MY INVOLVEMENT IN THE PROBATE AND TRUST LAW SECTION BEGAN MANY YEARS AGO WITH THREE SIMPLE WORDS: “COME WITH ME.” I WAS A NEWLY MINTED ATTORNEY AND HAD BEEN PRACTICING LAW FOR ONLY A FEW MONTHS AT BLANK ROME WHEN ONE OF THE SENIOR ASSOCIATES IN MY PRACTICE GROUP SAID THOSE WORDS TO ME ONE TUESDAY AFTERNOON. DECIDING TO INTERPRET THOSE WORDS AS AN INVITATION RATHER THAN A COMMAND, I JOINED MY COLLEAGUE, DANIEL KALINER, AT MY FIRST EDUCATION COMMITTEE MEETING WHICH WAS HOSTED BY THE COMMITTEE’S THEN CHAIR, JUDY STEIN. LITTLE DID I KNOW THEN THAT ONE CASUAL INVITATION TO JOIN A PROBATE AND TRUST LAW SECTION COMMITTEE WOULD SPARK IN ME A LASTING INTEREST, AND THAT I WOULD HAVE THE HONOR OF SERVING AS THE SECTION’S CHAIR ALMOST TWO DECADES LATER.

AT THE RECENT PHILADELPHIA BAR LEADERS RETREAT I ATTENDED, AN INVIGORATING SPIRIT OF ENGAGEMENT AND COMMITMENT TO SERVICE WAS EVIDENT. DURING THE RETREAT, CHANCELLOR DEBORAH R. GROSS COMMUNICATED THAT SHE WILL FOCUS HER TENURE ON PROMOTING THE LEGAL SERVICES COMMUNITY AND ON ENCOURAGING GREATER PARTICIPATION IN PRO BONO REPRESENTATION. I FELT MOTIVATED BY SOME LEADERS AND LIASONS AT THE RETREAT WHO EXPRESSED INTEREST IN PARTNERING WITH THE SECTION TO CARRY OUT THE CHANCELLOR’S PRO BONO INITIATIVE.

OUR MEMBERS HAVE A STRONG TRADITION OF SUPPORTING VARIOUS LEGAL AID NONPROFITS AND PRO BONO ACTIVITIES BY PROVIDING LEGAL REPRESENTATION AND ALSO FINANCIAL CONTRIBUTIONS. THERE ARE NEW OPPORTUNITIES AS WELL.

FOR EXAMPLE, THE ELDER JUSTICE RESOURCE CENTER WAS RECENTLY ESTABLISHED UNDER THE LEADERSHIP OF PRESIDENT JUDGE SHEILA WOODS-SKIPPER. THE CENTER IS LOCATED IN CITY HALL ROOM 278, AND I ENCOURAGE YOU TO VISIT THE NEXT TIME YOU HAVE BUSINESS TO CONDUCT AT CITY HALL. THE GOAL OF THE CENTER IS TO PROVIDE PHILADELPHIA SENIORS WITH DIRECT ASSISTANCE AND REFERRALS SO THAT THOSE INDIVIDUALS CAN NAVIGATE THROUGH THE COURT SYSTEM AND OBTAIN LEGAL SERVICES. OUR MEMBERS’ EXPERTISE IN MATTERS INVOLVING PROBATE, ORPHANS’ COURT ISSUES AND ELDER LAW WILL BE...
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A LOOK BACK WITH THANKS

BY THE HONORABLE MATTHEW D. CARRAFIELLO, ADMINISTRATIVE JUDGE | ORPHANS’ COURT DIVISION, COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

Here we are, taking on challenges of a new year with hardly a chance to even look back on the accomplishments of 2016. For the Orphans’ Court Bench and the Probate and Trust Section Bar, we deserve a few moments to reflect on the accomplishments that have been brought by our joint diligence and hard work.

What a phenomenal effort was made to gear up for the effective date of our new Orphans’ Court rules. These rules essentially changed this section’s practice, and yet with diligence and preparation, hardly a ripple on the Sea of O.C. Litigation was felt.

The amazement comes from the fact that we not only survived the enactment of substantially different state rules, and the local rules which we all were dependent upon were discarded, only to be reenacted as shown to be necessary upon submission to and approval by the state procedural rules committee. Without the Herculean effort of this section and the legal staff of Orphans’ Court, there would be no local Orphans’ Court rules today.

