PHILADELPHIA BAR ASSOCIATION

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REPORT OF THE CHAIR

BY JUDY STEIN, ESQUIRE | BNY MELLON

As I mentioned in my last column, our Section is part of a fine Philadelphia institution, the Philadelphia Bar Association. The Section plays an active role in the larger Bar Association. Here are just a few recent examples:

1. Our March CLE program, *The New Pennsylvania Power of Attorney Statute: What You Need to Know Now*, was so well-attended and so well-received, that Education Committee Chair Justin Brown and Executive Committee member Tim Holman who was also one of the panelists, made a proposal to the Bar Association to present it at this October's Bench-Bar Conference. Their proposal was accepted! Thus, if you were not able to catch this great program in March, you will have another opportunity to hear Tim, Brad Terebelo and Peter Johnson in October in Atlantic City.

2. Amy Quigg, a new member of the Executive Committee, volunteered to head the Section's new Community Service task force. This task force stemmed from Bar Association Chancellor Al Dandridge's broader community service initiative, called "Boots on the Ground", asking that Philadelphia lawyers be visible in giving back to the community. You can go to the Bar Association's website at http://philadelphiabar.org/page/BootsonTheGround to see the interesting community service projects the various Bar Association Sections have undertaken. Our Executive Committee determined that since so many Section members already participate in community service relating to our expertise, including pro bono activities, we would try to harness that energy and expertise and perhaps sponsor some of the activities in which our members already participate. Thus, Amy's first project was to work with the Barristers, one of the Bar Association's affinity groups, which sponsored a Wills Clinic by Senior Law Center. Amy helped the Barristers obtain subject experts from our Section to help the volunteers at the Wills Clinic. More on the Section's community service activities to come, but if you are interested in becoming involved,

continued on page 3

IN THIS ISSUE

NEWSLETTER ARTICLES

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

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IS PORTABILITY THE ANSWER?

It depends, but it should definitely be part of the conversation

BY MARGUERITE WEESE, J.D., LL.M (TAX) | WILMINGTON TRUST COMPANY

What is this portability concept and where did it come from?

On December 17, 2010, Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, affectionately referred to as "TRUIRJCA." Section 303 of the TRUIRJCA amended section 2010(c) of the Internal Revenue Code ("IRC") to allow portability of the applicable exclusion amount between spouses. The American Tax Relief Act of 2012, with the much easier acronym of ATRA, made portability permanent in section 101(a) of the Act, thus changing the discussion around estate planning.

Portability allows the estate of the decedent, which is survived by a spouse, to elect to transfer the decedent's unused federal transfer tax exclusion ("DSUE") to the surviving spouse. The surviving spouse can then use the DSUE obtained from the deceased spouse to address the survivor's own transfers during life and death. For example, a decedent dying in 2015 leaving behind a surviving spouse may leave to that spouse up to $5,430,000 of unused exemption, less any exemption used to offset the estate's federal taxes.

Ok, I get the concept of portability, now explain to me more about DSUE

DSUE is the unused estate tax exclusion that the deceased spouse transfers to the surviving spouse. One of the more important aspects to remember about DSUE is that while the basic exclusion amount is indexed for inflation during life, the DSUE amount established at death is frozen.[1] It is particularly important to remember that while DSUE ports the unused estate tax exclusion, it does not port over any unused generation skipping transfer tax exclusion.

One confusing aspect of DSUE is the definition of "last deceased spouse." If a surviving spouse who received DSUE remarries and the second spouse dies prior to the surviving spouse's use of the original

1 IRC Section 2010(c)(4) & Treas. Reg. § 20.2010-2T(c)(1).

continued on page 4

REPORT OF THE CHAIR, CONTINUED

please contact Amy at aquigg@salvorogers.com.

3. As you know, this is a judicial election year. As a public service, the Bar Association's Judicial Selection and Retention Commission investigates and makes recommendations with regard to all judicial candidates. By virtue of my role as Chair of the Section, I have had the privilege of being one of the 30 members of the Commission this year. The members include Judges, lawyers from the DAs and Defenders offices, Community Legal Services, members of other Sections and affinity groups and non-lawyers. We met every Friday from the end of January through the beginning of May to carefully review each candidate. A number of you volunteered to be on investigative teams that vetted judicial candidates and made recommendations to the Judicial Commission to assist the Commission in making its own formal recommendations. I can tell you without reservation that the process is thoroughly impressive. It is respectful, intelligent and not political. When the Bar Association makes a recommendation about a judicial candidate, positive or negative, you can absolutely rely on it.

These are but a few examples of the participation of our Section in the larger Bar Association and the larger community. As I previously mentioned, we have a large and active Section, and there is a lot going on. Get involved! You will find it very rewarding and, by the way, good for your practice and career.

DSUE, that DSUE is lost[2]. However, the surviving spouse can continue to use the DSUE of the first spouse until the death of the new spouse.[3] In this case, divorce from the second spouse will not destroy the original DSUE.[4] In the case of lifetime gift planning, the surviving spouse's DSUE is applied first to all taxable gifts.[5] This can be a great planning tool, but is beyond the scope of this article.

How do I utilize portability?

Portability must be elected on a timely filed estate tax return, even if an estate tax return would otherwise not need to be filed.[6] Failure to file timely is considered an affirmative statement opting out of portability, and the portability option will be forever lost.[7] Determining whether a federal Form 706 estate tax return should be filed is a major decision that carries great liability for the executor.

Since the power to elect portability is often left up to the discretion of the executor, it is important to select an executor who is friendly to the surviving spouse. For example, if the executor is the surviving spouse's stepchild or sibling of the deceased, and the relationship is or becomes strained, the surviving spouse may not receive the DSUE s/he is counting on receiving.

Now that I understand portability, how might it apply to my clients' estates?

How and if portability should be integrated into a client's estate really depends on the client's net worth and the client's ultimate objectives.

The most obvious reason that you would use portability as part of your client's estate plan is the simplicity of it. There will be clients, particularly in the current high federal exemption climate, that will want to simply opt for the straightforwardness of an "outright to spouse" plan over what I will refer to as the "traditional" planning approach, which will be discussed later. These clients tend to have more modest-sized estates, are not concerned with creditor protection, have an uncomplicated family situation, and probably do not have a large multigenerational plan.[8]

Another major benefit of utilizing portability is the potential for a better step-up in basis. Generally, the assets included in a decedent's estate receive a new basis equal to the value of the assets on the date of death.[9] However, upon the surviving spouse's death only assets that are in the surviving spouse's name or in a marital trust (but not in an exclusion/credit shelter trust) will receive a new basis at the survivor's death. If assets have appreciated between the death of the first spouse and the death of the survivor, then there could be potential capital gains tax savings on the sale of any assets included in the survivor's estate. Of course, if the assets have decreased in value between the two deaths, the "basis shelter" could be a disadvantage. A more complicated decision arises when the value of a married

2 The term "last deceased spouse" means the most recently deceased individual who, at that individual's death after December 31, 2010, was married to the surviving spouse. Treas. Reg. § 25.2010-1T(d)(5).

