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A PRACTITIONER-FRIENDLY GUIDE TO THE DELAWARE ASSET-PROTECTION TRUST

BY RICHARD W. NENNO, ESQUIRE | WILMINGTON TRUST COMPANY

Since July 9, 1997, when Governor Thomas R. Carper signed Delaware's Qualified Dispositions in Trust Act ("Delaware Act"), Delaware and non-Delaware residents have been using the Delaware Act to save taxes, to protect assets, and to accomplish other purposes summarized below. This article highlights key features of this kind of trust.

BACKGROUND

Under the common-law rule against self-settled trusts, an individual traditionally could not create a self-settled trust (i.e., an irrevocable trust from which he or she could benefit) and protect trust assets from claims by his or her creditors. So, if a client created an irrevocable trust and gave the trustee discretion to use the income and principal for the client and his or her spouse and children, the client's creditors could reach all trust assets, even if the trust had a spendthrift clause.

As American society became increasingly litigious, interest developed in a trust in which the person creating the trust could retain some potential benefits that could not be reached by his or her creditors. Until 1997, this interest was satisfied only by a trust, often called an "asset-protection trust" ("APT"), created in a foreign jurisdiction.

The Delaware Act (12 Del. C. §§ 3570–3576) gave birth to the Delaware APT. Besides Delaware, the states that now have some form of APT law are Alaska, Colorado, Hawaii, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming. I estimate that, since 1997, Delaware and non-Delaware residents have created over 1,000 Delaware APTs and that their market value exceeds $2 billion. New trusts are signed regularly.

The Delaware APT is not for everyone. Instead, it is an option to consider along with other techniques for shielding assets (e.g., liability insurance, incorporation, tenancy-by-the-entireties property,

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homestead exemption, retirement plans, and IRAs).

BENEFITS OF DELAWARE APTS

A trust that is structured as a Delaware APT may provide several benefits, including:

Save Taxes

Employ Tax Benefits. Your client might be reluctant to give away assets to use part or all of his or her $5.34 million gift- and GST-tax exemptions for fear that he or she will need the funds in later life. Although the tax treatment is less certain, the client should consider using a Delaware APT for these tax benefits because he or she may be a discretionary beneficiary of the trust and could get assets back in an emergency.

Reduce Federal Transfer Tax. A client will save federal transfer tax if he or she makes a gift that incurs gift tax, if he or she lives at least three years after making the gift, and if his or her estate must pay estate tax. If a client makes the gift through a Delaware APT, he or she might be able to get funds back from the trust if needed.

Avoid State Death Tax. If your client's state of residence imposes an estate or inheritance tax, he or she might be able to reduce that tax by making a gift before death. If the client makes the gift to a Delaware APT, he or she potentially could get funds back in the event of need.

Assure Favorable Tax Treatment for Grantor Trusts. A client's payment of income taxes attributable to a grantor trust is not a taxable gift, and inclusion in a grantor trust of a provision that gives the trustee discretion to reimburse the client for such taxes will not cause the trust to be included in the client's gross estate, provided that, as is true under the Delaware Act, the client's creditors may not reach trust assets by reason of the inclusion of that discretion (Rev. Rul. 2004-64).

Avoid State Income Tax. A client might try to use a type of Delaware APT commonly known as a Delaware Incomplete Nongrantor Trust ("DING Trust") to avoid income tax on undistributed ordinary income and capital gains of a trust imposed by a state that has not adopted the federal grantor-trust rules (i.e., Pennsylvania or Tennessee). Also, the IRS has ruled several times that APTs may be nongrantor trusts if they are structured so that distributions to the grantor are controlled by adverse parties (see, e.g., PLR 201410001). Consequently, your client might be able to avoid state tax on undistributed ordinary income and capital gains of a trust imposed by one of the 42 states that follow the federal grantor-trust rules. As a nongrantor trust for state tax purposes, the client's home state may not tax the trust due to a lack of contacts with the trust and Delaware would not impose a tax on income accumulated for non-Delaware beneficiaries. In later years, your client possibly could receive tax-free distributions of the untaxed income.

Obtain Asset Protection

General. Through success in business, savvy investing, or the receipt of a gift, inheritance, or personal-injury award, your client might own substantial assets outright. He or she could fund a Delaware APT with some of those assets to get protection from future creditor claims and business reverses.

Protect Young Adults' Assets. A client should encourage his or her children to put assets that they receive (or may withdraw from a trust) at majority in a Delaware APT. Although the children may receive distributions from the trust, they will not have the unlimited ability to squander them.

Provide Pre-Marital Planning. Because Delaware APTs are immune from claims by future spouses, a client's children may use them to shield assets from those claims without providing the financial disclosure that is required to implement effective pre-nuptial agreements.

Protect Officers and Directors. If your client is a corporate officer or director, his or her activities are receiving increased scrutiny. With this in mind, he or she should consider shielding some assets through a Delaware APT.

Protect Vulnerable Persons If your client is mentally, physically, or financially vulnerable, he or she

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should consider using a Delaware APT to protect assets.

Protect Estate-Planning Vehicles

Several common estate-planning vehicles (e.g., CRTs, GRATs, and QPRTs) are self-settled trusts and therefore are vulnerable to creditor claims. In fact, two courts have included the debtor's interest in a CRT in the bankruptcy estate (Mack, 269 B.R. 392; Mennotte, 303 F.3d 1261), and one court has included the debtor's interest in a QPRT in the bankruptcy estate (Earle, 307 B.R. 276). The Delaware Act extends protection to these arrangements.

Provide Options for NRAs

If your client is a nonresident alien ("NRA"), he or she should consider a Delaware APT for two purposes. First, a Delaware APT is a viable estate-planning and asset-protection option for an NRA, whether or not he or she has family members in this country. Second, if your client is considering immigrating to the United States, he or she might want to create a Delaware APT to take advantage of the favorable tax treatment afforded lifetime gifts by NRAs prior to immigration and to keep the ability to get funds back if needed.

Provide Protection for Existing Trusts

If your client has created a self-settled trust in a state where it does not have protection from creditors, he or she should explore moving it to Delaware. Similarly, for a number of reasons, a client might want to relocate a foreign APT to Delaware.

HOW TO CREATE A DELAWARE APT
(12 Del. C. §§ 3570(8), (11), 3571)

To create a Delaware APT, a client must establish an irrevocable trust that contains a spendthrift clause, designates Delaware law to govern the trust, and appoints at least one "qualified trustee." A "qualified trustee" is an individual who lives in Delaware (except the client) or a Delaware trust company that performs certain duties. The trust may have non-Delaware co-trustees and Delaware or non-Delaware advisers.

The Delaware Act specifically permits a client to have the power to:

1. Consent to or direct investment changes;
2. Veto distributions; and/or
3. Replace trustees or advisers.

The Delaware Act also expressly authorizes your client to have one or more of the following:

1. The ability to receive income or principal pursuant to broad discretion or a standard;
2. The right to receive current income distributions;
3. An interest in a CRT, a GRAT, or a QPRT;
4. Up to a 5% interest in a total-return unitrust;
5. A lifetime or testamentary power to appoint the principal in the trust to or for anyone except the client, the client's estate, the client's creditors, or the creditors of the client's estate;
6. The ability to be reimbursed for income taxes attributable to the trust on a mandatory or discretionary basis; or
7. The power to provide for the payment of taxes, debts, and expenses payable at the client's death.

Under the Delaware Act, any "understanding" that your client will receive money whenever he or she asks is void.

A Delaware APT may be funded with tenancy-by-the-entireties property without destroying protection from each spouse's separate creditors.

DRAFTING ISSUES

Unauthorized Provisions

Because not specifically permitted by the Delaware Act, a Delaware APT should not:

1. Appoint the client trustee or co-trustee;
2. Provide that the client will get trust assets back at a certain age or after a certain amount of time;
3. Authorize the trustee, adviser, protector, or

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committee to terminate the trust; or

4. Authorize the trustee to reimburse the client for gift taxes.

Unwise Provisions

Although permitted by the Delaware Act, a Delaware APT should not, in certain circumstances:

1. Appoint a co-trustee in the state where the client lives or works; or

2. Give the client the power to replace the trustee.

FUNDING ISSUES

General

Your client should fund a Delaware APT with assets that he or she never expects to need. A rule-of-thumb for avoiding a fraudulent transfer (see below) is to fund a Delaware APT with one-third to one-half of your client's surplus assets that are not already exempt from creditor claims after he or she performs an analysis of existing and foreseeable assets and liabilities.

Intangible Property

The best assets to put in a Delaware APT are cash, stocks, and bonds.

FLP-LLC Interests

Interests in an FLP or LLC are good assets to put into a Delaware APT, provided that your client is not the general partner or the manager and that the entity does not own real estate outside Delaware.

Non-Delaware Real Estate

Your client should not put real estate outside Delaware in a Delaware APT because it will give non-Delaware courts jurisdiction over the trust and a basis for applying non-Delaware law. Putting non-Delaware real estate in an FLP or LLC and funding the trust with interests in that entity might help, but this strategy has not been tested.

Custody

To prevent a non-Delaware court from having jurisdiction, the qualified trustee should have custody of all assets of a Delaware APT.

FEDERAL TAX CONSEQUENCES

Income Tax

A Delaware APT usually will be a grantor trust for federal income-tax purposes, which means that the client—not the trust—must pay all income taxes on interest and dividends that the trustee receives and on capital gains that the trust incurs (IRC § 677). The IRS has ruled several times, though, that such a trust is a nongrantor trust, which means that the trustee—not the client—must pay all such income taxes, if distributions to the client are controlled by adverse parties (e.g., children who will receive assets that are not distributed to the client) (see, e.g., PLR 201410001).

Gift and Estate Taxes

If the trust gives the trustee or someone else discretion to distribute trust funds to your client and if your client retains a power of appointment and a power to veto distributions, he or she will not make a taxable gift when he or she creates a Delaware APT (Reg. § 25.2511-2(b)). However, if a client does not keep those powers, he or she probably will make a taxable gift when he or she creates a Delaware APT and the trust probably will not be included in the gross estate.

GST Tax

If the creation of a Delaware APT is a completed gift and if the trust is not includable in the gross estate, a client may allocate GST exemption at the creation of the trust.

DISTRIBUTION ISSUES

General

As mentioned above, your client should fund a Delaware APT with assets that he or she doesn't expect to need. If the Delaware APT gives the trustee discretion to use income or principal for the client, a Delaware corporate trustee will process requests for distributions in accordance with its usual procedures. For the trust to work, the client must give up control. So, he or she should

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request discretionary distributions rarely, if ever, and should not expect to use the trust as a checking account or to get money whenever he or she asks. If the client prefers, he or she may retain the right to receive regular income or unitrust distributions along with the ability to receive principal distributions on a discretionary basis.

Income Taxes

A Delaware APT typically will be a grantor trust for federal income-tax purposes so that your client will have to pay income taxes on trust income and capital gains that he or she does not actually receive. The client should keep enough money to pay those taxes and should not ask the trustee every April to exercise its discretion to give the client money to cover them. Alternatively, the trust may direct the trustee to pay (or reimburse the client for) such taxes.