As we begin 2017, we may bask in the satisfaction of a magnificent interaction between Bench and Bar, and the marvelous results it achieved. But we must also anticipate the need for the same synergistic joint effort for the re-crafting of guardianship rules and forms, the eventual creation and implementation of the statewide Orphans’ Court Data Management System, OCCMS and a Guardian Monitoring System.

With your cooperation, guidance and assistance, these challenges shall also meet with resounding success.

Let me express to you my good fortune and satisfaction to preside over the lawyers of the finest section of our Bar Association.

REPORT OF THE CHAIR, CONTINUED

valuable to the individuals served by the Center. The Center will need volunteer attorneys on a limited basis. Stay tuned for more information about how to get involved.

I look forward to working with you to make this a productive year. My suggestion to every member of our Section is not only to be an active participant in our Committees and pro bono efforts, but also to invite a colleague or friend to join along. You may not realize that the simple gesture of extending an invitation may have a career-long positive impact.


JOB POSTING

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Retirement accounts comprise a large portion of the total assets of many estate planning clients. Several factors have contributed to this result: since the enactment of the Employee Retirement Income Security Act (“ERISA”) in 1974, there has been a massive increase in the assets held in retirement vehicles, due to better opportunities for saving and more comprehensive rules ensuring retirement asset safety. At the same time, there has been a shift away from defined benefit pension plans, which provide a monthly benefit, toward defined contribution plans, in which there is an account balance on which the participant may draw during retirement. This change has had two consequences: first, the market risk for the growth or decline in the value of assets has been shifted from the employer to the employee. In defined benefit pension plans, the employer is responsible for ensuring that there are adequate funds to pay the benefits promised. By contrast, in defined contribution plans, the employee gets the benefit of increases in the value of assets and the detriment of declines in their value. Second, employees who are successful in their investments may accumulate large retirement accounts that may become subject to the claims of creditors, or might be at risk in other ways, such as through poor investment or withdrawal planning.

It is important to understand the difference between (1) 401(k) plans and other types of qualified plans and (2) plans that are not considered qualified, such as individual retirement accounts (“IRAs”). A qualified retirement plan satisfies the requirements of Section 401(a) of the Internal Revenue Code of 1986 (“Code”). Plans such as 401(k) plans, profit-sharing plans, money purchase pension plans and defined benefit pension plans fit into this category. IRAs of various types are authorized by Section 408 of the Code, which was added to the law as part of ERISA, and they have far fewer statutory and regulatory requirements. This difference is important when determining the protection available for retirement accounts. Qualified plans are protected from the claims of creditors by Section 401(a)(13) of the Code: a qualified plan must provide that benefits may not be assigned or alienated. This protects those benefits from the claims of creditors (or profligate plan participants) until they have been paid out. There are limited exceptions to this rule, for qualified domestic relations orders that divide assets in a divorce and for orders relating to wrongdoing that involves the administration of the plan. To the surprise of some sponsors of qualified plans, wrongdoing against the employer, as contrasted with the plan, does not permit an offset to plan benefits.

By contrast, there is no protection in the federal pension law for IRAs. This can be a problem for people who retire, because, in many cases, they will roll over their qualified employer plan accounts to IRAs, and thus lose the federal statutory protection from creditors. Some states have attempted through legislation to provide relief for IRA owners. In Pennsylvania, the exemption of particular property from the claims of judgment creditors extends to retirement funds and accounts. 42 Pa. C.S.A. § 8124(b). The specific exemption applies to pensions for state employees and public school teachers; pensions granted by private employers under a plan that prohibits the assignment of benefits; and retirement plans of self-employed persons (though with a complicated limitation). An additional exemption in Section 8124(b)(1)(ix) makes specific reference to a retirement or annuity fund provided for in Code Sections 401(a) [qualified plans], 403(a) and (b) [annuity plans]; 408 [IRAs]; 408A [Roth IRAs]; 409 [employee stock ownership plan] or 530...
RETIREMENT ACCOUNTS AND PROTECTION FROM CREDITORS, CONTINUED

[education savings accounts], plus the appreciation and income in such funds, benefits payable from them, and transfers and rollovers between such funds. However, this blanket exemption does not extend to amounts contributed by the debtor within the year before the debtor filed for bankruptcy; but that exclusion does not extend to amounts rolled over from another exempt fund. Also excluded are amounts contributed by the debtor to the fund in excess of $15,000 within a one year period, but once again excluding rollovers. Finally, fraudulent conveyances are not protected. The statute is a confusing one, with overlaying provisions added at different times and uncertainty as to certain aspects of its coverage. For example, does it protect retirement funds, such as IRAs, that are inherited from their original owner?

