REPORT OF THE CHAIR

BY JUSTIN BROWN, ESQUIRE | PEPPER HAMILTON LLP

I recently read an article by a trusts and estates attorney about how the trusts and estates practice was dying and that millennials were reluctant to enter the practice area because of the anticipated decreased need for trusts and estates attorneys in the future. The author painted a grim picture of a future for trusts and estates practitioners as a result of increased exemptions, the eventual use of AI to eliminate the need for humans to draft estate planning documents, and the absence of young estates lawyers who could succeed an aging generation of baby boomer estates lawyers nearing retirement.

But don’t think for a second that my first column as Section Chair will dwell on the despondent attitudes of those glass-half-emptyers. I could go on at length about how the trusts and estates field is not going away any time soon, about how AI can never understand the emotional side of estate planning, and how taxes, while important, are not always the driving force behind an estate plan. As Section Chair, however, my thoughts in reading the article focused on what our Section and the Bar Association can do to stay relevant in a future where estate planning will undoubtedly look different than it is today. Will it still be worth my time and money to join the Section and be involved? How can the Section better address the needs of our most experienced members, while at the same time, create a welcoming environment for our newer members who are just starting their careers?

In our 44th year, we have built our Section into one of the most vibrant, robust, and collegial Sections of the Philadelphia Bar Association. This year, I hope to continue the growth of our Section by establishing the framework for our continued success into the future. In just the first two months of the year, our committee chairs and liaisons have already put into place programming and goals which focus on the future of our Section as it adapts to changing laws, changing technologies, and the changing role that Bar Associations now play in a practice. We are making our Section more relevant than ever, and I

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Clockwise from top left: Clark D. Robertson, Esq.; Leslie Gillin Bohner, Esq.; Aaron H. Fox, Esq.; Peter J. Johnson, Esq.

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encourage you to join one of our many committees so that you can experience firsthand the benefits of Section membership. Here is just a sampling of what we have in store for this year:

• **Education Committee.** The Education Committee is hard at work planning amazing CLEs for the year. The CLEs will cover topics ranging from drafting techniques and planning strategies in light of the Tax Cuts and Jobs Act, to understanding digital assets in estate planning and estate administration in both RUFADAA and non-RUFADAA jurisdictions.

• **Legislative Committee.** The Legislative Committee will continue analyzing the newest proposed trusts and estate laws, including issues dealing with digital notaries, e-wills, and “super wills”.

• **Rules and Practice Committee.** The R&P Committee will undertake the herculean task of revising the Philadelphia Estate Practitioner’s Handbook – an invaluable statewide resource to even the most experienced practitioners who practice before the Register of Wills and the Orphans’ Court.

• **Technology Committee.** The “Tech” Committee will continue researching, discussing, and educating our Section on the evolution of technology in the law and the impact of technology on an estates practice.

• **Tax Committee.** The Tax Committee will be updating the Section as to the newest and most important tax cases that impact our practices. We hope to continue our annual tradition of meeting with the Department of Revenue to learn about the latest inheritance tax issues impacting the Department.

• **Business Planning Committee.** As the first Committee to podcast its meetings for our Section, the Business Planning Committee is in the process of planning a discussion on drafting shareholder agreements – a topic immensely important to every practitioner, young and old, engaged in business planning.

• **Diversity Committee.** The Diversity Committee has been instrumental in shaping the future composition of our Section. At the recommendation of the Diversity Committee, this year, each of the Executive Committee members will be aspiring to fulfill the requirements of the Section’s Diversity and Inclusion Plan, a mandatory plan instituted a few years ago for the Section’s officers, designed to increase and encourage diversity and inclusion within our Section and the Bar Association.

• **Elder Law and Guardianship Committee.** The Committee will continue to develop strategies to address some of the many issues surrounding the guardianship practice. A special thanks to our immediate past Chair, Rise Newman, who has graciously agreed to spearhead this task force.

• **Publications Committee.** From opinion pieces to educational articles, the Publications Committee creates our newsletter, the digital face of our Section. One need only flip through this newsletter to see the professionalism and pride exhibited in every piece in the newsletter.

• **Orphans’ Court Litigation and Dispute Resolution Committee.** For both litigators and non-litigators, the Orphans’ Court Litigation and Dispute Resolution Committee fosters monthly discussions on the latest Orphans’ Court cases that will impact our Section’s members. Drawing on the wisdom of its members, these meetings always dive deep into each case study and turn into thought provoking discussions that will shape our practices.
NAVIGATING THE DIGITAL LANDSCAPE: PLANNING FOR DIGITAL ASSETS AFTER DEATH

BY CHLOE MULLEN-WILSON, J.D. CANDIDATE, 2019 | TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW

A large portion of our lives exists online, tucked away in a “cloud” for safekeeping. Gone are the days of file cabinets full of bank statements, investment portfolio reports, and vinyl records. Instead, most Americans are opting to digitize their assets; not only can the Internet store more data, but it does so in an organized and easily-navigable manner. Thus, Americans are accumulating an ever-increasing number of online accounts. To combat the changing infrastructure of the way we store assets, how we manage them, and the management of these assets after death, the Uniform Law Commission (“ULC”) enacted legislation to streamline the administration of digital assets. The Revised Uniform Fiduciary Access to Digital Assets Act (or “RUFADAA”) now governs the disposition of digital assets in forty-four states, granting decedents control over their digital selves in a way that was previously unavailable.