3 Treas. Reg. § 25.2010-3T(a)(3); Treas. Reg. § 2 5.2505-2T(a)(3).

4 *Id*.

5 *See* Treas. Reg. § 20.2010-3T(c) and Treas. Reg. § 20.2505-2T(d). And if surviving spouse uses the DSUE of the first decedent spouse, and remarries, and that new spouse dies with DSUE, the surviving spouse has a "new" last deceased spouse's DSUE to use prior to using the surviving spouse's own exclusion. *Id*.

6 *See* IRC § 2010(c)(5)(A). This section provides certain requirements that must be met to allow a surviving spouse to take into account a DSUE amount of a deceased spouse.

7 Treas. Reg. § 20-2010-2T(a)(3)(ii)

8 For at least a significant number of clients who opt for an "outright to spouse" plan, planners would be well-advised to include disclaimer planning as well, as another way to protect these clients from future changes in the law or in their financial or family circumstances, but that is beyond the scope of this article.

9 *See* IRC § 1014.

continued on page 5

couple's assets are more than the spouses' combined federal estate tax exclusion amount at the death of the survivor, creating a tradeoff between the potential income tax savings and estate tax savings.

As mentioned earlier, a potential downside of utilized portability is the requirement that a federal estate tax return must be timely filed. In states where a death tax is not otherwise required (Florida, for example), surviving spouses may be reluctant to incur the extra expense associated with filing a federal estate tax return. However, in states like Pennsylvania and New Jersey, where date of death values and other information must be gathered for state death tax returns, the incremental cost of preparing a federal estate tax return is less impactful.

A significant downside to portability is that it does not apply to the generation skipping transfer tax exemption, meaning if the first spouse does not utilize his/her exemption, it cannot be transferred to the surviving spouse and will be lost.

When does Portability not make sense for my clients' estates?

For clients who face a high probability of having a federal estate tax imposed at their death or their surviving spouse's death, the "traditional planning" approach is often still the best solution. This typically includes the use of a "credit shelter" or "exclusion" trust for the surviving spouse to capture the assets of the estate using the remaining estate tax exclusion, in addition to a marital gift, if the client is married. The marital gift utilizes the marital deduction[10] and can be distributed either outright or in trust. From a tax-only standpoint, there are two main reasons why the "traditional" approach could be superior:

- Prevent compounding tax liability: The traditional planning strategy allows part of the decedent's estate to be frozen for estate tax purposes at the surviving spouse's death. If this freezing strategy is not utilized, additional appreciation in the surviving spouse's estate could greatly compound the tax liability at the surviving spouse's death. This is an important point to remember because the DSUE amount is frozen and does not increase with inflation.

- Multi-Generational Objectives: For clients who would like to benefit multiple generations, "traditional planning" is the more effective route as it fully utilizes a client's generation-skipping transfer tax exemption.

Federal estate taxes aside, the other benefits that a "traditional planning" approach affords clients can be very appealing:

- Creditor Protection: Using the "traditional planning" strategy affords clients creditor protection by distributing assets into trusts for the benefit of surviving heirs.

- Peace of Mind: Clients often want to ensure their wishes are going to be followed after their death.

  – **Control:** Some clients do not wish to lose control of assets by placing them in a spouse's name, irrespective of how strong the marriage is.

  – **Blended Family:** In a time when estate plans are being crafted for blended families that involve second marriages, children from previous marriages, or marriages that occur later in life, spouses do not always want to benefit the same persons, and therefore a traditional plan makes more sense and can cause less controversy.

  – **Inherited Wealth:** Clients may feel an obligation to transfer inherited assets to descendants of the original descendent, rather than to a spouse.

  – **Spouse is not a U.S Citizen:** Transfers to a non-citizen spouse do not qualify for the unlimited marital deduction.[11]

10 See IRC § 2523.

continued on page 6

TAX UPDATE

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

FEDERAL ESTATE TAX

Failure to File Return

Specht v. U.S., 2015 WL 74539 (S.D. Ohio 2015) (January 6, 2015)

A decedent's estate was held liable for $1.2 million in late filing penalties and interest because of its failure to file a federal estate tax return, despite its defense that the executor had relied on an attorney who, because he was suffering from a brain cancer undisclosed to her, had failed to file the return and was liable for malpractice. The Court ruled that the estate's failure to timely file the return and pay the taxes was not due to reasonable causes and not willful neglect.

Janice Specht, the executor of the estate of Virginia Escher, had little experience with financial matters and no experience with attorneys. She engaged an attorney with fifty years of experience in estate administration to assist her in administering the estate. The attorney did not properly inform the executor as to the status of extensions for the filing of the federal estate tax returns.

The executor argued that the failure to timely file and pay the estate taxes resulted from "reasonable cause," because she was relying on the attorney. All through the process, the attorney kept telling her that everything was fine. The Court ruled that reliance on counsel is not sufficient to constitute reasonable cause for this failure. Although the term "reasonable cause" is not defined in the Internal Revenue Code, the Treasury Regulations require an estate to demonstrate that "reasonable cause" can be demonstrated when an estate exercised "ordinary business care and prudence" but was nevertheless unable to timely file the estate tax return. *See U.S. v. Boyle,* 469 U.S. 241, 246 (1985). Here, reliance on an attorney is not necessary. All taxpayers are expected to know that "tax returns have fixed filing dates and that taxes must be paid when they are due." *Id.* at 251.

To avoid incurring penalties under IRC Section 6651, the estate had to show that the late filing and payment was not a result of willful neglect. The estate was unsuccessful in demonstrating this.

continued on page 8

IS PORTABILITY THE ANSWER, CONTINUED

It is important that clients and their attorneys take into consideration the long term implications about a client's net worth trajectory and the potential for estate tax law changes in conjunction with a client's ultimate estate objectives. Clients who might not be affected by federal estate tax liability now could be in the future. Under the current federal administration, the wealth transfer tax laws are "permanent," the exemption is high (and increasing) and DSUE appears to be here to stay, but any or all of these could change under a new federal administration. These changes could all be irrelevant if the client's objectives are solely non-tax driven. Explaining the advantages and disadvantages of portability with a client is usually the best course of action because it will allow a client to make a better, more informed decision about the structure of the estate plan.