The Pennsylvania statute is in many situations a useful bar to claims of creditors, but it has a shorter history than the federal statute and has had fewer decisions issued to interpret it. It is clearly designed to protect Pennsylvania residents who have assets in IRAs, among other types of plans, no matter where those assets are custodied (although most IRA assets will simply be ledger entries). But review of the underlying documents that are signed when an IRA is established often reveals that the law of another state is the governing law for the documents. This leads into the complex area of conflicts of laws, which might nevertheless result in the Pennsylvania law applying to the IRA assets. (But this is an argument that has not yet been observed in decided cases.) A more difficult situation arises when a Pennsylvania resident who has established an IRA moves to another state. It is unlikely that Pennsylvania law will protect a former Pennsylvania resident now living in Arizona or Florida. All but five states have some protection for IRAs, but the extent of that protection depends on the wording of each statute and the decisions of state and federal courts reviewing them. And although the extent of the protection provided by Code Section 401(a)(13) is dependent on the many decisions interpreting that law rendered by federal district and appeals courts and the U.S. Supreme Court since ERISA’s enactment in 1974, leading to some variation in the level of protection, there is clearly a stronger base of protections for qualified plans.

Another aspect of the protection from creditors afforded to owners of retirement plan accounts and IRAs is provided in the federal Bankruptcy Code (Title 11 of the U.S. Code). In Pennsylvania (unlike many other states), a debtor in bankruptcy may choose to take advantage of exemptions provided for in federal bankruptcy law or the exemptions under state law. Qualified plan assets enjoy unlimited exemption under the Bankruptcy Code, but protection for IRAs has been more of a problem. An exemption was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which protects up to $1,000,000 in IRAs. (That limit is subject to increases every three years, and is now $1,283,025.) The limit does not apply to qualified plans or specialized IRAs such as SEP-IRAs, nor to rollovers to IRAs from qualified plans.

But there is a limit to the protection provided by the Bankruptcy Code. In Clark v. Rameker, 82 USLW 4481, 134 S. Ct. 2242, the U.S. Supreme Court determined that an inherited IRA was not entitled to the exemption. The reason, basically, was that while the IRA was a retirement account while owned by the individual who set it up, it was not for the person who inherited it at the owner’s death. Therefore, when the inheritor declared bankruptcy, she was not entitled to the Bankruptcy Code exemption.

This decision might warrant some planning regarding IRA beneficiaries. If a potential beneficiary of an IRA has financial issues, it might be appropriate to name a trust for that person as the IRA beneficiary, rather

continued on page 6
than the person outright. But this requires some further inquiries by the estate planner than are customarily made, seeking information not only about the persons doing the planning, but their descendants as well. And not necessarily just their current status, but what might happen in their financial futures – a very difficult inquiry.

The gold standard for asset protection of retirement accounts is that applicable to qualified plan assets. For IRAs, reliance upon state law protections and bankruptcy law exemptions will be necessary but must be carefully analyzed. The careful planner will pay close attention to the disposition of retirement assets and other employee benefit payments, and will advise clients on the most effective asset protection techniques after considering the overall family circumstances and the interplay of applicable state statutes, the federal Bankruptcy Code and the Internal Revenue Code.

**VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES**

*A Comparison of the Statutes in New Jersey and Pennsylvania*

BY DAPHNE GOLDMAN, ESQUIRE | PNC BANK, NATIONAL ASSOCIATION

During the administration of a trust, it is sometimes necessary to seek an agreement of the parties or a determination by the court as to an issue relating to the administration. Such issues may relate to almost anything that might arise during the course of administration, including, but not limited to, the interpretation of the trust instrument; a modification of the trust in a manner permitted under applicable statute; the appointment of a successor trustee; the waiver of the trustee’s account; approval of a specific transaction or course of action; or an agreement as to the trustee’s compensation.

Unless everyone who has an interest in the trust is bound by either the court’s decision or a non-judicial settlement agreement as to the issue at hand, the court’s determination or the agreement will not be final as to the people who are not bound. In other words, anyone not bound by the decision or agreement can reopen the issue. This means that without the ability to bind all current and future parties in interest there would be no finality as to the issue at hand.

In order to ensure that it is possible to obtain finality, various doctrines under which one person may represent another have arisen. The legal ability of a known beneficiary of a trust to represent and legally bind a beneficiary who is unknown or who does not have legal capacity is called virtual representation.