In a world where an administrator is denied access to over 190 million dollars in digital currency left behind by the founder of a major cryptocurrency exchange, the folly of failing to plan for digital assets becomes abundantly clear.

The RUFADAA defines a digital asset as an “electronic record in which an individual has a right or interest,” excluding assets and liabilities unless they are in and of themselves electronic records. Digital assets can be divided into five categories, with some overlap:

1. electronic documents, usually emails or other online communications;
2. social media sites;
3. financial assets, including bank accounts and electronic currencies;
4. business accounts and related assets; and
5. a miscellaneous category consisting of largely entertainment, such as blogs, music videos, online gaming accounts, and the like. These digital assets are stored online, on the websites of service providers, called “custodians” under the RUFADAA.

According to a 2011 survey by McAfee, Intel’s security-technology unit, the average American owns digital assets worth about $55,000. In 2017, the average person had seven social media accounts, and over ninety online accounts that required passwords. In the United States, there are an average of 130 accounts affiliated with each email address. These numbers are only expected to increase over time, and reflect the growing value of digital assets.

• Young Lawyers Division. As the future of our Section, our young lawyers bring enthusiasm and fresh ideas to the Section. This year, our YLD Liaisons are planning multiple programs and long-term projects designed to increase our young lawyer membership and implement tools necessary to educate and mentor our young lawyers.

We have an incredibly busy year ahead that could not be made possible without the tireless efforts of our committee chairs, liaisons, and most of all, our Section’s members. Let’s continue our Section’s growth and relevance and ensure its continued success for the next generation of estate and trust practitioners. I’ll see you at a committee meeting!
Federal Acts as Protective Measures

Congress protected digital assets long before any state enacted legislation related to third-party access to digital assets. While the Fourth Amendment grants a privacy right which protects certain communications, digital communications fell through the gap as an unanticipated asset worthy of privacy. For example, the Electronic Communications Privacy Act (“ECPA”), enacted in 1986, built upon federal wiretapping law that governed the interception of “hard” telephone lines, but ignored the interception of “soft” computer and digitized communications. The ECPA now protects wire, oral, and electronic communications that are stored electronically.

The Stored Communications Act (“SCA”) and the Computer Fraud and Abuses Act (“CFAA”), enacted under the ECPA, criminalize the unauthorized access of digital accounts. The SCA punishes any individual who “intentionally accesses without authorization . . . an electronic communication.” Violation of the SCA is punishable by imprisonment and a fine. Meanwhile, the CFAA safeguards digital assets by the threat of criminal liability for hackers. The CFAA prohibits accessing an individual’s computer without permission or authorization; and, in today’s world, the term “computer” also extends to other devices such as cellphones and tablets. These federal laws criminalize the exact actions many people take after the death of a family member, namely, logging onto a loved one’s electronic device to investigate their online accounts for value, or sentimentally-valued assets.

Obviously, when a family member violates the ECPA, the government may never know, and in fact, many Americans who have lost family members violate these acts every day without facing criminal liability. The problem is more acute for custodians, as the owners of the websites where users have accounts. A widow logging onto her deceased spouse’s tablet in order to access his emails will likely go unnoticed by federal prosecutors. Online service providers governed by the ECPA, however, are bound to protect a user’s digital presence on their websites. These companies are subject to civil and criminal liability if they fail to do so. Each state also has statutes to prohibit computer hacking and unauthorized access of online accounts; most are nearly identical to the language of the SCA and CFAA.

Under the SCA specifically, custodians are required to disclose digital information only in criminal cases. Essentially, the only mandatory disclosure occurs when a governmental entity requires it pursuant to a criminal warrant or court order; the content requested can range from the contents of electronic communications, as in the body of an email, to a plain record of the electronic communications, like an inbox view that shows the sender and date of the user’s emails without divulging the contents. Service providers are protected from any cause of action under the ECPA so long as they disclose information pursuant to the SCA.

Click “I Agree” to Continue

Online accounts are also governed by complex, often long-winded, small-printed agreements, known as terms of service agreements (“TOSA”), which are generally click- or scroll-throughs for users. Service providers typically limit access to a user’s online account in a few ways: the user may have a non-transferable right, as provided in Yahoo’s TOSA. Alternatively, the user may have only a licensing right during his or her life, thus any interest in the account terminates at death, like Apple’s TOSA. Finally, the user may have the right under a TOSA to grant another person limited access after the user’s death, as in Google’s Inactive Account Manager, or Facebook’s Memorialized Account feature. If an account is transferable posthumously, it is typical for service providers to limit use after the original user dies. Facebook, for example, allows a decedent’s
The Failure of the First Act

Prior to the introduction of the UFADAA in 2014, most state probate codes made no reference to fiduciary access to digital assets. When UFADAA talks began in 2012, only Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island had enacted statutes which specifically pertained to digital assets and third-party use. In 2015, to provide consistent treatment of digital assets either after death or at incapacity, the ULC introduced the UFADAA.