For more information on planning with portability as well as how portability works in conjunction with state death taxes, attend PBI's June 3, 2015 live seminar on Portability and Planning. To register, go to: http://catalog.pbi.org/store/seminar/seminar.php?seminar=39680.

11 See IRC § 2523(i). If the spouse is not a U.S. Citizen, then the marital deduction is limited to $145,000 in 2015. The martial deduction for non-citizen spouses is indexed for inflation.

LIVE SEMINAR

Learn more about portability and planning on on June 2, 2015 at 12:30 pm. during a live seminar titled “Portability: Throwing a Wrench into Traditional Estate Planning”

Panelists will include:

Jill R. Fowler, Esquire, Heckscher, Teillon, Terrill & Sager, P.C.

Glenn A. Henkel, J.D., LL.M., CPA, Kulzer & DiPadova, P. A.

Marguerite Weese, J.D. Wilmington Trust Company

To Register go to:

http://catalog.pbi.org/store/seminar/seminar.php?seminar=39680

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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Willful neglect is defined in *Boyle* as "a conscious, intentional failure or reckless indifference. *Id.* at 245. She was aware of the nine-month deadline for filing the estate's federal tax return and knew that the tax liability was about $6 million. She had received, but ignored, many notices from the probate court before the nine-month deadline. After the deadline, she received additional notices from the court about the attorney's failure to file an accounting and the Ohio state tax return and even was told she needed to hire another lawyer.

The court reluctantly ruled that it was required to follow binding precedent in ruling that the executor was responsible for the attorney's malpractice.

Qualified Disclaimers

IRS Letter Ruling 201516056

The IRS ruled that a surviving spouse's disclaimers of property he received from his wife during her lifetime were qualified disclaimers.

The wife had transferred all of the assets in one account to the husband, and she later made the husband a joint owner of a second account. The husband withdrew funds from both accounts during her life. At her death, he decided to disclaim the assets of both accounts that had not been purchased or sold from the date of the transfer to his account or the date of the wife's death, in the case of the assets in the joint account.

The IRS ruled that the nine-month period for qualified disclaimers began, with regard to the respective accounts, on the dates of the transfer to the husband's separate account and the date of the wife's death. The husband could accept some of the assets and disclaim the remaining assets because the assets in the accounts were severable. The husband was executor of the wife's estate and co-trustee of the trust to which the assets would be directed as a result of the disclaimer, but he was not treated in his fiduciary role as accepting the disclaimed property because it passed to the trust beneficiaries without any direction by the husband.

FEDERAL GIFT TAX

Crummey Rights

Mikel v. Comm'r., T.C. Memo 2015-64, Docket Nos. 16538-13 and 16563-13 (U.S. Tax Court, April 6, 2015)

The Tax Court ruled, on summary judgment, that $1.44 million of property gifted through Crummey withdrawal rights (based on withdrawal rights of $24,000 each granted to each of 60 beneficiaries) qualified for the gift tax annual exclusion.

In 2007 the donors, husband and wife, created a $3.3 million gift trust granting 60 beneficiaries, many of whom were minors or spouses of immediate family members, annual rights of withdrawal. The trust provided that if a beneficiary exercised his/her withdrawal rights, the property must be distributed immediately. In 2011 the donors filed separate gift tax returns reporting these gifts and claiming an annual exclusion of $720,000 based on $12,000 gifts of present interests granted to each of the beneficiaries. The IRS denied that the gifts qualified as present interest gifts because they did not have a legal remedy to enforce its terms.

Under the terms of the trust, the beneficiaries were required to make a claim on their share of the funds within sixty days of receipt of the Crummey notice. The trust also provided for discretionary distributions to the beneficiaries for wedding expenses, buying a home or entering a profession. Any dispute about the proper interpretation of the trust was to be submitted to arbitration of a three-person panel of Orthodox Jews called a "beth din." The trust also contained an in terrorem provision which stated that any beneficiary who challenged the discretionary acts of the trustees "in any court, arbitration panel or any other manner," would lose all beneficial rights in the trust.

The IRS claimed that the beneficiaries lacked a present interest in the trust because they had no practical legal remedy to enforce its terms. If a trustee refused to disburse funds and the beth din

continued on page 9

upheld that decision, the in terrorem clause would act to discourage the beneficiary from seeking recourse in the state courts.

The Tax Court ruled that the IRS did not properly interpret the terms of the trust. It stated that the beneficiaries had a present interest in the trust property because they had an unconditional right to withdraw property from the trust and the trustees would not "legally resist" their demands for withdrawal. Thus the in terrorem clause had no effect on the beneficiaries' exercise of their withdrawal rights.

Reformation of GRATs to Correct Scrivener's Errors

IRS Letter Ruling 201442045

Taxpayer's attorney created two GRATs, one with a four-year term and one with a fifteen-year term. The remainderman of each GRAT was a revocable trust for the benefit of Taxpayer's four children. The next year the accountant who was preparing the gift tax return for the transfers to the GRATs contacted the attorney to warn him that the purpose of the GRAT would be defeated if a revocable trust was the remainderman. The attorney ignored the advice. Some years later, a financial planner reviewing the GRATs noticed the problem and referred Taxpayer to a second attorney to reform the documents under state law to make the trust irrevocable. The IRS respected the reformation and ruled that, thanks to the clear documentation concerning the Taxpayer's purpose in creating the GRATs and the subsequent tax filings that were consistent with that intent, the transfers of the remainder interest in the GRATs were completed gifts.

OBAMA ADMINISTRATION "GREENBOOK": FISCAL YEAR 2016 REVENUE PROPOSALS

The Obama Administration set forth its proposals for changes in the tax laws in its annual "Greenbook." Here is a summary of the estate, gift and GST tax proposals:

- Restore the 2009 estate, gift and GST exemption amounts (estate and GST tax exemption of $3.5 million; gift tax exemption of $1 million), with no indexing for inflation. Preserve 40% tax rate and portability election for the surviving spouse, but limit portability during the surviving spouse's life to "the amount of remaining exemption the decedent could have applied to his or her gifts made in the year of his or her death"

- Impose consistency on the reporting of the basis of property:

  o the basis of property received by reason of death under IRC §1014 must equal the value of that property for estate tax purposes

  – the basis of property received by gift during the donor's lifetime must equal the donor's basis under IRC § 1015

  – the basis of property acquired from a decedent to whose estate IRC §1022 is applicable is the basis of that property (including additional basis that may be allocated by the executor) as reported on Form 8939

- Modify the rules for GRATs and other grantor trusts:

  – Minimum term of 10 years and maximum term of life expectancy plus 10 years

  – Remainder must be equal to the greater of 25% of the value of assets contributed to the GRAT or $500,000