MOVING TRUSTS TO DELAWARE (12 Del. C. §§ 3570(10), (11), 3572(c), 3575)

The Delaware Act provides for the move to Delaware of self-settled trusts created in other states or abroad, and the time that the trust existed before it is moved counts toward the four-year period (see below) during which a creditor may pursue a claim against the trust. Thus, your client might be able to move an existing self-settled trust to Delaware that cannot be defeated under the Delaware Act.

AVOID FRAUDULENT TRANSFER

If a client makes a transfer, whether he or she gives money to children, establishes an FLP, or creates a Delaware APT, and does not keep enough assets to pay existing and foreseeable creditors, your client has made a fraudulent transfer and the transfer may be undone. So, your client is a good candidate for a Delaware APT if he or she has surplus assets after performing a realistic assessment of existing and foreseeable assets and liabilities. Conversely, your client is a bad candidate for such a trust if he or she has—or is about to incur—a large obligation and wants to hide assets to avoid paying it. Nevertheless, if your client must meet a specific debt or claim, he or she may consider a Delaware APT for assets that aren't needed to satisfy that obligation.

To ensure that your client doesn't make a fraudulent transfer when establishing a Delaware APT, the qualified trustee probably will require him or her to provide background information and to complete a solvency letter.

WHO MAY DEFEAT A DELAWARE APT (12 Del. C. §§ 3572–3573)

The Delaware Act bars original actions and actions to enforce judgments, including judgments entered outside Delaware, and it requires a creditor to bring an action against a Delaware APT in the Delaware Court of Chancery.

Under the Supremacy Clause of the U.S. Constitution, certain "super creditors," such as the IRS, the SEC, the FTC, and minor children seeking support, may reach the assets of vehicles (e.g., tenancy-by-the-entireties property and domestic APTs) otherwise shielded from creditors by state law. Under the Delaware Act, the following four categories of creditors may reach the assets of a Delaware APT:

Pre-Transfer Claims

If a creditor's claim arises before your client creates a Delaware APT, that creditor must bring suit within four years after creation of the trust or, if later, within one year after the creditor discovered (or should have discovered) the trust. The creditor also must prove by clear and convincing evidence that creation of the trust was a fraudulent transfer.

Post-Transfer Claims

If a creditor's claim arises after your client creates a Delaware APT, that creditor must bring suit within four years after the trust's creation and must prove by clear and convincing evidence that creation of the trust was a fraudulent transfer as to that creditor.

Family Claims

A spouse, former spouse, or minor child who has a claim resulting from an agreement or court

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order for alimony, child support, or property division incident to a judicial proceeding with respect to a separation or divorce may reach the assets of your client's Delaware APT at any time, but a spouse whom the client marries after creating the trust may not take advantage of this exception. A surviving spouse probably will not be able to reach the assets of a Delaware APT by electing against the Will.

Tort Claims

A person who suffers death, personal injury, or property damage before the client establishes a Delaware APT for which your client is liable may reach trust assets at any time.

CONSEQUENCES IF A DELAWARE APT IS DEFEATED (12 Del. C. § 3574)

If a creditor proves that one of the above exceptions applies, your client's Delaware APT will be defeated only to the extent necessary to pay that creditor's claim and related costs, including attorneys' fees. Thus, each creditor must bring a separate action against the trustee. Unless a creditor proves that the trustee acted in bad faith, that trustee may use trust assets to pay its costs of litigating the claim before satisfying the claim. A beneficiary (including your client) who received a distribution before a creditor brings a successful suit to defeat a Delaware APT may keep the distribution unless the creditor proves that the beneficiary acted in bad faith. The Delaware Act protects trustees, attorneys, and other advisers who work on a Delaware APT.

INFRASTRUCTURE

An important factor in evaluating the effectiveness of Delaware APTs is that Delaware has a long-standing tradition of leadership in the trust industry. The original Delaware Act was written and enacted over a three-month period in 1997, and amendments have been drafted and enacted in short order. To date, no Delaware APT has been tested in court, but, in other situations, Delaware judges have upheld Delaware statutes in difficult cases, such as those that might arise if creditors were to challenge a Delaware APT.

DEFENDING DELAWARE APTS

If your client lives in Delaware or if he or she is an NRA, creditors should not be able to reach the assets of his or her Delaware APT except in the situations mentioned above. If your client does not live in Delaware but is a resident of the United States, a Delaware APT should afford the same protection, but this cannot be guaranteed because issues under the U.S. Constitution might come into play. The danger is that a court in a state that doesn't recognize APTs might decide that its law—not Delaware law—applies and order the trustee to pay a creditor, even if the claim is not one that is recognized under the Delaware Act.

There are several reasons why your client's trust should stand even if he or she is not a Delaware resident or an NRA. They include:

1. A non-Delaware court may not enter a judgment that binds the trustee of a Delaware APT if it does not have jurisdiction over trust assets or a trustee;
2. A non-Delaware court should defer to Delaware courts on issues that involve a Delaware trust;
3. A judgment against a client is not binding on the trustee of the client's valid trust;
4. A non-Delaware court should apply Delaware law—not its own law—on questions involving a Delaware APT;
5. Delaware courts might not have to recognize (i.e., give full faith and credit to) judgments that non-Delaware courts enter against a trust;
6. Delaware may set deadlines for the enforcement of judgments from other states; and
7. Creditors should not be able to reach a Delaware APT if your client ends up in bankruptcy.

CONCLUSION

No court has yet considered how effectively a Delaware APT protects assets, so the Delaware APT is not yet fail-safe.

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WHAT IS "REASONABLE"? ANALYZING FIDUCIARY COMPENSATION IN PENNSYLVANIA, DELAWARE AND NEW JERSEY

BY PETER E. MOSHANG, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

The concept of fiduciary compensation varies from state to state and often lacks specific guidelines. For example, compensation in Pennsylvania is based on an amorphous "reasonableness" standard, whereas compensation in other jurisdictions is prescribed by fee schedules. This article attempts to set out the basic guidelines for the compensation of personal representatives, trustees and guardians in Pennsylvania, Delaware and New Jersey.

We note that the concept of fiduciary compensation has many other factors that can affect the actual compensation received by the fiduciary, such as individuals acting in dual capacities or where a fiduciary delegates his, her or its duties. However, this article is intended to provide a general overview of how compensation is calculated, including what factors a court may consider in the absence of a fee agreement.

Pennsylvania

Unlike some states, Pennsylvania does not provide a statutory fee schedule or guidelines to help guide the compensation of fiduciaries. Instead, Pennsylvania determines fiduciary compensation largely based on the concept of what is "reasonable." In order to discuss how different types of fiduciaries are compensated, it is helpful to highlight what "reasonable compensation" means.

Reasonable Compensation

Generally, reasonable compensation "depends upon the extent and character of the labor and the responsibilities involved." *See In re Reed's Estate*, 462 Pa. 336, 339, 341 A.2d 108, 110 (1975).

One measure of reasonable compensation was set out by the Pennsylvania Supreme Court in its discussion of counsel fees. In determining attorney compensation, the Supreme Court held that a court can consider the amount of work performed, the character of services, the difficulty of the problems, the amount or value of property in question, the degree of responsibility involved, the professional skill and standing of the fiduciary, and the ability of the client to pay a reasonable fee. *LaRocca Estate*, 431 Pa. 542, 246 A.2d 337 (1968). These factors have been used to determine the compensation of fiduciaries. *See, e.g., Kornberg Estate*, 25 Fiduc. Rep. 2d 203 (O.C. Phila. 2005) (using these factors to determine guardian compensation); *Chamberlin Trust*, 4 Fiduc. Rep. 2d 62 (O.C. Phila. 1983) (using these factors to help determine trustee

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DELAWARE ASSET-PROTECTION TRUST, continued

But, a properly designed and implemented Delaware APT will raise formidable obstacles for creditors. The Delaware APT also offers planning options that might be of great benefit to your clients.

FOR MORE INFORMATION ABOUT ASSET PROTECTION PLANNING, MR. NENNO IS CONDUCTING A LIVE SEMINAR TITLED "PROTECTING YOUR NEST EGG: USING DOMESTIC AND FOREIGN ASSET PROTECTION TRUSTS TO SAFEGUARD ASSETS" ON JUNE 3, 2014 AT 12:30 PM. REGISTER AT http://www.legalspan.com/pbi/calendar.asp?UGUID=&ItemID=20140416-229194-100737.

compensation). Additionally, some Orphans' Courts heavily weigh the time a fiduciary has spent on an estate or trust in determining the reasonableness of the requested fee. *See, e.g., DeBias Estate*, 15 Fiduc. Rep. 2d 58 (O.C. Bucks 1995); *Hassall Estate*, 15 Fiduc. Rep. 2d 251 (O.C. Chester 1995). The Superior Court, however, views time as merely one factor to consider. *See Estate of Burch*, 586 A.2d 986 (Pa. Super. 1991).

When there are multiple fiduciaries, they are entitled – in the aggregate – to one reasonable fee. *See, e.g.*, 20 Pa. C.S. § 7768 (Uniform Law Comment). The division of reasonable compensation can occur in a variety of ways. For example, when no express agreement exists, there is a presumption of equality in dividing compensation between co executors. *See, e.g., Friedline Estate*, 14 Fiduc. Rep. 2d 106 (O.C. Somerset 1994). Nonetheless, even where fiduciaries have equal responsibility, one fiduciary may receive a greater share of compensation if such fiduciary performed a large share of services. *See Baum Estate*, 30 Fiduc. Rep. 574 (O.C. Lanc. 1980), *aff'd per curiam*, 298 Pa. Super. 593, 443 A.2d 388 (1982). Additionally, a fiduciary's compensation will be reduced or eliminated if the fiduciary was negligent or caused loss to the estate or trust. *See, e.g., Card's Estate*, 337 Pa. 82 (1939).

Personal Representatives

The compensation of personal representatives in Pennsylvania is governed by 20 Pa. C.S. § 3537. Under Section 3537, "[t]he court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated percentage." The statute provides no guidance of what constitutes a "reasonable" fee. Generally, a personal representative's compensation "depends upon the extent and character of the labor and the responsibilities involved." *See Reed's Estate*, 462 Pa. at 339, 341 A.2d at 110; *see also Gardner's Estate*, 323 Pa. 229, 185 A. 804 (1936).

Compensation provisions in Wills will be upheld if such provisions are reasonable. *See Reed's Estate*, 462 Pa. 336, 341 A.2d at 108; *Dorsett v. Hughes,* 509 A.2d 369 (Pa. Super. 1986) (stating that the court may inquire into the reasonableness of fees even where a fee agreement authorized compensation as a percentage of an estate). *But see Estate of Loutsion*, 344 Pa. Super 447, 496 A.2d 1205 (1985). Additionally, a personal representative may be awarded additional compensation where circumstances are different than anticipated, *Boyer Estate*, 23 Fiduc. Rep. 233 (O.C. Montg. 1973), or where extraordinary services were rendered, *Taylor Estate*, 3 Fiduc. Rep. 2d 410 (O.C. Montg. 1983).