The significance of the UFADAA lies in its failure. The first act presumed that decedents wanted their executor or administrator to access digital accounts in the same manner as they could have accessed them before death. This presumption of digital disclosure catalyzed a coalition of online service providers, who lobbied together to propose a uniform act of their own. The association of custodians, known as NetChoice, consisted of providers like Google, Facebook, Yahoo!, eBay, PayPal, and more. Concerned with their exposure to federal hacker statutes if the presumption of disclosure after death were enforced, NetChoice was a major factor in the reversal of the presumption of disclosure. Unsurprisingly, the UFADAA passed in only one state.

A Revised Act Appeases Providers

The RUFADAA thus reflected a compromise between the concerns of custodians and the desire for uniformity. The ULC completed this revised act in July, 2015. The crucial difference between the RUFADAA and its predecessor is a change in presumption; instead of presuming a desire for release, the Revised Act stresses the importance of the decedent’s express consent to the disclosure of each digital asset. This express consent can be given either through the use of an online tool—separate from the TOSA—from the service provider, or by express consent included in a decedent’s estate planning documents, specifically granting access to digital assets.

The RUFADAA provides a hierarchy for how to grant a fiduciary access to digital assets. The use of an online tool, which is specific to the custodian’s platform, allows the designation of a person to access the account upon notification of the user’s death. These people under the RUFADAA are “designated recipients,” as the appointed person acts as the administrator of the account. An online tool is the top tier of access, superseding other forms. Oftentimes, this access is limited, as noted above in the example of Facebook’s Memorialized Account feature.

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If the custodian provides no such tool, or if it is not utilized, the user’s directions and express consent under a will, trust, or “other record” are necessary. A user’s directions through an online tool or express consent will override “a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user’s assent to the terms of service.” If a user fails to utilize an available online tool but provides direction in her will, it is, as of yet, unclear whether the custodian’s online tool limitations govern the fiduciary’s access. Finally, if the user does not use an online tool or provide consent in an estate planning document, the custodian’s TOSA will govern the account. The “do nothing” approach under the RUFADAA is the default for people living in states, like Pennsylvania, which have not yet adopted the legislation.

Custodians have broad discretion under the Revised Act. Specifically, the service provider, in its “sole discretion,” can give the fiduciary either (1) “full access to the user’s account;” (2) partial access to the user’s account sufficient to perform the tasks with which the fiduciary is charged;” or (3) an electronic or paper copy of the digital asset. An example of a digital asset copy would be a screenshot of the decedent’s photo gallery. Further, custodians retain the opportunity to petition the court if they consider a fiduciary’s request to be an undue burden. Custodians retain significant control under the RUFADAA, and to even trigger their obligation to disclose at all, a personal representative must provide:

1. a written request for disclosure;
2. a certified copy of the user’s death certificate;
3. a certified document evidencing the fiduciary’s authority under the will or other record; and
4. a certified document showing express consent granted to the requesting fiduciary (if no online tool was used). Custodians can also ask for additional documents, including, in some circumstances, a court order. If a fiduciary does not have express consent from the decedent, she may still request a catalogue record from the custodian, allowable because it is a disclosure that it not prohibited by the SCA, as it does not divulge the contents of communications. While a mild inconvenience for the executor, these requirements are fairly standard in the case of non-probate assets.

The RUFADAA is not without its limitations. Most importantly for estate planners, the language of the statute is ambiguous in several respects. “Designated recipients,” appointed via online tools, are meant to “administer digital assets,” while express consent can be granted to a “fiduciary” to allow disclosure of the digital assets. At no point does the RUFADAA specify what the duties of these individuals are to one another. On the face of the statute, it is unclear whether a designated recipient holds more power over that particular digital account. Another limitation involves the valuation of these digital assets. The RUFADAA excels by providing a framework whereby a decedent’s loved ones may access a user’s digital accounts, manage, and then terminate the user’s account. The Revised Act fails to mention how to value these accounts, or the data held within them; the RUFADAA never refers to beneficiaries and their respective rights, either. From an estate and wealth planning perspective, the RUFADAA grants attorneys virtually no guidance on who has the right to sell digital assets or accounts, and to whom those proceeds can be distributed. While the average person’s Facebook may have
nothing but sentimental value, certainly the same account for a professional photographer may differ. For now, state laws will have to sort out issues on which the RUFADAA is silent.

A Commonwealth without Guidance

Although the RUFADAA has been adopted in forty-four states, Pennsylvania is not one of them. The Commonwealth is notoriously slow to adopt uniform acts. For example, the Commonwealth enacted the Uniform Transfers to Minors Act forty-seventh, the Uniform Anatomical Gift Act forty-eighth, and the Uniform Act on Living Wills fiftieth, of a possible fifty-three states and territories. The ULC proposed the Uniform Anatomical Gift Act in 2006, which Pennsylvania recently passed in late 2018. The RUFADAA is no exception to Pennsylvania’s trend of lengthy bill considerations. The Revised Act, offered by the ULC in 2015, was introduced in January 2018 as Pennsylvania Senate Bill 827, and is a virtually unchanged version of the RUFADAA, adjusted only to reflect the Commonwealth’s terminology for fiduciaries. The state Senate passed Bill 827 and referred it to the House on January 24, 2018. As of February 2019, that is where Bill 827 sits. As Commonwealth adoptive trends in the estates sector go, it is unclear when the bill will become law.