  – Annuity must not decrease

  – No tax-free exchanges of assets held in the GRAT

  – Gift tax would be imposed on distributions from IDGTs if the distributions consist of trust appreciation or income; termination of grantor trust status would be considered a distribution

- Terminate the GST exclusion allocated to any trust on the 90th anniversary of the creation of the trust

- Extend the estate tax lien under IRC § 6324(a)(1) throughout the § 6166 deferral period

- Provide that the exclusion from the definition of a GST under § 2611(b)(1) applies only to a

continued on page 10

PREPARING FOR THE ARRIVAL OF ABLE ACCOUNTS

BY DAN STANEK, ESQUIRE

INTRODUCTION

"We know that a lot of families have relied upon and have really benefited from the so-called 529 plans, a section of the IRS Code that allows families to save tax-free for education. What we are trying to do with the ABLE Act is to replicate that opportunity so that families who have a loved one with a disability, it may be one disability or it may be more than one, but every family who has a loved one with a disability should have the opportunity to save just as they might for education in a tax-free manner, in a tax-advantaged way." This quote was part of an address that Senator Robert Casey made on February 27, 2014 while promoting his bill in the United States Senate. On December 19, 2014, just shy of a year after Senator Casey advocated for its passage, the Achieving a Better Life Experience Act ("ABLE Act" or the "Act") was signed into law by President Obama. This article will provide an overview of the ABLE Act and discuss its associated planning opportunities.

THE ABLE ACT

The ABLE Act, which was first introduced to Congress by Senator Ander Crenshaw in 2006, was finally met with bipartisan support and passed into law in 2014. Senators Crenshaw, Casey, and the other sponsors of the bill, modeled the ABLE Act after 529 qualified tuition plans, which are tax-advantaged savings plans designed to encourage saving for future college costs. According to legislative history, the stated purpose of the ABLE Act is "(1) to encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life, and (2) to provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under title XIX of the Social Security Act, the supplemental security income program under title XVI of such Act, the beneficiary's employment, and other sources." In short, the Act establishes tax-free savings accounts under state programs that can be used to pay for qualified expenses such as education, housing, and transportation without disqualifying the beneficiary from receiving Medicaid and supplemental security income ("SSI").

The provisions of the ABLE Act are codified in section 529A of the Internal Revenue Code ("IRC"). Similar to 529 qualified tuition programs, however, states are responsible for establishing and operating their own ABLE programs. States will need to issue regulations regarding the formation of ABLE accounts before taxpayers are able to open an account. This process is expected to take a year or more. Locally, the Pennsylvania Treasury presented draft legislation to the

continued on page 11

TAX UPDATE, CONTINUED

payment by a donor directly to the provider of medical care or to the school in payment of tuition and not to trust distributions, even if for those same purposes

- Eliminate the present interest requirement for gifts that qualify for the gift tax annual exclusion. Impose an annual limit of $50,000 (indexed for inflation after 2016) per donor on the donor's transfers of property that will qualify for the gift tax annual exclusion

- Expand the definition of "executor" to empower an authorized party to act on behalf of the decedent in all matters relating to the decedent's tax liabilities, whether arising before, upon, or after death. Authorize the executor to do anything on behalf of the decedent in connection with the decedent's pre-death tax liabilities or obligations that the decedent could have done if still living.

state General Assembly on April 7th, 2015.

a) Importance

The ABLE Act represents an important step forward for disabled individuals because it provides them with a tax-free saving mechanism without disqualifying them from receiving Medicaid and SSI. For many disabled individuals, Medicaid and SSI are the most important available government benefits programs and provide the majority of funding for care and livelihood. However, not all disabled Americans are eligible to receive these benefits. Medicaid and SSI are means-tested government benefits programs that require the beneficiary to retain a limited amount of assets and income in order to qualify. The ABLE Act permits disabled taxpayers to save assets and receive income beyond that which is allowed by the Medicaid and SSI rules while continuing to receive benefits from those programs. Of course, in order to remain compliant with Medicaid and SSI provisions, the Act includes a number of requirements related to the eligibility of beneficiaries, contributions, and expenditures. The following sections discuss these requirements in greater detail.

b) Eligibility

Eligibility under the ABLE Act is limited to those who meet the disability requirements prior to reaching twenty-six years of age. Anyone meeting this age requirement and currently receiving SSI or supplemental security disability income will automatically be found to meet the disability requirement. Otherwise, an individual must be found to have a physical or mental impairment which results in severe and marked functional limitations, and which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve months or is blind, and provides a copy of their diagnosis signed by a physician. In comparison, SSI and Medicaid generally require prospective beneficiaries to demonstrate an impairment that prevents them from performing a substantial gainful activity. The National Down Syndrome Society estimates that there are currently 5.8 million individuals in the United States who will qualify to open ABLE accounts when they become available.

c) Contributions

The ABLE Act provides that contributions will be accepted only if made in cash and do not cause the annual aggregate contributions to the account to exceed the amount in effect under IRC § 2503(b). The amount under IRC § 2503(b), also known as the "annual exclusion," is $14,000 in 2015. It is important to note that the annual contribution limit is viewed from the perspective of the ABLE account rather than the donor. That is to say, once the aggregate contributions to an ABLE account in any year reach the amount in effect under IRC § 2503(b), no further contributions can be made to the account in that year.

This will prove to be a rule that demands a fair amount of planning and orchestration as there may be multiple prospective donors to the account, e.g. parents, grandparents, aunts and uncles, etc. This should also be considered if a civil lawsuit, such as medical malpractice, provides the source of funds for the account, as there are no restrictions in the ABLE Act against self-settled accounts. Family and friends intending to make contributions to the account may be greeted with an unwelcome surprise if the contribution limit has already been met and they are therefore forbidden from making a contribution. Practitioners should use this as an opportunity to connect with clients' friends and family who may be interested in donating to the account and to also discuss other planning opportunities such as Special Needs Trusts ("SNTs").