Courts can allow compensation to be paid based on a gross percentage of the estate. However, neither Pennsylvania statutes nor case law provide a clear answer to what is an appropriate percentage. For example, the Pennsylvania Supreme Court has said that a commission of three percent of the gross estate is "prima facie fair and reasonable," but the Court stated that this declaration was "merely a 'rule of thumb.' The true test being what the services were actually worth." *Reed's Estate*, 462 Pa. at 340-41, 341 A.2d at 110 (internal citations omitted).

In 1983, in an attempt to provide additional clarity to this situation, the Chester County Orphans' Court utilized a schedule of fees allegedly approved by the Attorney General, which was used to provide prima facie reasonable rates at which personal representatives and attorneys could be compensated for estate administration. *Johnson Estate,* 4 Fiduc. Rep. 2d 6 (O.C. Chester 1983).

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FIDUCIARY COMPENSATION IN PENNSYLVANIA, DELAWARE AND NEW JERSEY, CONTINUED

The *Johnson* schedule, as applied to personal representatives, is as follows:

COMMISSIONS

						Per Col.	Per Total
	$	00.01	to	$100,000.00	5%	5,000.00	5,000.00
	$	100,000.01	to	$200,000.00	4%	4,000.00	9,000.00
Executor or	$	200,000.01	to	$1,000,000.00	3%	24,000.00	33,000.00
Administrator	$	1,000,000.01	to	$2,000,000.00	2%	20,000.00	53,000.00
	$	2,000,000.01	to	$3,000,000.00	1½%	15,000.00	68,000.00
	$	3,000,000.01	to	$4,000,000.00	1%	10,000.00	78,000.00
	$	4,000,000.01	to	$5,000,000.00	½%	5,000.00	83,000.00

1% Joint Accounts 1% P.O.D. Bonds 1% Trust Funds

3% Real Estate Converted with Aid of Broker 5% Real Estate: Non-Converted 1% Real Estate: Specific Devise

The Attorney General subsequently expressly disavowed the *Johnson* fee schedule, meaning that compensation based on the schedule can still be challenged. *See Nix Estate*, 8 Fiduc. Rep. 2d 179 (O.C. Chester 1988) (Editor's Note). Further, the Superior Court has decried the use of such schedule, stating: "[e]gregious error is committed when a court awards commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation, especially when the award is based, in part, on property not included in the decedent's estate, i.e. jointly-owned property." *Preston Estate*, 385 Pa. Super. 48, 57, 560 A.2d 160, 165 (1989); *see also Salvage Estate*, 19 Fiduc. Rep. 2d 83 (O.C. Bucks 1998) ("This Court cannot fix compensation as a percentage of the assets of an estate without some knowledge of the work actually done.").

Despite the Superior Court's and the Attorney General's positions regarding the *Johnson* fee schedule, Orphans' Courts continue to use this schedule as a guideline in determining reasonable compensation for personal representatives. *See, e.g., DeVitis Estate*, 30 Fiduc. Rep. 2d 195 (O.C. Montg. 2010); *Carr Estate*, 33. Fiduc. Rep. 2d 364 (O.C. Montg. 2002). Moreover, the Honorable Judge Calvin Drayer of the Montgomery County Orphans' Court stated that the *Johnson* schedule should be increased to reflect inflation. *Novotny Estate,* 24 Fiduc. Rep. 2d 214 (O.C. Montg. 2004). Practitioners frequently use the *Johnson* schedule when advising clients on the topic of personal representative commissions.

Lehigh County provided another resource to aid in determining a reasonable fee when it published its own guidelines that set forth compensation for attorneys' fees in decedents' estate, commissions for executors of estates, fiduciaries' and counsel's compensation for administration of living trusts after death of the grantor, compensation for trustees,

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guardians and their legal counsel, and compensation when an attorney is also a fiduciary. See Memorandum dated May 18, 1994 of the Honorable Robert K. Young, Administrative Judge, Orphans' Court Division of the Court of Common Pleas of Lehigh County.

Highlighting the lack of consistency across the Commonwealth, some local courts have said a commission of five percent is per se reasonable, but that this percentage can be adjusted based on the size of other estates, *see, e.g., Sell Estate*, 10 Fiduc. Rep. 2d 202 (O.C. Somerset 1988) (stating that 5% was reasonable for a estate valued at $220,400), whereas others determined that a commission of five percent was excessive, *Meo Estate*, 14 Fiduc. Rep. 2d 147 (O.C. Bucks 1994) (stating 5% was unreasonable for a gross estate valued at approximately $200,000). As such, case law does not provide a definitive guideline to what constitutes reasonable compensation based on a percentage of a gross estate.

Therefore, personal representatives should keep records of tasks and time spent, among other things, in their fiduciary endeavors. They should be prepared to provide to an inquiring court or an objecting beneficiary a detailed recitation of what they did, and should be heed to the factors set forth for attorney fees in *LaRocca*. A personal representative who does not keep time records to justify his or her compensation runs the risk of having the court decease such compensation. *See Wingert Estate,* 30 Fiduc. Rep. 2d 106 (O.C. York 2009).

Trustees

Following Pennsylvania's enactment of the Uniform Trust Act in 2006, the compensation of trustees is governed by 20 Pa. C.S. § 7768. If a trust provision or fee agreement provide for certain compensation, a trustee will be entitled to such compensation. 20 Pa. C.S. § 7768(b). However, a court may increase or decrease such compensation if (1) the duties of the trustee have become substantially different from what was originally contemplated, (2) the compensation is unreasonable or (3) the trustee performs extraordinary services and the trust instrument or fee agreement does not include specify compensation for such services. *Id.*

Section 7768 provides that in the absence of direction in the trust instrument or a separate agreement, the trustee is entitled to "compensation that is reasonable under the circumstances." 20 Pa. C.S. § 7768(a). A trustee may receive interim income and principal commissions if the trust has not yet terminated. *Id*. § 7768(c).

"In determining reasonable compensation, the court may consider, among other facts, the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value." 20 Pa. C.S. § 7768(d). As such, "[t]rustees are normally entitled to receive commissions based upon the principals, as well as the incomes, of the trusts they administer." *Estate of Schwenk*, 507 Pa. 409, 417, 490 A.2d 428, 432 (1985) (*citing Breyer Estate*, 475 Pa. 108, 379 A.2d 1305 (1977)). However, compensation for cemetery trusts must be paid solely from income if the principal of the trust does not exceed $20,000. 20 Pa. C.S. § 7768(e). Moreover, "[c] ompensation at levels that arise in a competitive market shall be presumed to be reasonable in the absence of compelling evidence to the contrary." 20 Pa. C.S. § 7768(d). Section 7768(d) is often used to assert the reasonableness of the fee schedules used by corporate fiduciaries.

In the absence of a fee provision or agreement, courts often use a trust's market value as a preliminary guideline in determining the reasonableness of trustee compensation. Even then there is little uniformity. *See, e.g., Tindle Trust,* 16 Fiduc. Rep.2d 21, 23 (Chester O.C. 1995) (stating that a trustee is entitled to "one-third of one percent per year [of principal], payable on the market

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FIDUCIARY COMPENSATION IN PENNSYLVANIA, DELAWARE AND NEW JERSEY, CONTINUED

value at the end of each year of management"); *see also Lare Estate*, 368 Pa. 570 (1951) (holding that income commission of 5% is usual); *Neidig Trust,* 19 Fiduc. Rep. 2d 474 (O.C. Northumb. 1999) (awarding trustee compensation of 5% of trust value); *Johnson Trust,* 5 Fiduc. Rep. 2d 147 (increasing corporate trustee income commission from 2% to 5%); *Thomas Trust,* 5 Fiduc. Rep. 2d 306 (O.C. Phila. 1985) (holding that a corporate trustee could receive an interim principal commission of 2% of the market value of principal); *Chamberlin Trust*, 4 Fiduc. Rep. 2d 62 (allowing an interim principal commission of 2.5%).

Not surprisingly, in addition to the market value of the trust, a court will likely consider "the work performed, the character of services rendered, the difficulty of the problems, the amount or value of property in question, the degree of responsibility involved, the professional skill and standing of the fiduciary, and the ability of the client to pay a reasonable fee." Id. at 23 (*citing Estate of LaRocca*, 431 Pa. at 546, 246 A.2d at 339). This includes "the skill and success of the trustee in administering the trust . . . ." *In re Crawford's Estate*, 66 Pa. D. & C.2d 697, 702 (O.C. Allegh. 1974).

"A mere increase in the dollar value of the estate or trust is, of course, insufficient by itself to warrant extra compensation. *In re Rea's Trust,* 28 Pa. D. & C.2d 433, 437 (O.C. Montg. 1962). However, when the value of the trust increases as a result of trust management, "such efforts should be reasonably compensated." Id. For example, a trustee was entitled to increased compensation where a trustee successfully increased the value of a large fund during an economic depression. *In re McCaskey's Estate,* 307 Pa. 172, 179, 160 A. 707, 709 (1932).

Trustees also have the power to make temporary investments of funds that the trustee may hold uninvested and "may make a reasonable charge, in addition to all other compensation to which the fiduciary is entitled, for services rendered in making the temporary investment." 20 Pa. C.S. § 7315.1(b). However, a trustee may be surcharged for such "sweep fees" when it fails to reflect these charges as separate entries in its accounting. *See Swope Estate*, 17 Fiduc. Rep. 2d 36 (O.C. Fulton 1996), *rev'd and modified (without opinion)*, 700 A.2d 1032 (Pa. Super. 1997), *appeal denied*, 553 Pa. 692, 717 A.2d 1029 (1998).

Guardians

As with other fiduciaries, guardians of incapacitated person depends on the "responsibility incurred and the service and labor performed." *Gardner's Estate*, 323 Pa. at 238, 185 A. at 808. As such, many of the considerations for personal representatives and trustees apply to guardians. For example, a court can consider the LaRocca factors discussed above in calculating a guardian's fee. *See, e.g., Kornberg*, 25 Fiduc. Rep. 2d 203; *Lewis, Incompetent*, 18 Fiduc. Rep. 2d 211 (O.C. Montg. 1998). Additionally, an equally important consideration is whether the work performed benefited the incapacitated person. *See, e.g., Kornberg Estate*, 25 Fiduc. Rep. 2d 203. The size of the guardianship estate is also important. *See id*. at 206.

In evaluating the services rendered, courts will consider whether such services were routine, ministerial in nature or lessened due to delegation of responsibility, and whether the guardian's role was passive. *See, e.g., Lundy Estate*, 29 Fiduc. Rep. 2d 310, 314 (O.C. Phila. 2009); *Kornberg*, 25 Fiduc. Rep. at 205; *Lewis*, 18 Fiduc. Rep. 2d at 215, 219. The court also will assess the reasonableness of the amount of time spent on particular tasks. *See Kornberg*, 25 Fiduc. Rep. 2d at 207.