Until the RUFADAA passes in Pennsylvania, it is a NO-FADAA jurisdiction. Without the RUFADAA, Pennsylvania decedents and their fiduciaries are governed by the SCA, the CFAA, and primarily, custodian TOSA’s. Accordingly, if a person dies today in the Commonwealth, not all hope is lost for fiduciary access to their online accounts. If the decedent utilizes available online tools, like Google’s Inactive Account Manager, the designated recipient under that tool will manage the account as a fiduciary, subject to each custodian’s specific rules. If, however, no online tool is available, for a photo-sharing account, for example, the decedent’s executor—or more likely, his attorney—must examine the TOSA for that website. Depending on the terms, it is possible that the executor may still be granted access to, or perhaps a record of the decedent’s account pursuant to the SCA. If a Commonwealth resident dies today with a provision in her will granting her fiduciary access to her digital assets after death, that express direction need not be honored, and there is a presumption of non-disclosure.

Pennsylvania attorneys can, of course, hope for RUFADAA. It is unclear what, if any, reason exists for the Commonwealth to reject Bill 827. Therefore, for young and healthy clients, it may be appropriate to inform them of the benefit that is likely to arise from including digital assets in their estate plans. Still, the RUFADAA does not change the ownership of assets, which should be stressed to clients; just because the fiduciary has access does not equate to the same access the living user had. For certain clients, more in-depth planning may be required. For business-owner clients, even a brief delay in access to their online accounts could be devastating, and therefore clients should be considering the most practical disposition of these accounts after death. Practical advice that can be implemented in a NO-FADAA locale include counseling clients on backing up data, closing unused accounts, copying photos—where not prohibited under copyright limitations—and utilizing available online tools. Providing express consent to a fiduciary will be upheld in a RUFADAA jurisdiction, such as New York, New Jersey, or Florida; but until Pennsylvania officially adopts the Revised Act, attorneys must also advise clients of the outcome that may result if the law does not pass.

The ethical implications of advising clients must be carefully navigated in a NO-FADAA state. It would be natural to tell a client in a RUFADAA state to keep track of online accounts, perhaps advise creating a spreadsheet or other document with usernames and passwords for the client’s various digital assets. In
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THE DIGITAL LANDSCAPE, CONTINUED

a NO-FADAA jurisdiction however, to advise a client to keep track of that information must be done with an eye towards the applicable federal and state anti-hacker laws. If there are familial tensions that may lead to a will contest or some other dispute over assets, it would be best to advise clients not to access their loved ones’ accounts after death. For now, planning for RUFADAA is the most rational option for Commonwealth attorneys.

The wide adoption of the RUFADAA reflects the importance of digital assets. Crucial to estate administration in many instances, access to digital assets has become a routine part of executorship. While custodians retain significant control over the disclosure of online accounts, the RUFADAA grants more access to users than any TOSAs or federal laws have in the past. Yet a dilemma arises in NO-FADAA jurisdictions, where attorneys toe the line between adequately advising their clients and enabling hacking techniques. While decedents from Pennsylvania are, for now, without the RUFADAA’s protections, the legislation will only become more crucial to estate planners over time, as wealth inevitably shifts from the physical to the digital realm.
CASE SUMMARY FROM THE ORPHANS’ COURT LITIGATION COMMITTEE


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

Continuing a recent string of opinions concerning the actions of agents under power of attorney, Capobianco Estate, Power of Attorney, 8 Fid. Rep. 3d 201 (O.C. Phila. 2018), examined the powers and limitations an agent under a power of attorney has over the principal’s assets and the responsibilities imposed on the agent in exercising those powers.

Gloria Capobianco executed a power of attorney naming her son Otto as agent. On the same date Gloria executed a will leaving her assets equally to her seven children. Gloria’s power of attorney gave her agent the power “to handle interests in estates and trusts,” the power to dispose of real and personal property and the power to make “unlimited gifts, outright or in trust, . . . to any donees [including the agents] in such amounts as the agents may decide including such gifts which will serve to accelerate eligibility for governmental assistance programs . . . [and] create revocable or irrevocable trusts of my property which may extend beyond my disability or life[.]”

Gloria suffered from Alzheimer’s, which became severe by December 2011. On April 24, 2016, Gloria was hospitalized for pneumonia, and she was placed into a medically-induced coma from which she never recovered. On May 27, 2016, while Gloria was in a coma, Otto, as agent for Gloria, created an irrevocable trust naming himself and two of his seven siblings as beneficiaries and transferred Gloria’s home and tangible personal property to the trust. Otto claimed that he did so to protect the assets “from being counted for the purpose of determining Medicaid eligibility.” Otto claimed he only included himself and two of his siblings as beneficiaries “because they either supported her financially, lived with her, cared for her, or helped her significant” after their father’s death.