Like the rule pertaining to 529 qualified tuition plans, the ABLE Act also includes provisions limiting the size of ABLE accounts, and limits beneficiaries to only one account each. While the total asset limit of ABLE accounts is to be established by the states, the ABLE Act has effectively set the total asset limit at $100,000 for beneficiaries who are recipients of SSI and Medicaid.

continued on page 12

PREPARING FOR THE ARRIVAL OF ABLE ACCOUNTS, CONTINUED

The Act provides that the first $100,000 in an ABLE account will be disregarded for purposes of the SSI and Medicaid means test. If an account exceeds this amount, the beneficiary will be disqualified from receiving SSI (but may still be eligible to receive Medicaid). Once again, practitioners should be sure to advise clients carefully regarding this rule as well-intentioned gifts from family and friends could potentially have negative consequences for the beneficiary.

d) Qualified Disability Expenses

The cornerstone of the ABLE Act is that after-tax contributions grow, and distributions can be made, without tax liability or disqualification from Medicaid or SSI provided that distributions are made for "qualified disability expenses." Qualified disability expenses have been defined in the Act as those "related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary…" The Act further supplies an incomplete list of expenses that can be considered qualified disability expenses. This list includes expenses for goods and services such as education, housing, transportation, health, prevention and wellness, employment training and support, financial management, and legal fees, among others. The Act instructs the Secretary of the Department of Treasury to draft and issue regulations further clarifying the breadth of "qualified disability expenses." These regulations have not yet been released and are expected in early 2016.

It is worth noting the apparent vagueness and breadth of some of the goods and services included as qualified disability expenses: for instance, "health, prevention and wellness." A more conservative reading of this phrase may raise ideas of goods and services generally associated with medical care such as vitamins and first aid. At this point in time, however, there is no reason to believe that a more liberal interpretation will not be taken. In fact, in the context of acceptable distributions from SNTs (which have similar distribution standards as those stated in the ABLE Act), courts have allowed distributions from an SNT made to a special needs beneficiary for such things as a trip to Disneyland and tickets to see Britney Spears in concert. (*Zimring et al* discuss this idea in greater detail in the treatise *"Fundamentals of Special Needs Trusts."*) This will be an area for practitioners to pay close attention as the law develops because a more liberal interpretation of "qualified disability expenses" may lead to increased utility of ABLE accounts.

e) Tax Treatment

As with contributions to 529 qualified tuition programs, contributions made to ABLE accounts are made after tax but grow in the account free from the imposition of federal taxation so long as distributions are used to pay for qualified disability expenses. Violative distributions will be subject to federal income tax and an additional 10% penalty. Contributions to an ABLE account will be treated as completed gifts, which are not future interests in property. However, they will not be treated as qualified transfers under IRC § 2503(e). It is left to the states to determine how these accounts will be treated for state tax purposes. It is likely that the states will apply similar principles to the taxation of ABLE accounts as to those being applied to 529 qualified tuition accounts.

f) Medicaid Payback

In addition to possible income tax exposure and 10% penalty on violative distributions, the ABLE Act also includes a Medicaid payback provision. The Medicaid payback provision essentially requires, to the extent benefits have been provided, any assets left in the account at the death of the beneficiary be paid to the Medicaid program. No such rule exists related to third-party SNTs. (First party, or self-settled, SNTs have a similar Medicaid Payback provision.) For families relying solely on an ABLE account to supplement Medicaid and SSI, this provision will not likely be an issue. In the case of a more well-to-do beneficiary of both an ABLE account and an SNT, there is greater risk that the ABLE account will not be exhausted at the death of the beneficiary. Care is advised when planning distributions from the

continued on page 13

various asset pools such that the ABLE account is exhausted at the time of the beneficiary's death.

PLANNING OPPORTUNITIES

Given the strict contribution and asset limits on ABLE accounts, planning opportunities are rather limited. That said, use of these accounts should not be disregarded. Medical advances have enabled many disabled individuals to live far longer than in the past. For instance, according the National Down Syndrome Society, life expectancy for people with Down syndrome has increased from 25 years in 1983 to 60 years today. Planning, therefore, must consider not only the immediate needs of the disabled individual, but also, potentially, a lifetime beyond that of the parents or guardian.

As families of the disabled are surely aware, the financial burden associated with caring for a disabled individual can quickly become unmanageable. A savings account that produces tax-free income and allows the beneficiary to continue receiving Medicaid and SSI is a valuable tool in the effort to care for these individuals. Assuming a 3% annual return on investment, a family that is able to contribute the annual maximum amount can grow the account to $100,000 in roughly five years. Even a more modest annual contribution of $5,000 should grow the account to $100,000 in about 15 years. A family relying on Medicaid and SSI (who would therefore be restricted from growing the account beyond $100,000 for reasons discussed previously in this article) would surely enjoy the extra tax-free income each year to help care for their loved one.

That said, the realistic utility of an ABLE account with a $100,000 asset limit is questionable, especially when one considers the other planning opportunities available to disabled beneficiaries. Congress has long allowed disabled Americans the use of SNTs to supplement their Medicaid and SSI benefits. SNTs are discretionary trusts established to allow the additional needs of an individual with disabilities to be met monetarily without disqualifying the beneficiary from Medicaid or SSI. Considering deductions discussed in the instructions relating to Form 1041-ES, and also considering the standard deduction, with a properly drafted SNT, in 2015 a disabled beneficiary is able to receive distributions of up $14,300 without incurring federal income tax liability or being disqualified from SSI or Medicaid. In order to receive similar benefit under the ABLE Act, an account would need to earn greater than a 14% annual return on investment. While SNTs are widely used and often meet the additional needs of the beneficiaries, many families with disabled loved ones lack the requisite financial means to take advantage of SNTs since trusts can be costly to establish and maintain. The ABLE Act seeks to fill some of that void by providing lower and middle-income families with a way to further provide for their disabled loved-ones.

CONCLUSION

The ABLE Act is a positive step in the effort to help care for disabled Americans. Finally, families without the means to establish and maintain SNTs have a tool at their disposal to provide care beyond that which is already provided by Medicaid and SSI. However, it is likely that those using the ABLE act will find the benefits provided to be inadequate. Restrictions on annual contributions and asset limits, among other things, inhibit the potential utility of ABLE accounts. While Congress has included many of these restrictions to avoid potential abuse, measures such as the Medicaid payback provision should be relied upon to achieve this goal rather than utilizing provisions that effectively defeat the primary purpose of the legislation.

The ABLE Act is a new law, and hopefully it is a work in progress. The purpose of the law is well intentioned, but there is much that Congress can do to improve upon it. While waiting for improvements to be made, practitioners should educate themselves and their clients about the ABLE Act and use it as necessary. Those who are unable to afford SNTs are likely to enjoy use of ABLE accounts more than others, but even wealthy families should find use for these tax-free savings accounts.

NAVIGATING THE WORLD OF PERSONAL PROPERTY APPRAISING

BY AMY PARENTI, HEAD OF DEPARTMENT, APPRAISALS AND VICE PRESIDENT, TRUSTS AND ESTATES | FREEMAN'S

Professionals are often asked by clients for assistance in establishing value for personal property for reasons that may include insurance, estate tax, bankruptcy, damage and loss clams, equitable distribution, charitable giving or divorce. Inherent in solving this problem and seeking answers for the client is an understanding of personal property appraising. What follows is a primer for personal property appraising.