Whether – and to what extent – one person may represent another person with regard to his or her interest in a trust is a matter of state law and varies greatly from state to state. Prior to the promulgation of the Uniform Trust Code and its enactment in various states, many states followed certain limited rules for virtual representation. These traditional concepts included the following:

- Trustees represent trust beneficiaries;
- Executors represent decedents’ estates; and
- Guardians represent wards (minors or incapacitated adults)

1 © 2017 All Rights Reserved. The views expressed in this article are those of Daphne Goldman individually and should not be construed to represent the position of PNC Bank, National Association or any of its affiliates.
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

Often states had court rules or statutes which provided for additional representation in judicial proceedings. These rules often permitted:

- A parent to represent minor children for whom a guardian had not been appointed, so long as there was no conflict of interest or adversity between them;

- A person with an interest in the trust to represent a minor, or otherwise legally incapacitated persons, unborn individuals and unascertained persons by another beneficiary of the trust, so long as their interests are substantially identical as to the particular question or dispute. UTC §304. In addition to codifying these traditional concepts of virtual representation, the UTC provides that a person holding a general testamentary power of appointment may represent permissible appointees and takers in default whose interests are subject to the power of appointment. UTC § 302. In all instances under the UTC, the representation is permitted only if there is no conflict between the representative and the person being represented.

New Jersey Uniform Trust Code ("NJ UTC") is almost identical to the UTC. See NJSA §§ 3B:31-13 - 31:31-17. The most significant change is that NJ added a second paragraph to the Power of Appointment provision so that it reads:

3B:31-14. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT.

a. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

b. A holder of a general power of appointment in favor of the holder or the holder’s estate shall not be deemed to have a conflict with permissible appointees and takers in default.

Thus, in New Jersey, unlike in states which adopted the UTC without change, the holder of a general power of appointment in favor of the holder or the holder’s estate may represent and bind everyone with an interest in the trust, without the necessity of an analysis as to whether or not a conflict of interest exists.

Pennsylvania’s virtual representation statute is part of the Pennsylvania Uniform Trust Act ("PA UTA"). It
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

differs from the UTC and the NJ UTC in several significant ways:

- In NJ, a parent may represent a minor or unborn child if a conservator or guardian has not been appointed. NJSA § 38:31-15(f).

In PA, a person may represent that person’s minor and unborn descendants. 20 PA.C.S. § 7723(9).

- In NJ, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power and the holder shall not be deemed to have a conflict. NJSA § 38:31-14.

In PA, whether or not there is a conflict of interest described in this section, the sole holder or all coholders of a presently exercisable or testamentary power of appointment represent all potential appointees and all takers in default of exercise of the power of appointment if the holder may appoint to:

(i) the holder’s estate, the holder’s creditors or the creditors of the holder’s estate; or

(ii) anyone other than the holder’s estate, the holder’s creditors and the creditors of the holder’s estate. 20 PA.C.S. § 7723(7).

- In PA the holder of a limited power of appointment may represent and bind all potential appointees as long as there is no conflict of interest. 20 PA.C.S. § 7723(8).

- PA provides for class representation under a variety of circumstances. 20 PA.C.S. §§ 7723(3), (4) & (5).

- In PA, notice must be given to a proposed representative and he or she is given 30 days to decline to act as a representative. 20 PA.C.S. §§ 7725 & 7726.

As discussed above, the general rule is that a representative may not represent another if the representative has a conflict of interest with the person being represented as to the matter at hand. A conflict exists in any situation in which the potential representative may benefit to the potential detriment of the person being represented. Some examples of circumstances in which a conflict of interest may exist are when the representative is deciding whether to consent or object to any of the following courses of action:

- Exercise of discretion to distribute income to an individual or group of individuals

- Exercise of discretion to invade principal for the benefit of an individual or group of individuals

- Exercise of discretion to terminate a trust and distribute the assets to an individual or group of individuals

- Exercise of discretion to change the investment allocation to favor one class of beneficiaries over another class of beneficiaries

- The approval of an accounting or trust administration in which any of the foregoing exercises of discretion took place

- Appointment of a trustee who has a reason to favor the potential representative over the person being represented

The following hypotheticals illustrate the application of the New
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

Jersey and Pennsylvania virtual representation statutes.

Facts:

George and Judy are married. George and Judy created a trust for the benefit of their issue. Trust income is payable to their issue, per stirpes. They have 2 children, Susan and John. Susan is 45 years old. John is 43 years old. Susan has 2 children, Debby and Sandy. Debby is 17 and Sandy is 16 years old. John has 3 children, Bill, Michael and Nancy. Bill is 12, Michael is 10 and Nancy is 8 years old. The trust terminates at the death of the survivor of Susan and John and is distributable to George and Judy’s then-living issue, per stirpes. The trustees have the discretion to invade principal for Susan, John and their issue.