Gloria died on June 3, 2016, and her original will could not be located, so it was not probated. Accordingly, Gloria’s probate estate would pass by intestacy equally to her seven children, which was the same disposition as under her missing 2005 will.

Otto filed an account of his actions as agent, and one of Gloria’s other children filed an objection to the transfer of Gloria’s real and tangible property to the trust. The Orphans’ Court initially noted that agents “under power of attorney do indeed have broad latitude in the exercise of powers granted to them by the instruments of their appointment.” In that context, the Court considered whether the power of attorney permitted the transfers.

The Court examined the provision in Gloria’s power of attorney authorizing the agent to “handle interests in estates and trusts” and relied on 20 Pa. C.S. §5603(r), which defines the power to handle interests in estates and trusts as the power to “receive a bequest, devise, gift or other transfer of real or personal property to the principal in the principal’s own right or as a fiduciary

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1 The Orphans’ Court Litigation and Dispute Resolution Committee will provide summaries of recent litigation cases in each quarterly newsletter.
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3 An individual’s primary residence (subject to certain limitations), personal effects and household goods are not considered includable assets for determining Medicaid eligibility.
for another and give full receipt and acquittance therefor or a refunding bond therefor; approve accounts of any estate, trust, partnership or other transaction in which the principal may have an interest; enter into any compromise and release in regard thereto; and receive on behalf of the principal all notices and reports required by section 7780.3 (relating to duty to inform and report) or permitted by section 7785(a) (relating to limitation of action against trustee)." The Court then stated that "no reasonable reading of 20 Pa. C.S. §5603[(r)] would permit an agent to change the principal's estate plan; it does not grant the agent any power to create an estate plan for the principal, but rather to make decisions regarding any interests the principal may have in the estates of others."

The Court next considered whether the provisions of the power of attorney authorizing the agent to make gifts outright or in trust and to dispose of the principal’s real or personal property authorized the transactions. The Court stated that although the agent was authorized to make gifts, pursuant to 20 Pa. C.S. §5601.3(b)(6), “agents under power of attorney are also bound by a fiduciary duty to attempt to preserve the principal’s estate plan . . . if preserving the plan is consistent with the principal’s best interest based on all relevant factors” and noted further that “nowhere in the power of attorney was [the agent] granted the power to alter [Gloria’s] estate plan.” While Gloria’s will giving her probate estate equally to her seven children could not be located and therefore was not probated, Pennsylvania’s intestacy statute would dispose of her assets in the same manner. Thus, the Court concluded that Otto “knew that [Gloria’s will] would have distributed [Gloria’s] estate equally among her children, and held a subjective believe in its validity at the time he created the Trust. In creating the Trust and naming only himself and two of his six siblings as beneficiaries, [Otto] deviated substantially from the intent that Pennsylvania presumes when a person dies intestate and from the estate plan he believed [Gloria] herself created that antedated her incapacity.”

The Court also noted that transferring the real and tangible property to the Trust would not have prevented the property from being counted for the purposes of Medicaid eligibility due to Medicaid’s lookback rules.

Thus, the Court concluded that there was “no discernible purpose in creating the Trust other than disinheriting [Otto’s siblings]” and that his “creation of the Trust was a product of his perception that, unlike himself and the other two named beneficiaries of the Trust, the four excluded siblings had not earned a share in their mother’s estate. Using his power as agent under power of attorney to disinherit his four siblings based only on his evidence resentment toward them is an action that cannot be characterized as being taken in good faith.” Accordingly, the Court concluded that Otto breached his fiduciary duty, declared the trust invalid and ordered all trust assets to be returned to Gloria’s probate estate.
GUIDANCE FROM THE IRS

Internal Revenue Service Released 2018-2019 Priority Guidance Plan

The IRS recently released the first version of its 2018-2019 Priority Guidance Plan which covers the period from July 2018 through June 2019. The IRS indicated that it may update the plan during the plan year based on changes that may occur. The projects affecting trusts, estates and gifts include the following:

• Guidance on the basis of assets held under a grantor trust under Code Section 1014;

• Final regulations under Code Section 2032(a) dealing with the restrictions of assets of an estate during the alternate valuation period;

• Regulations under Code Section 2053 relating to personal guarantees and present value concepts in determining deductible claims against the estate as expenses of the estate; and

• Regulations under Code Section 7520 relating to the use of actuarial tables in valuing certain interests.

Internal Revenue Service Provides Estimated Tax Penalty Relief

On January 16, 2019, the IRS issued Notice 2019-11 by which it announced that the penalty applicable for a taxpayer’s failure to make estimated income tax payments for 2018 is waived if the taxpayer’s estimated tax payments made by January 15, 2019 equal or exceed 85% of the tax shown on that individual’s 2018 tax return. Form 2210 provides instructions as to how the taxpayer can take advantage of the tax relief, noting that the taxpayer should complete the “85% Exception Worksheet” contained in Form 2210 instructions to see if he or she is able to claim the waiver. If the conditions are met, the taxpayer much check Box A in Part II, write “85% Waiver” next to Box A and file page 1 of Form 2210 with the return.