Perhaps overriding all of the above factors, which speak more to the methodology behind the courts' analysis, is the principle that no fees and expenses "ought to be allowed, except such as are manifestly just and moderate." *Wier v. Myers*, 34 Pa. 377, 1859 WL 8844, *3 (1859). The notion that all fees must be "just and moderate" has been universally

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applied for the past 150 years. *See, e.g., Davison's Estate*, 300 Pa. 26, 150 A. 152 (1930); *Equitable Trust Co. v. Garis*, 190 Pa. 544, 552, 42 A. 1022, 1024 (1899) (stating that "fees and charges of all kinds should be allowed only on the most moderate scale of compensation"); *Kornberg*, 25 Fiduc. Rep. 2d at 205; *Lewis,* 18 Fiduc. Rep. 2d at 215; *Williams Estate*, 9 Fiduc. Rep. 681, 681 (O.C. Allegh. 1959). While this principle has its roots in preserving assets for use for the benefit of the incapacitated person, that the fees must also be moderate is relevant even where the incapacitated person has died. See, e.g., *Lewis,* 18 Fiduc. Rep. 2d at 215; *Kearney Estate*, 17 Fiduc. Rep. 2d 161, (O.C. Lack. 1995); *Medved, Incompetent*, 14 Fiduc. Rep. 2d 156 (O.C. Allegh. 1994) (all cases involving reduction of fees requested after the death of the incapacitated person).

Unlike the cases of personal representative and trustee compensation, a petition for allowance must be filed with the court so that guardian can obtain an order approving and directing the use of guardianship principal for such guardian's commission. In at least one case, a court denied a guardian an interim commission and stated that the guardian must present a claim for such compensation at the final accounting. *Reidenbach, Incompetent*, 30 Fiduc. Rep. 347 (O.C. Allegh. 1980).

Delaware

Like Pennsylvania, Delaware allows fiduciaries "reasonable compensation." Unlike Pennsylvania, in which what is "reasonable" is determined by case law, Delaware's Court of Chancery Rules provide factors that aid in this determination.

Personal Representatives

Delaware provides that personal representatives are entitled to "reasonable compensation." Del. Ch. Ct. R. 192(a). Such "[c]ommissions and attorneys' fees shall be allowed as provided by rule of the Court of Chancery." Del. Code tit. 12, § 2305(a). Additionally, "[t]he Court of Chancery may reduce commissions and attorneys' fees if the accounts required to be filed by this chapter are not filed within the required time period." *Id*. § 2305(c).

Specifically, in determining reasonable compensation, a court can consider the time spent, the risk and responsibility involved, the novelty and difficulty of the questions presented, the skill and experience of the personal representative and the attorney, any provisions of the will regarding compensation, comparable rates for similar services in the locality, the character and value of the estate assets, the character and value of assets which are not part of the probate estate but which must be valued and reported on any federal, state, local, or foreign death tax return, the time constraints imposed upon the personal representative and the attorney, the loss of other business necessitated by acceptance of the administration, and the benefits obtained for the estate by the administration.

Del. Ch. Ct. R. 192(b).

Additionally, "commissions of personal representatives and attorney fees shall be presumed reasonable unless a beneficiary files an exception to the account of the personal representative," but the Chancery Court may reduce such fees sua sponte if it determines such fees are unreasonably high. *Id*. R. 192(d).

While Rule 192 provides guidance, as in Pennsylvania, these various factors fail to provide definitive guidelines which personal representatives can rely upon in determining compensation. A court's inquiry into compensation, as in Pennsylvania, is inherently a case-by-case determination. For example, in 2010, the Delaware Chancery Court determined that an executor's $50,000 commission on a $1.7 million estate (less than 3%) was excessive, where the executor put forth minimal effort, had minimal risk and paid nearly

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$60,000 to estate and tax advisors. *Stone v. Stant,* CIV.A. 890-VCN, 2010 WL 2734144 (Del. Ch. July 2, 2010) *on reargument*, C.A. 890-VCN, 2010 WL 4926580 (Del. Ch. Nov. 30, 2010). However, the Court determined that $10,000 amounted to reasonable compensation without substantive discussion of how it reached this figure, other than the supposed simplicity of the estate. *Id.*

Additionally, there is a "general rule that when an estate is administered by more than one person, such persons should not receive more than what a single representative would have been entitled to." *Matter of duPont's Estate*, 376 A.2d 91, 94 (Del. Ch. 1977).

Overall, much like Pennsylvania, reasonable compensation for personal representatives in Delaware is a largely abstract concept.

Trustees

Trustees are entitled to reasonable compensation in accordance with the trust instrument. Del. Code tit. 12, § 3560(a). The Court of Chancery, however, may increase or decease such compensation in the following circumstances:

(1) Where the duties of the trustee are substantially different from those contemplated when the trust was created;

(2) Where the compensation in accordance with the terms of the trust would be unreasonably low or high;

(3) In extraordinary circumstances calling for equitable relief.

Id.

If a trust instrument does not specify the trustee's compensation, and so long as such instrument does not specifically provide that a trustee shall serve without compensation, "reasonable compensation shall be allowed." Id. § 3561(b).

In Delaware, a "'qualified trustee' means any person authorized by the law of this State or of the United States to act as a trustee whose activities are subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation or the Comptroller of the Currency of the United States." Id. § 3561(a). Qualified trustees must "file with the Register in Chancery for every county in this State, a copy of a schedule or formula by which its allowance as compensation shall be computed." Id. § 3561(b)(1)(a). This schedule must be based on the following:

1. The time spent or likely to be spent in administering a trust of the type contemplated;

2. The risks and responsibilities involved;

3. The novelty and difficulty of the tasks required of the trustee;

4. The skill and experience of the trustee;

5. Comparable charges for similar services;

6. The character of the trust assets; [and]

7. The time constraints imposed upon the trustee in administering the trust[.]

Id.

Trustees who are not "qualified trustees" shall have compensation determined by the Court of Chancery Rules. *Id*. § 3561(b)(2). Court of Chancery Rule 132 sets out the formula for determining trustee commissions. This Rule also applies to all guardians, other than guardians over the property of minors. For income commissions, trustees receive a charge during each trust accounting year as follows: "6% on the first $20,000 of income; 3.5% on the next $10,000 of income; 3% on the next $270,000 of income; [and] 2% on all income over $300,000." Del. Ch. Ct. R. 132(a). Periodic principal commissions are calculated based on the following rates: "5/10 of 1% on the first $100,000 of principal; 3/10 of 1% on the next $100,000 of principal; 2/10 of 1% on the next $500,000 of principal; [and] 1/10 of 1% on all principal over $700,000." *Id.* R. 132(b).

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FIDUCIARY COMPENSATION IN PENNSYLVANIA, DELAWARE AND NEW JERSEY, CONTINUED

The principal commissions of trustees who receive such commission upon distribution or transfer of a trust are calculated as follows: "5% of principal on the first $50,000; 3.6% of principal on the next $50,000; 2.3% of principal on the next $900,000; 1% of principal on all over $1,000,000." *Id.* R. 132(e). However, if a trustee has administered the trust for less than ten years, the trustee's principal commission will be the following percentage of the rates set out above:

30% if termination occurs within 3 years;

40% if termination occurs after 3 and before 4 years;

50% if termination occurs after 4 and before 5 years;

60% if termination occurs after 5 and before 6 years;

70% if termination occurs after 6 and before 7 years;

80% if termination occurs after 7 and before 8 years;

90% if termination occurs after 8 and before 9 years;

100% if termination occurs after 9 years.

Id. Additionally, these principal commissions will be decreased by the sum of prior periodic principal commissions to the trustee "with respect to the trust estate or, in the case of partial distribution, with respect to the distributable portion of the trust estate." *Id*.

These commissions can be increased or decreased in special situations. Specifically, if a trust includes real estate, a trustee's income commission will include "gross rents collected by an outside agent and paid to the trustee." *Id.* R. 132(c). Moreover, if the trustee directly collects such rents, the trustee shall receive a commission of 8% of rents. *Id.* When a trust includes one or more mortgages, an additional commission shall be allowed at the annual rate of ¼ of 1% of the total face value of all mortgages held in the trust as of the times of the valuation of the trust assets required by [the periodic principal commission schedule] or, if the trustee is not charging periodic principal commissions, of the total face value of such mortgages held in the trust on the last business day of each fiscal year of the trust. *Id*. R. 132(c). Finally, the court can award extra compensation for "unusual and extraordinary circumstances." *Id*.

Conversely, "[i]f the direction and control of investments in any trust, the corpus of which exceeds $300,000 in value, rest solely with a person other than the trustee," such trustee's periodic principal commissions will be decreased by 15% so long as this condition exists. *Id*. R. 132(d)(1). Additionally, a trustee administering a trust with limited diversification and a fair market value equal to or greater than $1 million, with "three fourths or more of the fair value of which is invested in not more than 2 blocks of stocks and/or bonds," then such trustee's income commissions will be reduced by 25% so long as the condition exists. *Id*. R. 132(d)(2).

Finally, in cases of co-trustees, the court may determine compensation based on "the amount and character of the trust property, the extent of the risk and responsibility of each trustee, the character of the services rendered by each trustee, the degree of difficulty in administering the trust, the skill and success of the administration, and any other relevant and material circumstances." *Id*. R. 132(h). The aggregate compensation of each trustee may exceed the rates for a single trustee. *Id*.

As such, unlike for personal representatives, Delaware's court rules provide clearer guidelines for determining trustee compensation. However, these guidelines, both for qualified and other trustees, are subject to judicial review for reasonableness. Del. Code tit. 12, § 3562.

Guardians

As stated above, the guidelines for trustees and guardians are largely the same. A "qualified guardian" is one that meets the definition of a qualified trustee, and must meet the same requirements in setting out its

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compensation schedule or formula. *See* Del. Code tit. 12, § 3927(a)-(d). The commissions of non-qualified guardians, other than those holding property for minors, is governed by Court of Chancery Rule 132. *See id*. § 3927(e). Additionally, a guardian's compensation may be increased by the Court if "the duties of the guardianship are substantially greater than those for a typical guardianship of its size or under extraordinary circumstances." *Id*. § 3927(f).

Additionally, a court's "final guardianship order may designate that a guardian of the person or property shall provide fiduciary services to the disabled person on a fee-for-service basis, and that compensation shall be made to the guardian from the funds of the disabled person on that basis, and not based on a commission as provided in Rule 132." Del. Ch. Ct. R. 131. The final guardianship order shall expressly or though incorporation by reference set out the fee-for-service. *Id.*

New Jersey

New Jersey differs in large part from Delaware and Pennsylvania in that it has a statutory scheme that sets forth fiduciary compensation. While the compensation of fiduciaries is generally governed by statute, such compensation is subject to review by the court. *See In re Estate of Summerlyn*, 327 N.J. Super. 269, 273 (App. Div. 2000).

Fiduciaries must seek approval pursuant to an accounting for such commissions, and must prove the reasonableness of such fees by a "fair preponderance." *In re Phipps Trusts*, 147 N.J. Super 331, 354, 373.

Personal Representatives

If a decedent's Will contains a provision for specific compensation of a personal representative, "the compensation shall be deemed full payment for services in lieu of commissions provided by this chapter, unless the fiduciary shall in writing filed with the surrogate or clerk of the Superior Court renounce such compensation." N.J.S.A. § 3B:18-3.