Hypothetical 1:

A successor trustee is being appointed. The initial trustee has asked the successor trustee to waive an accounting and agree to release and indemnify it for claims relating to its administration of the trust. Who may represent the minor grandchildren, unborn issue and more remote contingent remainder beneficiaries (who would take in the event of a failure of issue) to sign a release of the successor trustee for waiving an accounting, releasing and agreeing to indemnify the initial trustee?

Both the NJ UTC and the PA UTA permit parents to represent minor children. Therefore, in both states, Susan and John may represent their minor children, so long as nothing in the administration unduly favors the current income beneficiaries over future income beneficiaries or remainder beneficiaries. See NJSA § 3B:31-15(f) and 20 Pa.C.S. § 7723(9).

In addition, both states permit an adult beneficiary to represent minor, unborn or unascertained beneficiaries, if their interests are similar or substantially similar and there is no conflict of interest or adversity between them. Therefore, Susan and John may represent all of the minor, unborn and unascertained future income beneficiaries and remainder beneficiaries of the trust, so long as nothing in the prior administration unduly favors the current income beneficiaries over future income beneficiaries or remainder beneficiaries. See NJSA § 3B:31-16 and 20 Pa.C.S. § 7723(6).

If there is a conflict of interest in the account, Susan and John may not represent anyone else. A guardian ad litem would need to be appointed by the court. Potential conflicts would include the exercise of discretion by the trustee (1) to distribute income to Susan and John, (2) to invade principal for the benefit of Susan and John, or (3) to change the investment allocation to favor income beneficiaries (Susan and John) over the remainder beneficiaries.

continued on page 10
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

Hypothetical 2:

The basic facts are the same as Hypothetical 1, except Debby is 20 years old, instead of 17. At this time, the current trustee wishes to settle its administration of the trust to date. Who may represent the minor grandchildren, unborn issue and more remote contingent remainder beneficiaries (who would take in the event of a failure of issue) as part of an accounting action with the court or to sign an Interim Release and Indemnification Agreement?

Once again, Susan and John may represent their minor children, so long as nothing in the administration unduly favors the current income beneficiaries over future income beneficiaries or remainder beneficiaries. See NJ § 38:31-15(f) and 20 Pa.C.S. § 7723(9). Because a question could be raised in the future as to whether something in the accounting created a conflict between Susan and John and the class of remainder beneficiaries, it is better to treat Debby as the representative of the other parties in interest.

In addition to the general provision and the provision for the representation of minor children discussed above, the PA UTA includes provisions which permit current or presumptive adult members of a class of beneficiaries to act as class representatives. 20 Pa.C.S. § 7723(4) and (5) provide for the representation of the entire class of remainder beneficiaries by the current adult presumptive remainder beneficiaries as follows:

(4) Where property or an interest in property will pass to a class of persons upon the occurrence of a future event, the living sui juris class members represent the class members who are minors, unborn, unknown or unascertained. The class members entitled to represent other class members or potential class members are the persons who would take the property or interest in property if the future event had occurred immediately before the commencement of the judicial proceeding relating to the property or interest in property or immediately before the effective date of the nonjudicial resolution of the matter.

(5) Where property or an interest in property will pass to a person, class of persons or both upon the occurrence of a future event, but the property or interest in property will pass to another person, class of persons or both upon the occurrence of an additional future event, the person, class of persons or both who would take upon the occurrence of the first event represents...
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

the person, class of persons or both who would take upon the occurrence of the additional event, provided their interests are identical or substantially similar for purposes of the particular trust matter. If a class of persons would take upon the occurrence of the first event, paragraph (4) applies to representation between or among the class.

20 Pa.C.S. § 7723(4) and (5).

In this instance, pursuant to §7723(4), Debby may represent all members of the class of potential income beneficiaries at the death of Susan, if she dies prior to John, as well as the members of the class of contingent remainder beneficiaries. In addition, under § 7723(6), the general provision, Debby may represent the members of the class of potential income beneficiaries at the death of John.

In NJ, § 3B:31-16 would permit Debby to represent all of the minor, unborn or unascertained beneficiaries in the trust, since their interests are similar or substantially similar and there is no conflict of interest or adversity between them.