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

Revenue Procedure 2019-3 sets forth the issues that the IRS’s Associate Chief Counsel will not issue letter ruling or determination letters. The question of whether two or more trusts will be treated as a single trust under Code Section 643(f) for purposes of subchapter J of Chapter 1 was newly added to the list.

LEGISLATIVE HAPPENINGS

The “Protecting Access to the Courts for Taxpayers Act”

On December 19, President Trump signed into law the “Protecting Access to the Courts for Taxpayers Act”, which expands existing statutory authority for Article III judges to transfer to the United States Tax Court cases which were misfiled. Taxpayers who misfile will not have to pay duplicative filing fees and the act ensures taxpayers who file in the wrong court can have their matters transferred to the Tax Court.

PRIVATE LETTER RULING

The IRS recently issued a private letter ruling holding that a surviving spouse could roll over to her own IRA her deceased spouse’s IRA despite the fact that the designated beneficiary of the deceased spouse’s IRA was a trust. Pertinent to the analysis was that the surviving spouse was the sole trustee and beneficiary of the trust and was entitled to all the income and corpus of the trust.

In reaching its determination, the IRS noted that since the beneficiary of the decedent’s IRA was the trust,
TAX UPDATE, CONTINUED

The surviving spouse could not treat the IRA as her own. However, as she was entitled to all the income and the entire principal of the trust, the surviving spouse is the individual for whom the account is maintained for the purposes of applying Code Section 408(d)(3)(A).

As the surviving spouse could roll over any distribution made from the proceeds of the IRA (other than any required minimum distribution) into one or more of her IRAs, she can be treated as having acquired the IRA directly from the surviving spouse and doesn’t have to include in gross income any portion of the proceeds distributed which are timely rolled over into an IRA maintained for her benefit. However, required minimum distributions cannot be rolled over and the ruling was subject to the one rollover per year limit of Code Section 408(d)(3)(B).

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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Changes to Orphans’ Court guardianship practice continue apace. Below is a brief discussion of several updates.

Orphans’ Court publishes new Manual for Guardians of Incapacitated Persons

The first edition of the Manual, prepared in 2009 by then-Administrative Judge Joseph D. O’Keefe, served as a critical resource to the community for nearly ten years. It provided a plain-language how-to guide for those who found themselves involved in guardianship proceedings, and more importantly, those who found themselves appointed guardians. Many pro se guardians (and probably a few with counsel!) would have been lost without the manual.

However, forms, rules and procedures have changed over time since 2009, and a sea change in procedure is underway with the introduction of new guardianship rules under Chapter XIV of the Pennsylvania Orphans’ Court Rules. All of this leaves the 2009 Manual sadly out of date.


New guardianship rules coming June 1, 2019

A reminder: the current Chapter XIV of the Pennsylvania Orphans’ Court Rules will expire on June 1, 2019, and new rules will come into effect. The new rules will significantly change guardianship practice, so be sure to review them in advance. The new Chapter XIV rules, changes to related rules, and new forms, can be found here: https://www.pabulletin.com/secure/data/vol48/48-24/914.html. Or here: http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%20-%2010356638238010357.pdf?cb=1?cb. Here are a few of the many changes these new rules will bring:

• New procedure and notice requirement regarding the use of deposition testimony vs. live testimony of medical expert (see new Rule 14.3).
• New Rules regarding the transfer of guardianship to and from Pennsylvania (see new Rules 14.11–14.13).

All local guardianship rules will also expire on June 1, 2019. The Rules and Practice Committee and court staff worked diligently together last fall to draft new local guardianship rules, which have been submitted to the Supreme Court Orphans’ Court Procedural Rules Committee, and are currently under review. New local rules as approved by the Supreme Court Committee will also come into effect on June 1, 2019.
Pennsylvania lawmakers approved Senate Bill 180, the Donate Life PA Act (the “Act”), and Governor Tom Wolf signed the Act into law on October 23, 2018. The Act represents a significant change in Pennsylvania’s organ donation statutes, which had not been revised in nearly 25 years.

The Act makes a distinction between the transplantable organs with which most are familiar: hearts, lungs, livers or kidneys (“anatomical gifts”), and organs and other body parts that are now transplantable as a result of some truly remarkable scientific developments in recent years: hands, limbs or facial tissue, which are among a class of body parts known as vascularized composite allografts (collectively, “VCAs”).1 Specifically, the law provides that if a principal affirmatively wishes to donate VCAs, the principal must confirm such consent via a written document, such as a will, health care power of attorney or a living will.2 The donor’s instructions must be made separately from those relating to traditional anatomical gifts.3 Therefore, in a health care power of attorney or living will, if the potential donor (“principal”) wishes to donate his or her VCAs, in addition to other organs and tissues, such wishes must be spelled out separately from traditional anatomical gifts.4

What will be key for practitioners when counseling clients in this regard is that, if the principal has not specifically directed either the preference for or the refusal of the donation of his or her VCAs in a written document, and the surrogate does not have actual notice of contrary intentions by the principal, then the surrogate will be permitted to consent to the donation of VCAs.5 The Act further clarifies the decision-making hierarchy by listing members of the family who can make such decisions in the event there is no surrogate, or if the surrogate is unavailable.6 As a result, the principal must be clear with his or her wishes to his or her surrogates/family, either in a formal writing or otherwise, because the surrogate or the principal’s family may be approached by clinicians asking for consent to donate the principal’s VCAs.7 Obviously, organ donation is a sensitive subject in ordinary circumstances, but the donation of VCAs is likely to be even more so, as VCAs by nature are more personal (e.g. a loved one’s face is much different from the same loved one’s kidneys) and also may impact funeral arrangements, such as having an open casket.8