If no compensation is set out in the will, a personal representative will be entitled to compensation based on statutory law. Specifically, a personal representative is entitled to commissions without court allowance in the amount of 6% "on all income received by the fiduciary." *Id*. § 3B:18-13. Additionally, a personal representative may take a commission on corpus received as follows:

> 5% on the first $200,000 of all corpus received by the fiduciary;
>
> 3.5% on the excess over $200,000 up to $1,000,000;
>
> 2% on the excess over $1,000,000; and
>
> 1% of all corpus for each additional fiduciary provided that no one fiduciary shall be entitled to any greater commission than that which would be allowed if there were but one fiduciary involved.

Such commissions may be reduced by the court having jurisdiction over the estate only upon application by a beneficiary adversely affected upon an affirmative showing that the services rendered were materially deficient or that the actual pains, trouble and risk of the fiduciary in settling the estate were substantially less than generally required for estates of comparable size.

N.J.S.A. § 3B:18-14.

Moreover a personal representative may annually, without court allowance, take sums as follows on account of corpus commissions: if there is but one fiduciary, the amount so taken may equal one-fifth of 1% of the value of the corpus and, if there are two or more fiduciaries, the amount so taken may equal the commissions which may be taken pursuant to this section when there is but one fiduciary, plus one-fifth of the commissions for each fiduciary more than one.

Id. § 3B:18-17.

Finally, the court may allow a personal representative to receive additional compensation, "on an

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intermediate or the final settlement of the fiduciary's accounts," where personal representative demonstrates that the personal representative rendered "unusual or extraordinary services." *Id*. § 3B:18-16. However, there is a dearth of case law or other guidance defining what constitutes such services.

Trustees and Guardians

The compensation of trustees and guardians in New Jersey is governed by the same relevant statutory provisions.

Traditionally, where the trust instrument fixes the rate of compensation, that rate is binding on the court and on trustees who are parties to the instrument. *In re Loree's Trust Estate*, 24 N.J. Super. 604, 95 A.2d 435 (Ch. Div. 1953); *see also* 11 N.J. Forms Legal & Bus § 25:47. However, for trustees of a testamentary trust, if the Will allows commissions in excess of those provided by statute, such trustee or trustees will only be entitled to such excess commissions if "the testator, in his last will acknowledges that he is aware of the commissions specified in this article and expressly authorizes payment of commissions in excess thereof." N.J.S.A. § 3B:18-31.

Conversely, a nontestamentary trustee, on the settlement of the account, is entitled to compensation "as may have been agreed upon by the instrument creating the trust. . . ." N.J.S.A. § 3B:18-2.

As with personal representatives, trustees and guardians are entitled to commissions without court allowance in the amount of 6% "on all income received by the fiduciary." N.J.S.A. § 3B:18-24.

Additionally, trustees and guardians, without court allowance, may take annual commissions on corpus (including accumulated income) "in the amount of $5.00 per thousand dollars of corpus value on the first $400,000.00 of value of corpus and $3.00 per thousand dollars of the corpus value in excess of $400,000.00." *Id*. § 3B:18-25(a). Additionally, a fiduciary is entitled to a minimal annual fee of $100. § 3B:18-25(c). While the Court may review the reasonableness of a trustee or guardian's commission, such trustee or guardian will be entitled at least to this corpus commission or minimum $100 commission. § 3B:18-25(e). However, if such fiduciary is a bank or financial institution, "the fiduciary shall be entitled to such commissions as may be reasonable." *Id*. § 3B:18-25(b).

"Compensation payable to a guardian shall not exceed 5% of the income of the ward during any year." *Id*. § 3B:13-17. A court, following a hearing settling the account, may award "additional compensation payable from the estate of the ward, but no compensation shall be allowed on the corpus of an estate received from a preceding guardian." *Id*.

If two or more trustees (or guardians) are receiving annual commissions on corpus, the aggregate commissions of all fiduciaries "may equal the commissions which may be taken pursuant to that section when there is but one fiduciary, plus one-fifth of the commissions for each fiduciary more than one. No one fiduciary shall be entitled to any greater commission than that which would be allowed if there were but one fiduciary involved." N.J.S.A. § 3B:18-25.1.

Upon the termination of a trust or guardianship, or the distribution of assets from such trust or guardianship, the fiduciary may take a commission on corpus (including accumulated income) as follows:

a. If the distribution of corpus occurs within 5 years of the date when the corpus is received by the fiduciary, an amount equal to the annual commissions on corpus authorized . . ., but not actually taken by the fiduciary, plus an amount equal to 2% of the value of the corpus distributed;

b. If distribution of the corpus occurs between 5 and 10 years of the date when the corpus is received by the fiduciary, an amount equal to the annual commissions on corpus authorized . . ., but not actually received by the fiduciary, plus an

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FIDUCIARY COMPENSATION IN PENNSYLVANIA, DELAWARE AND NEW JERSEY, CONTINUED

amount equal to 1 ½ % of the value of the corpus distributed;

c. If the distribution of corpus occurs more than 10 years after the date the corpus is received by the fiduciary, an amount equal to the annual commissions on corpus authorized pursuant to . . ., but not actually received by the fiduciary, plus an amount equal to 1% of the value of the corpus distributed; and

d. If there are two or more fiduciaries, their corpus commissions shall be the same as for a single fiduciary plus an additional amount of one-fifth of the commissions for each additional fiduciary.

Id. § 3B:18-28.

As with personal representatives, [t]he court may, on an intermediate or the final settlement of fiduciaries' accounts, allow corpus commissions in addition to those provided [for trustees and guardians], on a showing that unusual or extraordinary services have been rendered by the fiduciary for which he should receive additional compensation. *Id*. § 3B:18-29. However, as with personal representatives, there is little guidance on what constitutes such services as to justify additional compensation.

Conclusion

Overall, while Delaware and Pennsylvania both permit "reasonable" fiduciary compensation, Delaware provides much more guidance in how to determine the appropriate compensation for trustees and guardians. Neither state provides concrete guidelines to determine personal representative compensation. On the other hand. New Jersey has a set statutory fee schedule to determine such compensation.

As such, attorneys who advise fiduciaries in these three states, or a combination thereof, must be aware of the differing standards in determining fiduciary compensation. Additionally, Pennsylvania (and probably Delaware) fiduciaries must be careful in documenting their efforts and time spent, as well as keeping up with recent case and statutory developments, in order to determine such fiduciary fees because in those states, fiduciary fees are often evaluated on a case-by-case basis.

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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WHY LAWYERS NEED TO KNOW ABOUT ALZHEIMER'S DISEASE

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The Alzheimer's Association recently released 2014 statistics which are sobering and should be on the radar of all attorneys. More than 5 million Americans are living with dementia. Someone in the United States develops the disease every 67 seconds. One in three seniors will die of Alzheimer's or some other dementia. Alzheimer's disease is the 6th leading cause of death and the cause of death in the top ten that cannot be prevented, cured or even slowed (www.alz.org). The Pennsylvania Bar Institute (PBI) recently offered a course on "What Every Attorney Should Know about Alzheimer's Disease" (see www.pbi.org for more information). Every attorney, in dealing with clients, should be aware of the potential that a client's dementia symptoms could affect legal transactions and learn how to deal with this possibility.

The PBI course covered a great deal of material in six hours. It began with the science of Alzheimer's presented by experts in the field. Alzheimer's disease is one of a group of disease processes under the umbrella of dementia. It is helpful if lawyers begin to familiarize themselves with basic information on the dementia disease process. Dementia presents differently in each person, depending on the stage, age at onset, type of dementia and many other factors. Sometimes what appears to be dementia is some other underlying disease process, such as depression. The Alzheimer's Association has a wealth of information and offers support for those who are experiencing dementia as well as their loved ones/supporters.

Ideally, everyone would have executed thoughtfully written Powers of Attorney both for finances and healthcare, advance directives and Wills before any symptoms of dementia appear. Failing that, even if a person is in the early stages of a dementia process, it would also be ideal if that person established a relationship with a lawyer versed in estate planning. We do not live in a perfect world, however; many times family members wait too long to assist their loved ones with addressing the need for Power of Attorney documents. What is too long, though? Capacity is on a continuum, and not everyone progresses at the same rate.

The need to assess for capacity can be situational for the lawyer. Capacity is a legal term, the final arbiter of which is a judge in a guardianship proceeding. Medical information is important, but it is also important for the lawyer to be able to assess the client's abilities, and to make a capacity determination depending upon what is trying to be accomplished. Pennsylvania's Rule of Professional Conduct, RPC 1.14 deals with working with a client with diminished capacity; it and the comments to it are helpful in trying to maintain as normal relationship as possible with a client, even one with obvious capacity issues. The ABA's Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005) refers to a six step process to assist lawyer when assessing a client's capacity.

Some practical tips offered by some of the presenters include keeping the client involved as part of the process. Do not think that they no longer have or should have a voice. Meeting with clients in their homes might make them more comfortable and improve their understanding of what is being discussed. In a practical sense, if family members are going to be a problem now or in future, your assessment of capacity may need to be more stringent in order to make sure that the client is not going to inadvertently be the victim in a family "feud."

Most attorneys are aware of the level of capacity one should have to execute a Will. Some clients with dementia become very susceptible to influence of "bad actors," and may try to change their current estate plan in a way that the lawyer knows is not consistent with prior expressed wishes. However, it is Powers of Attorney that are often the most important in situations where capacity is questionable, and where the lawyer's ability to assess and work with the current situation is vital.

A diagnosis of dementia does not mean that a client cannot initiate or continue to participate in his or

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PRACTICE POINTS

A Model Local Orphans' Court Rule for Mediation

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In April, 2013 the Supreme Court Orphans' Court Procedural Rules Committee published a set of proposed new revised and expanded statewide Orphans' Court Rules, the first such universal revision in forty years. The current project of the Fiduciaries and Orphans' Court Subcommittee of the Alternative Dispute Resolution Committee of the Pennsylvania Bar Association involves drafting and implementing a proposed Model Local Orphans' Court Rule for Mediation for consideration and adoption, with any options deemed appropriate, statewide by counsel and the local courts.

The New Rules, which remain under review and further revision by the Rules Committee after comments were received, would include, for the first time, a New Rule 1.6 that would authorize mediation in matters before the Orphans' Court Division. There could be expansion of such mediation into matters not yet filed, but possibly so, if not resolved otherwise by disputing parties.

New Rule 1.6, in its originally published form, provided as follows:

Rule 1.6. Mediation by Local Rule or Special Order:

The Court, by Local Rule or special order, may direct the parties to participate in private or court-sponsored mediation.

Note: Rule 1.6 has no counterpart in former Orphans' Court Rules.

Explanatory Comment: The confidentiality of mediation is provided by statute, see 42 Pa.C.S. § 5949.

Although this version of New Rule 1.6 likely will not be the final version of such a new Rule, it is expected to be retained and adopted in some form that would authorize mediation generally in Orphans' Court matters. After final New Rules would be issued by the Pennsylvania Supreme Court, Local Orphans' Court Rules, which would not be inconsistent with the generic statewide New Rule regarding mediation, could be promulgated. The Subcommittee desires to produce such a reliable set of Model Local Rules for Mediation, with options, explanations, and resources, for consideration in the various judicial districts to implement mediation in Orphans' Court matters specifically.