What is personal property?

A formal definition offered by the Uniform Standards of Professional Appraisal Practice (USPAP) states the following: personal property is "identifiable tangible objects that are considered by the general public as being "personal" for example, furnishings, artwork, antiques, gems and jewelry, collectibles, machinery and equipment; all tangible property that is not classified as real estate." Further clarifying this definition, there are two classifications of personal property: those that depreciate and those that do not. An example of depreciable property is most machinery and equipment while certain art, antiques and collectibles have the potential to appreciate.

Per the IRS, personal property: "…includes but is not limited to paintings, watercolors, prints, drawings, sculpture, ceramics, furniture, decorative arts, antiques, textiles, carpets, silver, rare manuscripts, historical memorabilia, antiquities, ethnographic art, collectibles, gems and jewelry. Machinery and equipment and other items classified as personal property are all intended for inclusion."

What is an appraisal?

As defined by the Appraisal Foundation Board, an appraisal is "the act or process of developing an opinion of value; an opinion of value."

The purpose of the appraisal

Identifying the purpose for the valuation dictates the value used and the appraisal content. An insurance appraisal requires a retail replacement value (RRV) which is the highest value used in appraisal reports and is defined "as the highest amount in terms of US dollars that would be required to replace a property with another of similar age, quality, origin, appearance, provenance, and condition within a reasonable length of time in an appropriate and relevant market place." For example, a painting by Pennsylvania Impressionist, Edward Willis Redfield (American, 1869-1965) may have an insurance value of $800,000.

In an estate, divorce or charitable donation appraisal, fair market value (FMV) is most often used. FMV is defined by the IRS as "the price at which the property would sell on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, nor both having reason knowledge of the relevant facts." The FMV for the above cited Edward Willis Redfield (American, 1869-1969) may be in the range or $250,000 or $300,000, considerably lower compared to the insurance value.

All types of appraisals should be regularly updated to ensure the assigned values reflect the current market.

How to select an appraiser

When selecting an appraiser, several questions should be considered.

- **What is the focus of the appraiser's valuation practice?**

For example, an appraiser's practice may concentrate on estate valuations and not be well suited for an insurance appraisal. Identifying values for an insurance appraisal requires searching galleries and retail markets for figures and in these types of appraisals, it is helpful to engage an appraiser who has relationships with these outlets making access to the needed information easier and the values accurate. Historically, gallery owners are closed mouthed (and rightly

continued on page 17

so) when someone is cold calling for a value on a particular piece of art. Fair market values are usually found on the secondary market using subscription based auction databases such as invaluable, askArt, Artnet, or LiveAuctioneers® or when appropriate, eBay. A word of caution regarding eBay: it is important to look at sold records and not asking prices. It is possible to do this using the advanced search function.

- **Does the appraiser have a specialty or are they a generalist?**

If the property to be appraised is fine art, e.g. a painting by the Pennsylvania Impressionist Fern Coppedge (American, 1883-1951), a good question to ask is "Does the appraiser have a fine art background and knowledge of this genre or access to a specialist that does?" Some fine art appraisers may have a concentration in Modern and Contemporary Art with limited background in Pennsylvania Impressionism. If the property of an entire house is to be appraised, a generalist appraiser most likely would be appropriate.

- **Is the appraiser in a solo practice, group practice or part of an auction house?**

For each of these types of practices there are distinct advantages and disadvantages. One point to consider for a solo practice is the following: does the appraiser have the available resources to support conclusions either through reference material or access to experts for a number of genres? Recently Freeman's appraised a table purportedly made by an early 19th century Philadelphia craftsman. The piece had strong family provenance but no existing label to help identify the maker. Utilizing our Americana Department and outside experts, we concluded the piece was probably not crafted in Philadelphia but was French in origin. Since an appraiser may encounter all types of property that may or may not be in their area of expertise, having available resources is a crucial part of an appraisal practice.

- **Is the appraiser impartial?**

Statements of objectivity and impartiality must be clearly stated verbally and in writing. Values included and fees charged must not reflect any bias by the appraiser. In other words, the appraiser does not inflate or deflate a value in order to broker a sale or to accept a lower fee. The relationship between the object valued and the appraiser is one of independence and objectivity.

- **What are the fees charged and when is the expected date of completion?**

Fees should NEVER be based on the value of the object. To ensure a trouble free process, both the client and the appraiser should be clear about completion dates and deadlines.

- **Is the appraiser USPAP compliant?**

This will be addressed in the following section.

History of USPAP

Following the savings and loan crisis of the 1980's, an ad hoc committee was formed made up of nine leading professional appraisal groups from the United States and Canada. The purpose of this committee was to improve credibility and create standards in appraisal practice. The committee agreed upon a "generally accepted set of standards."

Eight American appraisal organizations adopted these standards and in 1987, The Appraisal Foundation (TAF) was formed to implement these standards formally known as Uniform Standards of Professional Appraisal Practice (USPAP).

The Appraisal Foundation (TAF)

TAF, headquartered in Washington, is a private, not-for-profit organization charged with the responsibility of establishing, improving, and promoting minimum uniform appraisal standards and establishing criteria for appraiser qualifications. The Foundation is not part of the Federal government but is authorized by Congress as the source of appraisal practice and appraiser qualifications. The Foundation is overseen by an Appraisal Subcommittee (ASC), a

continued on page 18

Federal agency whose purpose is overseeing state appraisal regulatory programs as well a monitoring the activities of TAF.

The Foundation serves as an umbrella structure to three boards: the Appraiser Qualification Board (AQB), the Appraisal Practices Board (APB) and The Appraisal Standards Board (ASB). The functions of these boards are as follows: ASB develops, interprets, and amends USPAP; AQB sets minimum standards for appraisers regarding education, experience and examination requirements for real property appraisers; and the APB offers voluntary guidance to appraisers, regulators, and users of appraisal services on valuation methods and techniques for all valuation disciplines. The Board of Trustees of the Appraisal Foundation oversees the activities of the boards, provides funding, and appoints members to the boards.

What is USPAP? What does USPAP provide?

"USPAP is the generally accepted standard of professional appraisal practice in North America. USPAP contains standards for all types of appraisal services, including real estate, personal property, business, and mass appraisal."

The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 recognizes USPAP as the generally accepted appraisal standards and requires USPAP compliance for appraisers in federally related transactions.

At this time, there is no required adherence to USPAP standards for personal property appraisers but there is an increasing reliance on the standards as a guide to evaluating the "reasonableness" of an appraisal. This is not true for real property appraisals.