Finally, an individual who elects to be an “organ donor” on a Pennsylvania driver’s license has consented to make anatomical gifts of traditional organs;9 however, the driver’s license designation does not also constitute consent to donate hands, facial tissue, limbs or other VCAs.10 If the principal feels strongly about donating (or not donating) VCAs, he or she should be sure that the appropriate language is included in his or her health care power of attorney or living will. The Act also includes tools to increase public awareness about the donation process and the importance of organ donation.11 The Donate Life PA Registry will be established online to allow people to register more easily as a donor.12 The Act also imposes rules to prevent organ donation from interfering with criminal investigations.13

It is the hope that the passage of the Act will increase the number of organ donors in Pennsylvania thereby improving survival rates for transplant patients.

1 20 Pa.C.S. § 8601.
2 20 Pa.C.S. § 8654(1).
3 Id.
4 Id.
5 20 Pa.C.S. § 8655.
6 20 Pa.C.S. §§ 8611(b), 8653, 8655(1).
7 20 Pa.C.S. § 8656.
8 20 Pa.C.S. § 8656(1)(v).
9 20 Pa.C.S. § 8619(a).
10 Id.
11 20 Pa.C.S. §§ 8619(a.1), 8622(b).
13 20 Pa.C.S. § 8611(b.1).
The PEPC invites the Philadelphia Bar Association Probate and Trust Law Section to join our Council for membership and programming

March Luncheon Program
Tuesday, March 19, 2019
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Social Security and Retirement Planning: A Hit or Myth Proposition”
Speaker: Kurt Czarnowski

Ethics Forum
Tuesday, April 30, 2019
8:00 – 10:30 a.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Ethics of Trust Modification”
Panel Discussion

Annual Meeting, Seminar & Reception
Thursday, May 16, 2019
3:00 – 8:00 p.m.
National Museum of American Jewish History
101 S. Independence Mall East, Philadelphia, PA
Topic: “Seven Deadly Claims”
Speaker: Steve Mignogna, Terrence Franklin & Robert W. Goldman

For more information on joining the Philadelphia Estate Planning Council or to register for any upcoming programs, please visit www.philaepc.org.
As we become a more mobile society, our clients are increasingly likely to have issues that extend beyond the ambit of Pennsylvania law. Knowing what you can and cannot do for clients with issues governed by the laws of a jurisdiction where you are not admitted to practice (“non-admitted jurisdiction”) is an important step in becoming a competent trusts and estates practitioner.

Under Pa.R.C.P. 5.5(a), “An attorney shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” One approach to comply with this rule is to become admitted in the non-admitted jurisdiction, which may be an option if the non-admitted jurisdiction permits an attorney to be admitted by motion and doing so is within the client’s timeframe. Merely being admitted, however, does not mean that the attorney will have “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation” to be considered competent with regard to the non-admitted jurisdiction’s law. Thus, being admitted to the new jurisdiction to handle a complex estate planning or administration matter, for example, without having knowledge of the governing law will almost certainly create additional issues.

Under Pa.R.C.P. 5.5(b), an attorney who is not admitted to practice in Pennsylvania is prohibited from holding out to the public or representing that the attorney is admitted to practice law here. Other jurisdictions include the same rule in some form. Although attorneys are generally barred from practicing where they are not licensed, there are several exceptions and safe harbor provisions which have been carved out from this blanket prohibition. For example, MRCP 5.5(c)(1) provides, “An attorney admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that are undertaken in association with an attorney who is admitted to practice in this jurisdiction and who actively participates in the matter.” A Pennsylvania attorney is permitted to collaborate with an attorney admitted in the jurisdiction provided that the admitted attorney actively participates in the matter. Unfortunately, “active participation” is not defined in the MRPC or the Comments; however, an example is useful.

**Hypothetical #1:** An old friend approaches you about drafting her pre-nuptial agreement. She lives in Virginia. You work at a law firm with several attorneys who are licensed to practice law in Virginia. If you discuss the matter with one of them, can you represent your friend?

**Answer:** Probably not. Unless an attorney admitted to practice in Virginia actively participates in the matter, the representation is likely prohibited by MRCP 5.5(c) (1). While discussions may be part of active participation, there must be additional involvement to meet this threshold. Comment 8 to MRCP...
ETHICS COLUMN, CONTINUED

5.5 requires shared responsibility for the representation of the client in addition to active participation. Accordingly, if the attorney is competent to do so, having her review the draft prenuptial agreement to make sure it achieves the client’s objectives and complies with Virginia law is a better strategy.

In many cases, however, it may not be practical or possible to have another attorney actively participate in the matter. MRCP 5.5(c)(4) provides that an attorney may provide legal services on a temporary basis that arise out of, or are reasonably related to, the attorney’s practice in a jurisdiction in which the attorney is admitted to practice. The broad phrases “temporary basis” and “reasonably related” are most easily considered in the context of the underlying facts.