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ALZHEIMER'S DISEASE, CONTINUED

her estate planning. For healthcare issues, because of our strong belief in patient self-determination, the patient should still be involved in all decisions, although written directives developed at a less stressful time can be invaluable guidance. An advance directive can be revoked at any time regardless of the client's capacity level due to the fundamental right of self-determination. In developing financial Powers of Attorney, capacity is presumed. The three part test in DiStefano Trust is helpful: the principal must understand the nature of the authority given to the agent, what assets are subject to that authority, and the notice provision information. A guardianship is hopefully avoided when the attorney works with the client in developing effective Powers of Attorney.

Alzheimer's disease and other dementias have reached epidemic proportions in the United States, and working with clients with dementia, and their families, will continue to challenge all attorneys, but particularly those who practice in the areas of estate planning, wills, trusts, deed preparation, elder law, and areas that include the ability to create a contract. Lawyers should familiarize themselves with the applicable rules of professional conduct and the information available on assessing capacity to be prepared for assisting current clients, or in meeting with new clients and their families when dementia becomes part of the assessment.

ETHICS COLUMN

BY PAUL C. HEINTZ, ESQUIRE | OBERMAYER, REBMANN, MAXWELL & HIPPEL LLP

May lawyers "ghostwrite" petitions, briefs and other filings for pro se individual beneficiaries in orphans' court litigation?

It comes as a surprise to many Pennsylvania lawyers that pro se litigants may ethically be assisted by "ghostwriting" counsel. According to Joint Formal Opinion 2011-100, issued by the PBA Committee on Legal Ethics and Professional Responsibility and by the Philadelphia Bar Association's Professional Guidance Committee, ghostwriting is permissible. The opinion provides an excellent and comprehensive treatment of this most interesting and controversial topic. Furthermore, the ABA's Formal Opinion, 07-446, also opines that the Model Rules do not prevent "ghostwriting" and provides support for the Pennsylvania opinion. However, not all jurisdictions permit ghostwriting and some Federal District Courts and agencies also do not.

The ethics opinions that permit "ghostwriting", are usually based on Rule 1.2 (c) which provides that " A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent". In fact, the Committees believe that such engagements, variously called "discrete task representations", "limited scope engagements" and "unbundling of legal services", for no fees or reduced fees are not only permitted but basically encouraged by the Rules.

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PRACTICE POINTS, CONTINUED

The Subcommittee is in the process of drafting a Model Local Rule, with options and related materials, which will address various issues that could be further delineated under New Rule 1.6 at the local court level.

Such issues include, among others:

- Procedures and guidelines for appointment or engagement of qualified mediators with expertise in the unique issues addressed by fiduciaries and in the Orphans' Court;

- Generic forms, with options, for use by parties, counsel, and local courts;

- Educational programs regarding mediation, targeted to mediators, to fiduciaries, to counsel, and to parties in Orphans' Court Division matters and proceedings;

- Qualification and conduct of mediators, including recommended training, substantive experience or expertise, and conduct; and

- Reliable online resources supporting the mediation process, explaining the benefits and limitations of mediation in Orphans' Court matters, and listing contacts or services in counties promoting such mediation.

The Subcommittee's goal is to have a Model Local Rule, with explanations, options, forms, and resource links, available for deployment regarding Orphans' Court matters. The project would be completed in anticipation of all local rules being reworked (potentially even in those counties, such as Bucks and Chester, which have mediation programs in effect in their Orphans' Court Divisions), prior to a deadline when final new Supreme Court Orphans' Court Rules would become effective statewide. The Subcommittee, through the ADR Committee and the PBA, hopes to offer its work product to local Orphans' Court Division judges, to local bar association rules committees (which may assist the local courts), and to mediation organizations in the Commonwealth.

The purpose of the project is to facilitate and encourage mediation and to make it attractive for local courts to use, and adaptable to local situations, while preserving some consistency statewide.

PLEASE NOTE THAT READERS ARE ENCOURAGED TO SEND THEIR QUESTIONS OR IDEAS FOR CONSIDERATION IN FUTURE COLUMNS TO BERNICE J. KOPLIN AT bjkoplin@sglk.com.

ETHICS COLUMN, CONTINUED

The Committees also specifically opined that the lawyer has no obligation to affirmatively disclose the relationship pursuant to Rules 3.3 (Cantor to Tribunal), 8.4 (misrepresentations and prejudice to the administration of justice) and Rules 3.4, 4.1 and 4.3, all of which pertain to fairness and truthfulness. The assumption, of course, is that the lawyer has not entered an appearance with the court.

Both Committees emphasize the importance of having a detailed written engagement letter that provides informed consent as defined in Rule 1.0 (b) and (e). The Restatement (Third) of the Law Governing Lawyers §19, Comment c (2000), outlines five safeguards to determine the reasonableness of the limitation on the scope of services and describes the elements and clauses that might be wise to include in the engagement agreement.

Lawyers are also reminded that the limitations on the scope of the engagement do not relieve them of their professional responsibilities and will not provide insulation from exposure to professional malpractice actions.

The Committees' Opinion cautions lawyers that they must not assist in the presentation of false or meritless claims and actions that are specifically prohibited by Rule 3.1. If asked to be involved in such, the lawyer should first counsel the client to refrain from taking such action. If that does not succeed, the lawyer must then withdraw from representation pursuant to Rule 1.16(d)(1).

The courts have held that fiduciaries involved in Orphans' Court litigation must be formally represented by counsel.

WHAT WOULD YOU LIKE TO SEE IN FUTURE ETHICS COLUMNS?

Send your questions and ideas to:

Paul C. Heintz, Esquire
Obermayer, Rebmann, Maxwell & Hippel LLP
1617 JFK Boulevard
One Penn Center
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TAX UPDATE

BY MARGERY J. SCHNEIDER, ESQUIRE | ROSENN JENKINS & GREENWALD, LLP

FEDERAL ESTATE TAX

Failure to Fund Trust

Estate of Elwood H. Olsen et al. v. Commissioner, T.C. Memo. 2014-58; No. 1981-12 (2 Apr 2014)

The Tax Court ruled that, when a decedent had failed to segregate and fund marital and credit shelter trusts created by his wife in her revocable trust, a portion of those trust assets were taxable in his estate.

Elwood H. Olsen's wife died in 1998. She had created a revocable trust during her life, whose $2.1 million in assets at her death were to be transferred by the trustee into three separate trusts: Marital Trust A, Marital Trust B (both QTIP trusts) and a Family Trust (a credit shelter trust). Her estate claimed the QTIP deduction and a unified credit of $192,800. Elwood failed to create and fund these trusts. During the time between his wife's death and his own death in 2008, Elwood made three major withdrawals, totaling $1.5 million from the trust: he made separate charitable contributions of about $250,000 and $800,000 to Morningside College, where he had been Vice President, and he transferred about $400,000 to himself.

At the time of his death, the value of the trust assets was just over $1 million. After his death, their son, the personal representative of his father's estate, decided to create the three trusts , to take a marital deduction for Trusts A and B, and to attribute the three withdrawals to these two trusts. He could thus preserve the full credit shelter trust for the family. The IRS objected to these attributions.

The Tax Court looked to the provisions of Grace's revocable trust in order to determine to which of the three trusts the distributions should be allocated. Because the trust provisions allowed Elwood appoint assets from the family trust to charity, the Court ruled that the two gifts to Morningside were distributions from the family trust. Because the marital trusts contained provisions allowing invasion for Elwood's benefit, the Court ruled that the transfer of $400,000 came from the marital trust.

Value of Estate Tax Deduction

Riegels v. Commissioner (In re Estate of Saunders), 2014 U.S. App. LEXIS 4647 (9th Cir. Mar. 12, 2014)

The Ninth Circuit affirmed the Tax Court's decision in *Estate of Saunders v. Comm'r,* 136 T.C. 406, 409 (2011) that the value of an estate tax deduction for a lawsuit pending on the date of a decedent's death equaled the amount of the post-death settlement claim. On the decedent's date of death, the claim was in litigation. Since a wide range of values was assigned to the claim by the experts, the claim could not be ascertained with reasonable certainty and the Tax Court disallowed the estate's proposed $30 million deduction.

Gertrude Saunders died one year after her husband. Her husband's estate had been named as defendant in a legal malpractice suit in which $90 million in damages had been requested. Two and a half years after she died, the claim went to court and the case ended in a settlement in which her husband's estate ended up paying only $250,000 in attorney's fees. Since the claim was still pending at Gertrude's death, her estate claimed a deduction of $30 million, based on an appraisal letter prepared by an attorney, as the estimated value of the claim at the time of her death. The IRS disallowed the deduction and issued a notice of deficiency. The Tax Court agreed with the IRS and determined that the estate was entitled to deduct only the $250,000 that was actually paid to settle the claim. The Court held that the value estimated as of the date of death was not deductible by the Estate because it was not "ascertainable with reasonable certainty", as specified under Treas. Reg. Section 20.2053-1(b)(3).

The Estate appealed on the grounds that it was not permissible to take post-death events, including the final settlement for $250,000, into account. The Ninth Circuit affirmed the Tax Court's ruling, explaining that under the rulings in prior cases

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applying IRC Section 2053(a)(3) post-death events can be relevant if a claim is "contingent or disputed" on the date of death, but not if the claim is "certain and enforceable" (see Marshall Naify Revocable Trust v. United States, 672 F.3d 620, 626-628 (9th Cir. 2012)). Here, the malpractice claim was not contingent, but it was disputed at Gertrude's death because it was still pending, it had been litigated extensively, and it was scheduled for jury trial.

The Ninth Circuit affirmed the Tax Court's ruling that the value of the claim was not "ascertainable with reasonable certainty" because the estate's experts had offered a wide range of possible values for the claim. The Ninth Circuit also affirmed the Tax Court's ruling allowing the estate to deduct $250,000, the amount it paid to settle the claim, because under Treas. Regs. Section 20.2053-1(b)(4) the estate could deduct the value of a claim that had become certain when it was settled even if it was not certain as of the date of death.

Timely Payment Election

Woodbury v. Commissioner, T.C. Memo. 2014-66 (April 14, 2014)

The Tax Court granted summary judgment to the IRS, finding that an estate did not make a timely election to make installment payments of federal estate tax. The Court found that the estate failed to satisfy the deadline for making a Section 6166 election and did not "substantially comply" with the requirements for this election set forth in the Regulations.

Decedent died in 2006. His estate filed a timely Form 4768 requesting a 6-month extension, which was granted. Accompanying the request for an extension was a letter stating that the estate intended to pay the taxes due on its closely held business interests, valued at $10 million, in installments under IRC Section 6166. No details concerning these interests were provided. At that time, the estate paid $9.5 million in non-deferrable taxes. When the estate requested an additional extension in order to value its commercial real property and interests in businesses owning commercial real property, but again provided no further details on the properties or the business interests, the IRS denied the request on the grounds that it cannot grant an extension longer than six months. The estate made installment payments and filed Form 706 on June 1, 2010, with attachments detailing the decedent's ownership in twenty business interests. The IRS denied the estate's Section 6166 election as not being timely filed and issued a notice of final determination stating that the entire amount of unpaid estate tax, plus penalties and interest, was due.