Hypothetical 3:

Five years have passed. Both Debby and Sandy are adults. All 3 of John’s children are still minors. Debby has requested an invasion of principal in order to buy a house. Susan and John support the request. The Trustee has decided to make the distribution, if a consent, release and indemnification document is signed by the trust beneficiaries.

Who may represent the minor grandchildren, unborn issue and more remote contingent remainder beneficiaries (who would take in the event of a failure of issue) in executing the consent?

Virtual Representation:

Hypothetical 3

Because Debby will be receiving the distribution from the trust, there is a conflict of interest between her and the other contingent remainder beneficiaries (since more assets would remain in trust for their potential benefit if the distribution is not made). Due to the conflict of interest, Debby cannot represent the minor grandchildren, unborn issue and more remote contingent remainder beneficiaries.

Because Sandy’s interest in the trust is essentially identical to that held by all remainder beneficiaries (other than Debby) and she has no conflict of interest with them, she is the best person to represent their interests.

continued on page 12
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

Hypothetical 4:

Twenty-five years have passed. Susan has died and the beneficiaries have asked that the trust be divided along family lines into 2 new trusts, because their needs are different. The new trusts would remain in existence until John’s death, at which point the assets of the trust for Susan’s issue would be distributed to her then living issue, per stirpes, and the assets in the trust for the benefit of John and his issue would be distributed to John’s issue per stirpes. In the event none of Susan’s issue are alive, the assets of her trust would be distributed to John’s issue and vice versa.

The Trustee would like to have its administration prior to the division closed through either a Release and Indemnification Agreement being executed or the filing of an account of its administration. During the preceding 25 years various distributions of principal were made to John, Susan, Debby and Michael. All of the grandchildren are now adults and have children of their own.

Who may represent the minor great-grandchildren, unborn issue and more remote contingent remainder beneficiaries (who would take in the event of a failure of issue) either in executing the Release and Indemnification Agreement or in the accounting action?

Because John, Debby and Michael received principal distributions from the trust, there is a conflict of interest between them and the other beneficiaries. Due to the conflicts of interest, none of them can represent the minor great-grandchildren, unborn issue and more remote contingent remainder beneficiaries.

The analysis under the NJ UTC is as follows:

As Cindy’s parent, Nancy may represent Cindy and any unborn children of hers under NJSA § 3B-31-15(f). Nancy may not, however, represent her unborn issue generally under this code section.

In addition, because Sandy, Bill, Nancy, Charlie, Bob, Suzy and Joyce are all contingent remainder beneficiaries, all of them have interests which are either identical or substantially similar to those held by the minors, unborn issue and more remote contingent remainder beneficiaries. Since there are no conflicts of interest between them and the beneficiaries they would be representing, they may all act as virtual representatives under NJSA § 3B:31-16. Because Joyce’s interest is identical to Max’s interest and Nancy’s interest is substantially similar to Cindy’s interest, they may be the best options for representing Max, Cindy and other potential beneficiaries whose interests flow from John. Sandy, Charlie, Bob and Suzy all have interests which are substantially identical to those

continued on page 13
VIRTUAL REPRESENTATION OF TRUST BENEFICIARIES, CONTINUED

of unborn issue in Susan’s family line and so may represent those potential remainder beneficiaries.

Under the PA UTC, Sandy, Bill and Nancy may all act as class representatives as discussed more fully above.

Hypothetical 5:

Five more years have passed. Charlie, Bob and Suzy have children of their own. Debby and Sandy have requested that the trust for the benefit of Susan’s issue be terminated and the trust assets distributed to them. Joyce (John’s granddaughter) is estranged from the family. Although they know where she lives, no one in the family has spoken to her for 2 years. While Joyce has a contingent remainder interest in the trust, Charlie, Bob, Suzy, their children and Michael would all need to have predeceased Joyce for her to receive a distribution from the trust for Susan’s issue at John’s death.

Can anyone virtually represent Joyce?

Joyce is an adult member of the class of contingent beneficiaries. The only general provision in the NJ UTC provides:

3B:31-16. Representation by Person Having Substantially Identical Interest.

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

Because Joyce’s identity and location are known or reasonably ascertainable, no one else may virtually represent Joyce and she will need to receive notice of the termination and be given the opportunity to object.

The opposite is the result under the PA UTA. Because the PA UTA’s class representation sections permit certain members of a class to represent other members of the class EVEN IF the people being represented are competent adults, Joyce may be virtually represented and she need not receive notice of the termination.

continued on page 14
As the hypotheticals illustrate, the virtual representation provisions of the NJ UTC and the PA UTA are very useful tools. When coupled with the non-judicial settlement provisions of these statutes, finality as to issues arising in the administration now may be obtained without judicial proceedings. In addition, even when judicial proceedings are required, it may no longer be necessary to give notice to all parties in interest or to have a guardian ad litem appointed.