**Hypothetical #2:** The executor named in the Will of a decedent who was domiciled in Pennsylvania asks you to represent him with regard to probating the Will in Pennsylvania. The Will was prepared and signed in New Jersey before the decedent moved to Pennsylvania. Even if the Will was not executed in accordance with Pennsylvania law, the Will may be probated in Pennsylvania if it was executed in compliance with the law of the jurisdiction where the testator was domiciled at the time of the execution. Are you able to state to the Register of Wills, or opine to the client, whether the requirements for a valid Will under New Jersey law have been satisfied?

**Answer:** Yes. Under MRCP 5.5(c)(4) an attorney may “provide legal services on a temporary basis in this jurisdiction that … arise out of or are reasonably related to the attorney’s practice in a jurisdiction in which the attorney is admitted to practice.” This issue arises directly from the Pennsylvania attorney’s practice. Further, there will be no ongoing work in the state of New Jersey surrounding this issue and so the services are clearly temporary. In addition, New Jersey’s law becomes relevant purely as a matter of accomplishing an act permitted under Pennsylvania law. Moreover, in analyzing whether the attorney may act if the attorney can demonstrate that there is no unreasonable risk, the attorney may proceed with the requested representation on a temporary basis. In this example the risk is minimal, since even if the attorney is wrong, the only consequence would be perhaps a wasted trip to the Register of Wills.

Comment 14 to MRCP 5.5 states that a variety of factors will determine whether services arise out of or are reasonably related to the attorney’s practice. For example, the client seeking counsel in the non-admitted jurisdiction may have been previously represented by the attorney, or may be a resident of or have substantial contacts with the jurisdiction in which the attorney is admitted. The matter, although involving other jurisdictions, may have a significant connection with the jurisdiction in which the attorney is admitted. In other cases, significant aspects of the attorney’s work could be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. Comment 14 is particularly helpful in the following two examples.

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4 American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 5.5, at 204 (5th ed. 2016).
ETHICS COLUMN, CONTINUED

Hypothetical #3: The executor of an estate comes to you for estate administration services. During the initial meeting, you learn that the decedent owned a vacation property in Massachusetts. Ancillary probate proceedings must now be initiated. Can you handle the ancillary probate proceedings even though you are not admitted in Massachusetts?

Answer: Maybe. Again, MRPC 5.5(c)(4) permits an attorney to provide legal services in a non-admitted jurisdiction if the legal services arise out of or is reasonably related to the attorney’s practice in the admitted jurisdiction. Here, the legal advice and services for the estate administration are rendered in the admitted jurisdiction, but the ancillary probate occurs in a non-admitted jurisdiction. Although ancillary probate falls under the scope of Comment 14 which would permit such an action, the best course of action would likely be to collaborate with local counsel on this matter.

Hypothetical #4: A prospective client from Texas heard about the stellar work that you did for his brother, who lives in Philadelphia, and asks you to look over his estate plan and provide recommendations to reduce his federal estate tax liability. His estate planning documents were drafted by Texas counsel ten years ago. Can you represent the prospective client from Texas even though you are not admitted to practice in Texas?

Answer: Yes. “Where the attorney has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the attorney’s practice in non-admitted jurisdictions will be considered reasonably related to the attorney’s practice in the attorney’s admitted jurisdiction.” In this case the engagement is clearly permissible since the recommendations requested concern federal law. In fact, an attorney “with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions, again on a temporary basis.”

Prior to sending an engagement letter for the matter, however, the attorney should underscore that the scope of her representation of the client is limited to federal estate tax law and that local counsel should be retained to ensure that the recommendations comply with Texas law. It may also be prudent to reiterate this again when legal advice is provided.

Even though MRCP 5.5(c)(1) and (4) seem to give comfort to the attorney working in a non-admitted jurisdiction, the ACTEC Commentaries warn, “an attorney who is engaged to provide estate planning services by clients in a non-admitted jurisdiction and makes personal visits to those clients on a recurring basis should be cautious in relying on MRCP 5.5(c).”

MRPC 5.5(d)(2) also permits attorneys to provide legal services in non-admitted jurisdictions when an attorney is authorized to provide such services by federal law. This can be particularly helpful when dealing with federal tax issues.

Hypothetical #5: A prospective client owns a family business incorporated in Delaware which

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5 Ibid at 203.
6 Ibid.
7 Ibid.
becomes involved in a tax dispute with the IRS. May you represent the client before the IRS even though you are not admitted in Delaware?

**Answer:** Yes, provided that the attorney files a written declaration with the IRS that he is currently qualified as an attorney and is authorized to represent the party on whose behalf he acts. If the matter is before the United State Tax Court, then an attorney may represent a client if that attorney is admitted to practice or otherwise authorized by federal law to appear there.

In sum, actively collaborating with local counsel is the best way to comply with rules surrounding the unauthorized practice of law. If that is not possible and the matter carries some level of risk to the client, check the local rules in the non-admitted jurisdiction to be sure you are compliant.

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