Both the estate and the IRS moved for summary judgment. The estate argued that it had paid all interest that would have been due under a Section 6166 election and asked the court to rule that the Section 6166 election was valid under the equitable doctrine of substantial compliance. The IRS claimed that a Section 6166 election was only valid if made on a timely filed Form 706. The estate argued that it was the Treasury Regulations, and not the IRC, that mandate that the Section 6166 election must be made on Form 706, and that its actions in notifying the IRS of its election constitute "substantial compliance." The Tax Court rejected this argument because the estate failed to provide the information required to satisfy the requirements of Treas. Reg. Section 20.6166-1(b), namely, information about the properties constituting the closely held business interests and a statement of the reasons why the estate qualified for installment payments. The estate failed to prove that at least 35% of the value of the adjusted gross estate consisted of closely held business interests. The court also refused to ignore the deadline set by IRC Section 6166(d) for making the election.

Valuation of Build-in Capital Gains

Estate of Richmond v. Commissioner, T.C. Memo 2014-26

In this case, the Tax Court ruled on a valuation dispute concerning the correct discount to apply for built-in capital gains tax (BIGC) discounts. The Court recognized significant discounts for lack of control and lack of marketability (37.4%

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combined) for a C corporation holding investments.

Mrs. Helen Richmond died in 2005. Her estate held a 23.44% interest in Pearson Holding Company ("PHC"), 87.5% of the value of which was composed of underlying publicly traded securities, which were priced at $52,159,430 as of her date of death. Because the average annual turnover of the underlying securities was very low (1.4%), it was calculated that the hypothetical sale of all of the securities at the date of death would give rise to a BICG tax of $18,113,083. Using the capitalized dividend method, the Estate reported a value of $3,149,767 on the Federal Estate Tax return for her minority interest in PHC. The valuation was calculated by an individual who was not a certified valuation professional. The IRS disputed this value and issued a notice of deficiency

At trial, the IRS utilized the net asset value method and arrived at a value of $7,330,000, allowing a 6% discount for lack of control and a 36% discount for overall lack of marketability, which consisted of a 15% discount for the BICG tax liability and a 21% discount for lack of marketability. The Estate presented two valuations: the first, $5,046,500, used the capitalized dividend method, and the second, $4,721,962, used the net asset value method and a dollar-for-dollar reduction for the unrealized BICG tax. It also utilized an 8% discount for lack of control and a 35.6% discount for lack of marketability.

The Court held that the proper valuation was $6,503,804 and ruled that only the net asset value method could be used. It rejected the capitalization of dividends methodology because it is based entirely on estimates of the future and paid no attention to concrete and available valuation data. The Court also rejected the IRS's methodology in calculating the embedded 15% discount for BICG tax and stated that the discount should be calculated by using the present value cost of paying the BICG tax in the future, using a normal turnover rate of 20-30 years (and not the Estate's turnover of 70 years, calculated at 1.4% per year).

The Court also upheld a 20% accuracy-related penalty under Section 6662(a), (b)(5) and (g), stating that the Estate's appraiser lacked appraiser certification and that the Estate did not act with reasonable cause and in good faith because it not offer the appraiser as an expert witness or demonstrate that he was qualified as a valuation expert.

Election Against a Prenuptial Agreement

PLR 201410011 (released March 7, 2014)

A prenuptial agreement signed by the taxpayer and his spouse, in which each waived his right of election to take against the will of the other, provided for both a distribution to a marital trust for the spouse's benefit and outright distributions to the spouse. The taxpayer's revocable trust contained provisions making distributions to the spouse and marital trust consonant with the prenuptial agreement, as well as provisions allowing the spouse to elect to forgo the distributions mandated by the prenuptial agreement. Two issues were decided in the PLR: first, whether the spouse's ability to elect against the prenuptial agreement was considered a "contingency" under IRC Section 2056(b)(1) and thereby affected the marital deduction, and secondly, whether preferred LLC units distributed to the marital trust would qualify for the marital deduction. The IRS ruled that the spouse's ability to elect against the prenuptial agreement was a "mere procedural formality" and not a contingency; therefore, the deduction was allowed under IRC Section 2056(b)(1). The IRS also ruled that the spouse was allowed a marital deduction for the preferred LLC units, because, among other safeguards provided by the taxpayer, she would have a qualifying income interest of 8% annually for life in these units.

Definition of "Executor"

General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals (The Treasury's "Greenbook") (March 4, 2014)

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The Greenbook contains a new proposal expanding the definition of "executor" or "administrator" of a decedent to give that person authority to act on the decedent's behalf in all tax matters, not just estate taxes. The proposal gives the IRS the authority to promulgate regulations to resolve conflicts among multiple persons who may meet the definition of "executor" because they have actual or constructive possession of estate property.

FEDERAL GIFT TAX

General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals (The Treasury's "Greenbook") (March 4, 2014)

The Greenbook contains a new proposal entitled "Simplify Gift Tax Exclusion for Annual Gifts." The proposal would establish a new category with a maximum exemption of $50,000 per donor per year. This category would include

"transfers in trust, other than to a trust described in section 2642(c)(2), transfers of interests in passthrough entities, transfers of interests, subject to a prohibition on sale, and other transfers of property that, without regard to withdrawal, put, or other such rights in the donee, cannot immediately be liquidated by the donee."

The gift tax annual exclusion (currently $14,000 per donee) would be maintained for transfers to individuals or trusts that are only for the benefit of the donee and would be includible in the donee's estate. The proposal would eliminate the present interest requirement for gifts qualifying for the gift tax annual exclusion and deny the annual gift tax exclusion with respect to Crummey powers and certain other transfers.

GENERAL MATTERS

IRS: No Letter Rulings or Determinataion Letters

Rev. Proc. 2014-3, 2014-1 IRB 111 (Jan. 2, 2014).

The IRS will decline to issue letter rulings or determination letters on the following issues:

• Internal Revenue Code Section 102—Gifts and Inheritances. Whether a transfer is a gift within the meaning of IRC Section 102(a).

• IRC Section 641—Imposition of Tax. Whether the period of administration or settlement of an estate or a trust (other than a trust described in IRC Section 664) is reasonable or unduly prolonged.

• IRC Section 2031—Definition of Gross Estate. Actuarial factors for valuing interests in the prospective gross estate of a living person.

• IRC Section 2512—Valuation of Gifts. Actuarial factors for valuing prospective or hypothetical gifts of a donor.

The IRS has stated that it ordinarily will not rule on the following issues:

• IRC Sections 2035, 2036, 2037, 2038 and 2042—Adjustments for Certain Gifts Made Within Three Years of Decedent's Death; Transfers with Retained Life Estate; Transfers Taking Effect at Death; Revocable Transfers; Proceeds of Life Insurance. Whether trust assets are includible in a trust beneficiary's gross estate under IRC Sections 2035, 2036, 2037, 2038 or 2042 if the beneficiary sells property (including insurance policies) to the trust or dies within 3 years of selling such property to the trust, and: (1) the beneficiary has a power to withdraw the trust property (or had such power prior to a release or modification but retains other powers which would cause that person to be the owner if the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of IRC Section 2041, (2) the trust purchases the property with a note, and (3) the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.

CASE SUMMARY FROM THE ORPHANS' COURT LITIGATION COMMITTEE

LaVeglia Estate, 3 Fiduc. Rep. 3d 323 (O.C. Carbon 2013)

BY ADAM T. GUSDORFF, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

A recent decision from the Carbon County Orphans' Court clarified the legal standards that apply when changes to investment account beneficiary designations are challenged on grounds of lack of capacity and undue influence. In addition, the case provides a good example of circumstances under which – after the contestant raises the presumption of undue influence – the proponent of the designation can rebut the presumption. Simply put, it is one of many cases in which the existence and extent of a confidential relationship is used to justify the substantial benefit and provide an explanation and context for the absence of undue influence in the transaction at issue.

In *LaVeglia Estate*, the decedent ("Decedent") changed the transfer-on-death beneficiaries of three of his investment accounts from both of his sons in equal shares to only one of them ("Proponent"). The other son ("Contestant") argued that Decedent lacked capacity to change the beneficiaries and that the beneficiary designations were the product of undue influence by Proponent. Contestant and Proponent had not spoken with each other for more than 35 years when Decedent died.

Prior to making the changes at issue, Decedent always treated his sons equally in terms of gifting and estate planning. In 2001, Decedent transferred title of his home to them in equal shares. In August 2006, he executed a Will dividing his estate equally between them. Decedent named Proponent as executor and Contestant as his successor. Similarly, Decedent named Proponent as agent under a power of attorney and Contestant as his successor. In March 2005, Decedent created the three accounts at issue and designated both sons as equal primary beneficiaries.

In September 2006, Decedent was hospitalized and diagnosed with mild dementia, probably of the Alzheimer's type. Once Decedent was released from the hospital, Proponent helped him move to an assisted living facility near Decedent's home in New York. While Decedent resided in the New York facility, Proponent visited him frequently, whereas Contestant did not visit, but called Decedent on the phone every three to four months.

Decedent's decline in cognitive functioning was slow at first but accelerated in 2007 and 2008, and required him to move from independent living to assisted living in October 2008. In December 2008, Decedent's primary care physician estimated that decedent's dementia was at a six or seven on a scale of 0 to 10, with 10 being end-stage dementia. Decedent suffered mini-strokes, which often accompany dementia, and various CAT scans displayed the decline in his brain function.

Proponent, who lived in Pennsylvania, visited Decedent frequently. In December 2008, Decedent suggested he move to Pennsylvania to be closer to Proponent and Proponent's son. This move occurred in March 2009. Although Proponent requested that Decedent be placed in independent living, the initial evaluator at the facility determined that Decedent could not live independently and needed to be placed in assisted living. Following insistence by Proponent and an evaluation by the facility's physician, Decedent was moved to independent living. He was observed by staff to be mentally alert and able to act on his own, although there remained signs of cognitive decline. Decedent died in February 2011.

On or about October 1, 2009, Decedent changed the transfer on death beneficiary on his investment accounts from both sons equally to Proponent as sole primary beneficiary and Contestant as contingent beneficiary. Decedent erroneously dated these forms July 13, 1920, which was his date of birth. On October 2, 2009, Decedent again changed the beneficiary of

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LAVEGLIA ESTATE, CONTINUED

these accounts, with Proponent as primary beneficiary and Proponent's son as contingent beneficiary.

There was no evidence regarding how Decedent obtained the change forms, as he was unable to access his account online without assistance. Proponent admitted to helping Decedent access his accounts online, but denied obtaining the forms, assisting Decedent with making the changes or requesting the changes. The value of the accounts was in excess of $2.3 million, whereas the value of Decedent's probate estate (which his sons shared equally) was less than $10,000.

In assessing the claim that Decedent lacked capacity, the Court determined whether he had "an intelligent knowledge regarding the natural objects of his bounty, the general composition of his estate, and what he desires to do with it, even though his memory may have been impaired by age or disease." *LaVeglia*, 3 Fiduc. Rep. 3d at 327 (*quoting In re Estate of Angle*, 777 A.2d 114, 125 (Pa. Super. 2001)). The Court further noted that failure of memory or an inability to transact business or the inability to recall the names of persons with whom he has been intimately acquainted does not prove incapacity. *Id*. at 328 (*quoting Estate of Marie Lista*, 2006 WL 321189 at *14 (O.C. Phila. 2006)).