The goal of USPAP is to provide the user with a reliable, clear, transparent, objective, and credible document. USPAP is updated every two years and USPAP compliant appraisers are required to keep up to date with any changes.

What does a USPAP compliant appraisal look like?

The appraisal document will contain boiler plate that includes the following pages (but not limited to): certification; appraiser qualifications; scope of work; property description; effective valuation date; comparables and if needed, comparable analysis; market place analysis; statements, indemnification and disclaimer page; bibliography; and glossary.

The description of property should include the following:

- A brief description
- Title
- Quantity (if pair, set, etc.)
- Country or region of origin
- Medium or material
- Date or period of production
- Markings
- Dimensions and weight (if appropriate)
- Condition
- Provenance
- Exhibition History
- Publication record
- Point of acquisition
- Conservation history
- Photograph
- Location

Who is a user of a USPAP compliant appraisal?

The client who requests the appraisal is one user and another and frequent user is the IRS.

The IRS and USPAP

The IRS has developed guidelines for tangible personal property evaluation as well as requirements for qualified appraisals and qualified appraisers. A qualified appraisal is one that is "prepared by a qualified appraiser in accordance with generally accepted appraisal standards. Generally accepted appraisal standards are defined in USPAP by the ASP of the AF." A qualified appraiser is an individual

continued on page 19

with a "verifiable education and experience in valuing the relevant type of property for which the appraisal is performed." It is suggested that appraisers with designations from professional organizations "are deemed to have demonstrated sufficient verifiable education and experience." Professional organizations that offer programs in USPAP, principles of valuation, and qualifications through written exams and peer reviews raise the bar in appraisal practice.

Since the IRS is frequent user of USPAP and it appears to look favorably on reports prepared following USPAP guidelines, selecting an appraiser that is USPAP compliant will provide the client with a level of confidence when submitting a report to the IRS.

Select IRS Requirements

If a client makes a donation of art to an institution, certain requirements must be met. If the donation is greater than $5,000 but less than $20,000, a qualified appraisal by a qualified appraiser is required but does not need to be attached to the tax return. If the donation is greater than $20,000, a complete copy of the signed appraisal must be attached to the tax return. The appraisal must be made no earlier than 60 days prior to the date of the contribution of the art item and the qualified appraiser must complete Section B, Part III of Form 8283. Other supporting documents required are the deed of gift and a related use statement by the donee.

The IRS, Art Appraisal Services and Art Advisory Panel

Created in 1968, the Art Advisory Panel provides advice and guidance to the Art Appraisal Services Unit of the IRS. The Panel consists of select experts from the auction, gallery, and museum worlds who meet twice a year and all serve without compensation. Their task is to assist the IRS by reviewing and evaluating personal property appraisals submitted by taxpayers for Federal income, estate, and gift tax purposes. The panel reviews values looking for reasonableness and recommending adjustments as necessary. The benchmark for review by the panel is a claimed value greater than $50,000.

It is important to select an appraiser who is aware of IRS reporting requirements (photographic and preferred appraisal item format) for items valued at $50,000 and over.

Who are the recognized professional appraisal organizations that maintain high standards for personal property valuation?

American Appraisers Association of America (AAA)

- Established in 1949
- Non-profit
- Requires members to be USPAP compliant
- Home office-New York, New York
- Provides resources for locating appraisers
- www.appraisersassoc.org

American Society of Appraisers (ASA)

- Incorporated in 1952
- Non-profit
- International organization
- Multi-discipline (e.g., includes machinery and real property)
- Home office-Reston, Virginia
- Provides resources for locating appraisers
- Requires members to be USPAP compliant
- www.appraisers.org

International Society of Appraisers

- Founded in 1979
- Non-profit
- Personal property appraisers
- Home office-Chicago, Illinois
- Provides resources for location appraisers
- Requires members to be USPAP complaint
- www.isa-appraisers.org

continued on page 20

ETHICS COLUMN

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

My aged client, who shows diminishing capacity but still possesses testamentary capacity, has contacted me frequently in recent years to make changes in her will and powers of attorney and has been making unusual gifts. I now suspect she is the subject of undue influence by certain family members. What action may I take?

This question will arise more frequently as our population continues to age. Typically, the practitioner may think of only three courses of action: (1) blindly following the client's instructions, based on the belief that one must continue to be loyal and maintain confidentiality, (2) launching some form of court action, including petitioning for the appointment of a guardian, or (3) withdrawing from the representation.

However, Rule 1.14 of the Pennsylvania Rules of Professional Conduct, excerpted below, provides a comforting fourth option for practitioners caught in these situations:

"Rule 1.14(a) When a client's capacity to make adequately considered decisions in connection with representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and he cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Note the reference in 1.14(b) to the possibility of "…consulting with individuals or entities that have the authority to take action to protect the client…" An entity uniquely equipped to handle these situations is the local County Office of Services for the Aging, or its equivalent. In Philadelphia, the name of the agency is the Philadelphia Corporation for Aging.

These offices, which are becoming busier as elder financial abuse is growing, are required to implement the provisions of the Older Adults Protective Services Act found at 35 P.S. §10225.101. In all cases, when the confidential report by the practitioner or family member provides sufficient indications of financial mismanagement or abuse involving someone 60 years of age or older, the office will initiate a confidential investigation and assign

continued on page 21

PERSONAL PROPERTY APPRAISING, CONTINUED

All these organizations are resources for appraisal standards and locating appraisers.

Sources

Websites:

www.the appraisalfoundation.org

www.irs.gov/Individuals/Art-Appraisal-Services

www.artfixdaily.com

www.appraiservalues.com

http://www.irs.gov/pub/irs-pdf/p561.pdf

http://www.irs.gov/uac/Publication-526

a staff person as an investigator. The statute empowers such offices to take further action to aid it in determining whether or not abuse is actually occurring including petitioning a court. The investigation remains confidential and neither the client nor a family member will be able to learn from the investigator who or what sparked the investigation.

There are two interesting Orphans' Court cases which highlight the use of that technique and in which justice appears to have prevailed. One case involved an 82-year-old woman living alone who changed her power of attorney four times in six months naming different sons alternately as her agent: In the Interest of A. M., an Older Adult, 3 Fiduc. Rep. 3rd 129 (Chester 2013). The other involved a 99-year-old childless widow who had executed five wills consistently leaving the bulk of her residuary estate to charities but then, in the sixth will, left the bulk of her estate to a trust for the benefit of a niece who lived across the country and only recently "parachuted" into her life. In that case, scrivener of the sixth will was different from the scrivener of the prior five wills and had been procured by the niece when the long-time estate planning lawyer refused to follow her instructions without first meeting alone with the client: Flatow Estate, 5 Fiduc. Rep. 3rd 69 (Dela. 2015).