For your convenience, the NJ UTC and PA UTA virtual representation provisions follow this article.
NEW JERSEY UTC AND PENNSYLVANIA UTA VIRTUAL REPRESENTATION PROVISIONS


a. Notice to a person who may represent and bind another person under this article has the same effect as if notice were given directly to the other person.

b. The consent of a person who may represent and bind another person under this article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

c. Except as otherwise provided in N.J.S.3B:31-27 and N.J.S.3B:31-43, a person who under this article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor’s behalf.

d. A settlor may not represent and bind a beneficiary under this article with respect to the termination or modification of a trust under subsection a. of N.J.S.3B:31-27.


a. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

b. A holder of a general power of appointment in favor of the holder or holder’s estate shall not be deemed to have a conflict with permissible appointees and takers in default.


To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

a. a guardian of the property may represent and bind the estate that the guardian of the property controls;

b. a guardian of the person may represent and bind the ward if no guardian of the property has been appointed;

c. an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

d. a trustee may represent and bind the beneficiaries of the trust;

e. a personal representative of a decedent’s estate may represent and bind persons interested in the estate; and

continued on page 16
NEW JERSEY UTC AND PENNSYLVANIA UTA VIRTUAL REPRESENTATION PROVISIONS

f. a parent may represent and bind the parent’s minor or unborn child if a guardian for the child has not been appointed.

3B:31-16. Representation by Person Having Substantially Identical Interest.

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

3B:31-17. Appointment of Representative.

a. If the court determines that an interest is not represented under this article or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem or other representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A guardian ad litem or other representative may be appointed to represent several persons or interests.

b. A guardian ad litem or other representative may act on behalf of the individual or person represented with respect to any matter arising under this act, whether or not a judicial proceeding concerning the trust is pending.

c. A guardian ad litem or other representative may consider the benefit accruing to the living members of the individual’s family.

Pennsylvania Uniform Trust Act Provisions:

§ 7721. Scope; definition of trust matter

(a) Scope.--This subchapter shall apply to this entire chapter unless the context clearly specifies the contrary.

(b) Definition.--As used in this subchapter, the term “trust matter” includes a judicial proceeding and a nonjudicial settlement, agreement or act pertaining to any matter listed in section 7710.1(d) (relating to nonjudicial settlement agreements - UTC 111).

§ 7722. Representation of parties in interest in general

(a) Judicial proceeding.--In a judicial proceeding involving a trust matter, an order or decree of the court that binds the representative or representatives is binding upon a person, class of persons or both represented in accordance with section 7723 (relating to representatives and persons represented) if the trustee notifies the representatives in writing whom they represent, they do not decline the representation as provided in section 7725 (relating to notice of representation) and they act in good faith.
NEW JERSEY UTC AND PENNSYLVANIA UTA
VIRTUAL REPRESENTATION PROVISIONS

(b) Nonjudicial resolution.--In a nonjudicial resolution of a trust matter, notice to, the consent or approval of or the waiver or release by the representative or representatives is binding upon a person, class of persons or both represented in accordance with section 7723 if the trustee notifies the representatives in writing whom they represent, they do not decline the representation as provided in section 7725 and they act in good faith.

(c) Permissible consideration.--In making decisions, a representative may consider general benefit accruing to the living members of the family of the person represented.

§ 7723. Representatives and persons represented

The following rules except as set forth in paragraph (7) apply to the extent there is no conflict of interest with respect to the matter at issue between the representative and the person or persons represented that might affect the impartiality of the representative and, if two or more persons are being represented, to the extent there is no conflict of interest with respect to the matter at issue between or among the persons represented that might affect the impartiality of the representative:

(1) A plenary guardian represents the person whose estate the guardian supervises, and a limited guardian represents the person whose estate the guardian supervises within the scope of authority prescribed by the court order that defines the guardian’s authority.

(2) An agent under a general power of attorney represents the agent’s principal, and an agent under a limited power of attorney represents the principal within the scope of the agent’s authority under the power of attorney.

(3) Where property or an interest in property is vested in a class of persons, the living sui juris class members represent the class members who are minors, unborn, unknown or unascertained.