In applying these factors, the Court considered the testimony of numerous medical and lay witnesses in concluding that Decedent had capacity as of October 2, 2009, when he completed the last set of forms. While the Court found evidence that Decedent suffered from a weakened intellect (a critical prong of undue influence analysis), it was not convinced that Decedent lacked testamentary capacity. In fact, the Court observed that "people with a weakened intellect may well retain testamentary capacity." *Id*. at 332. In addition to relying upon witness testimony, the Court found it compelling that Decedent was able to properly follow the instructions in completing the forms, including providing the proper account numbers, his own Social Security Number, and the birthdates of his sons and grandson.

With respect to its analysis of undue influence, the Court applied the tripartite test that applies to Will contests, i.e., a presumption of undue influence arises upon clear and convincing evidence "'(1) that a person or persons in a confidential relationship with a testator or grantor has (2) received a substantial portion of the grantor's property, and (3) that the grantor suffers from a weakened intellect.'" *Id*. at 333 (*quoting Owens v. Mazzei*, 847 A2d. 700, 706 (Pa. Super. 2004) *aff'g DiCesare Estate*, 2003 WL 22053336, 23 Fiduc. Rep. 2d 233 (O.C. Phila. 2003)) . Once a presumption of undue influence arises, the proponent of the transaction has the burden to disprove undue influence by clear and convincing evidence. *Id*. Thus, although the change of beneficiary designation occurred during Decedent's lifetime, the Court did not treat the change as a lifetime gift, which would have required only a showing of confidential relationship to shift the burden to the Proponent. Compare *In re Estate of Clark,* 359 A.2d 777, 780 (Pa. 1976). While there was no discussion on this point, the Court likely applied the three-part test because a beneficiary designation, like a Will, is ambulatory and speaks only upon the grantor's death. On the other hand, a completed lifetime gift immediately divests the grantor of possession and control, which appropriately places a more difficult burden on the proponent of the transaction because the capacity to make a lifetime gift is necessarily higher than that to make a testamentary gift. *See, e.g., In re Null's Estate*, 153 A.2d 137, 139 (Pa. 1930).

Analyzing the three elements, the Court concluded that Proponent was in a confidential relationship with Decedent, not because Proponent had been designated as agent under power of attorney, but because of the trust and reliance the Decedent placed on Proponent in his later years. *LaVeglia*, 3 Fiduc. Rep. 3d at 335-36. Substantial benefit was obvious from the increase in Proponent's interest from half to all of the investment accounts as a consequence of the beneficiary designations. With respect to weakened intellect, the Court relied upon the testimony of numerous treating physicians

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LAVEGLIA ESTATE, CONTINUED

and at least one hired expert to determine that this element was met as well. Accordingly, the Court found that Contestant established a presumption of undue influence, such that the burden to disprove undue influence shifted to Proponent. *Id*. at 338.

In considering whether Proponent rebutted the presumption, the Court focused on the sons' relationships with Decedent. It considered that Proponent and Proponent's son were the only family members who visited Decedent, and that Proponent visited frequently and took Decedent to most of his doctor appointments. Although Contestant and Decedent spoke on the phone, Contestant never visited Decedent in the last six years of his life and did not attend Decedent's funeral. The Court did not know if Decedent ever met Contestant's children. Decedent's contact – or lack thereof – with his sons appears to have been the tipping point for the Court, which concluded that Proponent had not exerted undue influence over Decedent, stating:

Of course, we don't know, for sure, why decedent changed the beneficiary of his Vanguard accounts, but we don't have to guess. There were two sons. One was there when decedent needed him. One wasn't. And this made all the difference.

Id. at 339. In addition, the Court mentioned in a footnote that Decedent told Proponent in 2010 of the change after it had been done, and when asked by Proponent if he was sure he wanted to make such a change Decedent responded, "That is up to me." *Id*. at 339, n.11.

Further explaining its rationale, the Court observed that "not every child who is entrusted with the care of an elderly parent of diminished mental capacity and upon whom is bestowed a substantial benefit by that parent has exerted undue influence. It happens all the time, and it happened here." *Id*. at 340. The Court concluded its opinion by stating:

It is important not to penalize or stigmatize the person who assists an ill and dying person in her last days. As the Pennsylvania Supreme Court observed: "What offends against an innate sense of justice, decency and fair play offends against good law. And if a testatrix rewards a benefactress who cared for her when her need was great and others passed her by, the courts will not find her bequest offending against nature or law." *King Will*, 369 Pa. at 531-32, 87 A.2d at 474.

Id. (quoting Estate of Marie Lista, 2006 WL 321189 at *13, *Lista Will,* 3 Fiduc. Rep. 3d 275, 293-94).

This case will be helpful to the child (or niece, nephew, etc.) who cares for his or her elderly parent (or aunt, uncle, etc.) while other siblings and relatives remain distant, particularly when there is no evidence that the caregiver assisted with or was present when the decedent made the changes that ultimately benefited the caregiver.

PROBATE AND TRUST LAW SECTION COMMITTEE INFORMATION

Business Planning Committee. The Business Planning Committee meets quarterly to discuss topics of interest to trusts and estates lawyers who also provide business counsel to closely held businesses, on subjects including choice of entity and ownership of businesses, business succession planning, asset protection planning and buy-sell agreements. Through panel discussions and outside speakers, the Committee seeks to increase the expertise of trusts and estates lawyers in dealing with a broad range of issues and opportunities faced by business owners. For more information, contact co-chairs Dennis Reardon at DReardon@DReardonLaw.com or Bob Louis at rlouis@saul.com.

Diversity Committee. The Diversity Committee works to encourage participation in the activities of the Section by a diverse group of attorneys representing the entire legal community. It promotes inclusion of lawyers of every race, ethnicity, gender, age, national origin, or sexual orientation in the Section's programs and in the work of its committees and leadership. The Diversity Committee holds meetings on an ad hoc basis. For information, please contact committee chair Gordon Wase at gordon.wase@verizon.net.

Education Committee. The Education Committee meets during the year to discuss current topics relevant to the Section. Those topics become the basis for three programs (March, June and October) that provide CLE credits for program attendees. The Committee is responsible for choosing topics, outlining the content of the programs, and then selecting and recruiting qualified panelists to provide a two-hour presentation at the quarterly meetings. After the presentations are completed, the Committee reviews the evaluations that are generated from program attendees and utilizes those evaluations to improve upon future programs. The Committee welcomes suggestions for future program topics, and any interested Section members are encouraged to join the Committee by contacting Committee Chair Laura Stegossi at 215.972.7918 or lstegossi@wglaw.com.

Elder Law Committee. The mission of the Elder Law Committee is to further the knowledge and practices of members of the legal community having an interest in problems relating to the aging by developing educational programs and the information necessary to stay abreast in this growing and ever changing area of law. Our goal also is to study, review and make recommendations concerning legislation affecting the elder community. We further wish to serve the public generally by developing literature that will provide information about legal issues faced by the elder community and their caregivers. Meetings are generally held the fourth Thursday of the month at the Bar Association from 1-2:30 p.m. Lunch is available if reserved and there is a guest speaker. All Philadelphia Bar Association Members are welcome. Our next meeting is on October 24, 2013 at noon. For information, please contact committee chair Linda M. Hee at lhee@sgtmlaw.com.

Legislative Committee. The Legislative Committee monitors and provides comments on pending and proposed legislation in the areas relating to estate planning, and estate and trust administration. When appropriate, the Committee drafts proposed legislation on behalf of the Section. Currently, the Committee has two active subcommittees involved with proposed legislation. One subcommittee is in the process of receiving comments on a draft of Directed Trustee legislation prepared by members of the subcommittee. The second subcommittee is researching and analyzing the preparation of a proposed legislation regarding fiduciary authority over digital assets. Meetings are generally held the third Wednesday of the month at 4:00 p.m. at Pepper Hamilton at 18th & Arch Streets. Michael Stein is the Chair of the Committee. Michael may be contacted at PNC Bank, 1600 Market Street, Philadelphia, PA 19103, 215-585-8027 or michael.r.stein@pnc.com.

Orphans' Court Committee. The Orphans' Court Litigation Committee meets monthly on the second Tuesday of each month except for June, July, August, and December. The meetings begin at 8:30 am in the morning at One Liberty Place in Center City. An agenda for each meeting usually involves a presentation and a discussion of a recent Orphans' Court case as well as issues and fact patterns that Orphans' Court litigators will frequently encounter. Following the presentation,

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COMMITTEE INFORMATION, continued

a lively discussion among the committee members addresses the designated topic, and how the committee members have dealt with the issues and fact patterns in practice. For more information about this committee, please contact Committee Chair, Timothy J. Holman, at (610)-518-4909, or at tholman@smithkanelaw.com.

Publications Committee. The purpose of the Publications Committee is to further the knowledge and practices of members of the legal community through the publication of articles in this Probate and Trust Law Section Newsletter that are current, relevant and informative. The Newsletter generally is published three times per year. The Publications Committee will hold its next two meetings at the offices of Ballard Spahr, LLP, 1735 Market Street, at 8:30 a.m. on June 26th and November 19th. For information, please contact committee chair, Heike K. Sullivan at sullivanh@ballardspahr.com.

Rules and Practice Committee. The Rules and Practice Committee drafts local rules and the forms to accompany them, which are suggested to the Committee by the Judges of the Orphans Court Division of the Court of Common Pleas, local practitioners, or which the Committee determines are needed in connection with practice before the Orphans Court Division or the Office of the Register of Wills. Over the past years this Committee has published the Green Book, Blue Book and Red Book and updated them as needed. It has reviewed and commented upon the new proposed statewide Orphans Court Rules, reviewed the first draft of the Guardianship Manual, and drafted rules and forms for local use which also served as guides for the statewide forms now in effect. This committee also addresses procedural problems which come to its attention for the benefit of the Court and practitioners, and generally resolves such problems. For more information, please contact committee chair Bernice Koplin at bjkoplin@sglk.com.

Tax Committee. The Tax Committee meets monthly on the 4th Tuesday of each month, except for July, August and December. The meetings are typically at 8:15 in the morning in Center City. During the meetings, a written summary of pertinent recent developments in the tax law is distributed and reviewed with a short oral presentation focusing on highlights, and then, at most meetings, a speaker addresses a predetermined tax related topic. The meetings are frequently interactive and periodically include ad hoc discussions on various topics of current interest to committee members related to tax issues. Traditionally, certain monthly meetings have been reserved for specific purposes: January for determining the agenda for the year and discussing The Heckerling Institute programming, October for representatives from the PA Department of Revenue, and November for representatives from the IRS (although none have been available from the IRS in recent years). For more information about this Committee, please contact Committee Chair, Rebecca Rosenberger Smolen, at (610) 624-3391 or rebecca@balalaw.com; or Committee Secretary, Marguerite Weese, at (215) 419-6561 or mweese@wilmingtontrust.com.