In both cases, the local County Office of Services for the Aging, which had received confidential reports of financial abuse, launched an investigation that proved the reports were justified. In the first case, the agent, a manipulative son, had tried to hinder the investigation and move his mother out of Pennsylvania. In a subsequent proceeding, he was barred from contacting his mother and held in contempt (see Matter of Mazza, 3 Fiduc. Rep 3rd 427). In the second case, in which the long-term estate planning lawyer filed the report, the investigator suggested the client meet personally with that lawyer, the result of which was a seventh will that was similar to the five prior wills he had drafted. Upon the client's death, the niece contested the seventh will alleging the long-time estate planning lawyer had used the county office as his agent to unduly influence the decedent. The niece lost.

In summary, when we estate planning lawyers have reason to believe our aged client is the subject of financial abuse, we should consider contacting the local County Office of Services for the Aging, or its equivalent. The contact under such circumstances is sanctioned by the Rules of Professional Conduct and may well be the best solution.

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
19th Floor
Philadelphia, PA 19103

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

In re Yevette B. Matthews, an Incapacitated Person, 152 M.C.L.R. 105 (O.C. Mont. 2015)

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

Although the duty of a plenary guardian of an incapacitated person is simple – to assert the rights and best interests of the incapacitated person – in practice it can be anything but. This is especially so where the incapacitated person refuses medical or psychiatric treatment authorized by the guardian. The Montgomery County Orphans' Court recently addressed such a situation, analyzing the authority of a guardian to authorize treatment over the objections of the incapacitated person, as well as the limits – both legal and practical – of such authority.

In *In re Yevette B. Matthews, an Incapacitated Person,* Ms. Matthews was adjudicated a totally incapacitated person, possibly resulting from deprivation of oxygen to her brain following heart surgery. Ms. Matthews suffered from a host of medical issues, the main concern being congestive heart failure, which required specialized medical attention and equipment, as well as a host of life-sustaining medication, including immune-suppressants and blood thinners. Ms. Matthews also suffered from "a psychological disorder that has expressed itself in psychotic behavior with delusions[.]" *Id.* at 107. Although Ms. Matthews's guardian authorized certain medical and psychiatric treatment, Ms. Matthews often attempted to reject those treatments. Ms. Matthews's guardian sought the right to make full medical decisions, while her care facility believed she still had the autonomy to refuse medical treatment. Noting that the guardian is "currently in an untenable position[,]" the Court conducted a review hearing.

The Court initially noted that it is the duty of the guardian of the person to assert the rights and best interests of the incapacitated person pursuant to 20 Pa. C.S. §5521. In fulfilling such duty, "[e]xpressed wishes and preferences of the incapacitated person shall be respected to the greatest possible extent." 20 Pa. C.S. § 5521. The Court noted, however, that "[u]ltimately, the Guardian has the duty and authority to act on behalf of the incapacitated person and in her best interests, including overruling the incapacitated person's expressed wishes." *Matthews,* 152 M.L.C.R. at 109 (emphasis added).

The Court also cited the federal regulations for long-term care facilities, stating that although CFR § 483.10(b)(4) states that a resident has a right to refuse treatment, CFR § 483.10(a)(3) also provides that in the case of a resident who is adjudicated an incapacitated person, "all of the rights described in the regulations are to be exercised on behalf of the resident by the Guardian." *Matthews*, 152 M.L.C.R. at 109 (citing CFR § 483.10(a)(3)).

The Court noted that there are limits to a guardian's authority, however. For example, pursuant to 20 Pa. C.S. § 5521(f)(1), the guardian does not have authority to admit an incapacitated person to an in-patient psychiatric facility or state center for the mentally retarded. However, the guardian can seek outpatient psychiatric treatment (although in the instant case Ms. Matthews rejected that treatment).

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

continued on page 24

CASE SUMMARY, CONTINUED

Accordingly, the Court noted that there is a "gap in services available to incapacitated persons, who may not be a clear and present danger to themselves, and who are either unable or unwilling to consent to receive inpatient psychiatric treatment. As a result of this statutory limitation, many patients who are merely unable to consent to inpatient psychiatric treatment, but who are not a danger to themselves, go without adequate psychiatric treatment." *Matthews,* 152 M.L.C.R. at 110.

An additional limitation to the guardian's authority is in the case of withholding life-sustaining treatment: 20 Pa. C.S. § 5462(i)(1) provides that "[r]egardless of the principal's mental or physical capacity, a principal may countermand a health care decision made by the principal's health care representative that would withhold or withdraw life-sustaining treatment[.]" However, here the Court noted that the guardian was consenting to life-sustaining medical treatment, and Ms. Matthews was rejecting it; accordingly, Ms. Matthews's "attempts to countermand the consent of her Court-appointed Guardian of the Person are without legal effect." *Matthews,* 152 M.L.C.R. at 111.

The Court stated that, while Ms. Matthews was "strong-willed and articulate, and able to express her wishes vehemently regarding medical treatment, . . . her expressions do not reflect a rational appreciation of her situation." *Id.* at 110. Accordingly, the provisions of 20 Pa. C.S. § 5521(a) requiring the guardian to respect the wishes of the incapacitated person to the greatest possible extent "are of no relevance here where Ms. Matthews is unable to 'understand the situation.'" *Matthews,* 152 M.L.C.R. at 110.

Accordingly, the Court concluded that where "the medical staff and nursing care facility have received the express consent of the Guardian of the Person for medical treatment or the administration of medications, there is no need to obtain the 'informed consent' of Ms. Matthews, whose delusions prevent her from rationally evaluating her situation and expressing informed consent."[3] *Id.* at 111. However, the Court recognized that Ms. Matthews was "articulate and strong-willed, even though irrational," which presented a difficult situation when she refused medical care even though the guardian authorized it. *Id.* In such an instance, the Court stated that it was appropriate to "cajole" Ms. Matthews to accept the medication or treatment, or the medication could be administered "surreptitiously" so as not to provoke a response by Ms. Matthews. *Id*. The Court noted that it had not yet become necessary to consider whether Ms. Matthews could be forced to take certain medications, although "there may well be circumstances where the life or safety of an incapacitated person or others depends upon it, in which a guardian may consent to forcible medication or hospitalization of an incapacitated person." *Id.* However, it was not "reasonable to expect the Guardian of her person to compel her to participate in psychiatric care."

3 In one instance, EMT professionals refused to transport Ms. Matthews to the hospital on the basis that it would be "kidnapping" because Ms. Matthews refused to be transported, notwithstanding the guardian's authorization to do so. *Id.* at 112. The Court called this "utter nonsense." *Id*.