use it, and get a new one every six months.” Fiduciaries, of course, should not be unauthorized users.

company will grant access after a verification procedure.

8. At least one vendor – Directive Communication Systems – has designed a product that specifically complies with the “online tool” standard of RUFADAA. Entitled “Digital Asset Directives Management”, the program manages the online approvals for multiple internet service providers as opposed to managing the passwords themselves. If account passwords are not needed to access the digital property, the fiduciary or attorney can avoid any potential violation of federal or state laws. DSC’s no-password feature has the added benefit of minimizing ID theft and fraud potential.

9. Make sure your clients back up their data. Valuable or significant data stored online should be regularly backed-up to local storage media. To locally back up an online e-mail account, clients should use an e-mail application installed on their personal computer. For example, Mozilla Thunderbird is a free e-mail application available for Windows, Apple Mac OS and Linux-based computer systems. Facebook or Google+ social networking accounts can be downloaded into a single archive from the Account Settings page. Another Web-based service called Backupify will automatically create periodic backups of a client’s electronically stored information at Facebook, Twitter, Google Gmail, Flickr, Picasa, LinkedIn, Blogger, etc.

ETHICAL CONSIDERATIONS

Let’s get back to H and W and their Attorney. Which of the Pennsylvania Rules of Professional Conduct might provide guidance? This scenario should be familiar to most of our readers from the continuing legal education programs on Ethics aimed toward the practitioner of probate and trust law. Probate and Trust Law lawyers represent spouses all the time. It is frankly impractical in the majority of cases to dissuade spouses from serving as agent for one another under Powers of Attorney or as Executor for the other’s estate. Consequently, readers of this article will have seen variations of this case study when discussing Pennsylvania Rules 1.6 (confidentiality of information) and 1.7 (conflict of interest: current clients).

Certainly the duty of confidentiality is one of the most fundamental aspects of the client-lawyer relationship. Conceptually, Attorney must not share H’s revelations with W. Attorney, however, represents BOTH H and W. H’s revelation thus implicates Pennsylvania Rule 1.7 which states that a lawyer may not represent a client if either the representation of one client will be directly adverse to another client, or if significant risk exists that the representation of one client will be materially limited by the lawyer’s responsibility to another client. One possible approach would be for Attorney to make best efforts to persuade H to tell W about the secret accounts. If Attorney is unsuccessful, however, Attorney must withdraw from the joint representation of H and W. Unfortunately, that action is likely to lead to a host of unpleasantries. W probably will be suspicious, especially when Attorney advises H and W to obtain separate counsel. It is possible that Attorney’s

32 PA. R. PROF. COND. 1.6 cmt. 2 (duty of confidentiality underscores the “trust that is the hallmark of the client-lawyer relationship”).
33 Id. 1.7(a)(1), (2).
34 Id. 1.7 cmt. 4.
withdrawal from representation will cause damage to the marriage, yet continuing to represent H would be directly adverse to W.

Fortunately, the Pennsylvania Rule allows Attorney to continue to represent both H and W notwithstanding the existence of a concurrent conflict of interest if each affected client gives informed consent. The experienced practitioners with whom I have discussed this question over the years address the potential for conflicts of interest between spouses in estate planning engagements at the onset of the engagement. I call their process “Show-and-Tell” because the attorney advises both spouses that any information provided to the attorney by one spouse must be revealed to the other spouse. In essence, the attorney gets the approval of both spouses in writing up front to the joint representation. That way, if H is reluctant to sign any written waiver of confidentiality Attorney asks both H and W to sign as to each other, that reticence might demonstrate the need for separate representation ab initio. This approach is blessed by Comment 31 of Pennsylvania Rule 1.7. In this case study, Attorney also should tell H and W, in each other’s presence, that each can supersede her or his estate planning documents by making direct designations with their digital providers to disallow access notwithstanding the designation in the POA or the Will. Remember – the designation with the service provider prevails or trumps in RUFADAA.

Let’s now turn to our own legal practices and our own usage of and reliance upon the Internet for attorney-client communications. As attorneys, we struggle with digital assets in our respective practices. Securing the communication of protected client information implicates the twin duties of competency (set forth in Pennsylvania Rule of Professional Conduct 1.1) and confidentiality (set forth in Pennsylvania Rule 1.6). The comments to Pennsylvania Rule 1.1 include the following phrase in its explanation of the requisite knowledge and skill to be considered competent: “keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”. The comments to Pennsylvania Rule 1.6 similarly warn us of the risks associated with relevant technology, i.e., an attorney may be found to have violated her or his duty of confidentiality if the attorney has not made “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

The technology risks faced by lawyers are surveyed most thoroughly in an ABA Formal Opinion issued just two years ago by the ABA’s Standing Committee on Ethics and Professional Responsibility. The conclusion of that Opinion is,
“[A] lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.”

The Formal Opinion sets out seven (7) considerations as guidance to attorneys in securing attorney-client communications:

- Understand the Nature of the Threat
- Understand How Client Confidential Information is Transmitted and Where it is Stored
- Understand and Use Reasonable Electronic Security Measures
- Determine How Electronic Communications About Client Matters Should Be Protected
- Label Client Confidential Information
- Train Lawyers and Nonlawyer Assistants in Technology and Information Security
- Conduct Due Diligence on Vendors Providing Communication Technology

These considerations also factor into the determination of whether the lawyer made “reasonable efforts” to prevent the inadvertent or unauthorized disclosure of confidential information.

The ever-evolving sophistication of cyber-attacks makes protecting client confidentiality all the more challenging. According to the

President and CEO of a technology group whose profession is to protect digital assets from the latest cybersecurity threats, over 357 million new malware variants were introduced in 2016 alone, and 83% of all attacks came through the use of e-mail attachments or web links.

41 Beringer, Ethical Implications of Digital Assets: What You Need To Know, PEPC 2018 Ethics Forum (April 24, 2018). Successful cyberattacks are conducted 82% by outside cybercriminals; 11% are from company insiders; and 7% are conducted by nation states such as Russia or China. Id.
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