(4) Where property or an interest in property will pass to a class of persons upon the occurrence of a future event, the living sui juris class members represent the class members who are minors, unborn, unknown or unascertained. The class members entitled to represent other class members or potential class members are the persons who would take the property or interest in property if the future event had occurred immediately before the commencement of the judicial proceeding relating to the property or interest in property or immediately before the effective date of the nonjudicial resolution of the matter.

(5) Where property or an interest in property will pass to a person, class of persons or both upon the occurrence of a future event, but the property or interest in property will pass to another person, class of persons or both upon the occurrence of an additional future event, the person, class of persons or both who would take upon the occurrence of the first event represents the person, class of persons or both who would take upon the occurrence of the additional event, provided their interests are identical or substantially similar for purposes of the particular trust matter. If a class of persons would take upon the occurrence of the first event, paragraph (4) applies to representation between or among the class.
NEW JERSEY UTC AND PENNSYLVANIA UTA VIRTUAL REPRESENTATION PROVISIONS

(6) A person represents all minors or unborn individuals and persons whose identity or location is unknown and not reasonably ascertainable, to the extent such persons are not otherwise represented, if the interests of the person and the person represented are substantially identical with respect to the particular question or dispute involved.

(7) Whether or not there is a conflict of interest described in this section, the sole holder or all coholders of a presently exercisable or testamentary power of appointment represent all potential appointees and all takers in default of exercise of the power of appointment if the holder may appoint to:

(i) the holder’s estate, the holder’s creditors or the creditors of the holder’s estate; or

(ii) anyone other than the holder’s estate, the holder’s creditors and the creditors of the holder’s estate.

(8) The sole holder or all coholders of a presently exercisable or testamentary power of appointment not described in paragraph (7) represent all potential appointees and all takers in default of exercise of the power who are also potential appointees.

(9) Except as provided in paragraph (1), a person represents the person’s minor and unborn descendants.

§ 7724. Appointment of representative

Notwithstanding any other provision of this subchapter, if in any judicial proceeding involving a trust matter the court determines that the representation provided by section 7723 (relating to representatives and persons represented) is or might be inadequate, the court may appoint a guardian ad litem or trustee ad litem to represent the inadequately represented person, class of persons or both.

§ 7725. Notice of representation

A person representing another must be given written notice by the trustee that the person is representing the other person. A person to whom the notice is given is presumed to accept the representation unless the person declines the representation in a writing delivered to the trustee no later than 30 days after receipt of the notice.

§ 7726. Representation ineffective if person objects

Notwithstanding the provisions of this subchapter, a person may not represent another who is sui juris and files a written objection to representation with the trustee.
FEDERAL ESTATE TAX

Estate of Beyer, T.C. Memo. 2016-183 (September 29, 2016)

The Tax Court ruled that the full value of assets transferred by the deceased, Edward Beyer, former CFO of Abbott Laboratories, to a family limited partnership was includible in his taxable estate because they did not qualify for the exceptions to IRC § 2036(a)(1).

The Decedent had transferred approximately 800,000 shares of Abbott Laboratories stock, which were held in Decedent’s revocable trust, of which Decedent and two nephews were co-trustees, to a family limited partnership (the “FLP”) in 2003. The Decedent had no descendants of his own. The general partnership interest was held in a management trust, of which the two nephews were the co-trustees. Decedent retained about $4 million in assets outside of the FLP for his living expenses, but these assets were clearly not enough to also satisfy the Decedent’s expected federal estate tax liability.

At the end of 2005, one year after the funding of the FLP, an irrevocable trust was established for the benefit of Decedent’s nephews and niece. The living trust sold its 99% limited partnership interest to the irrevocable trust in exchange for a promissory note for almost $21 million. The trustees of the revocable trust paid $659,000 in gift tax owed by the Decedent arising from unrelated transactions, then transferred the same amount from the FLP account to the revocable trust. After the Decedent’s death in 2007, the FLP sold shares of the stock and transferred $250,000 to the revocable trust. Funds for some of the administration fees of Decedent’s estate, as well as $9.3 million in federal estate tax paid by the Executor of the Estate, also came from the FLP.

The IRS, claiming that under IRC §2036(a) the Estate should include the value of the shares transferred to the FLP, issued a notice of deficiency in the amount of $19 million. The Tax Court rejected the Estate’s argument that the transfer to the FLP was a “bona fide sale for an adequate and full consideration,” arguing that the Estate did not establish that the transfer was “motivated by a legitimate and significant non-tax purpose.” The payments made by the FLP on behalf of the Decedent demonstrated that the Decedent had retained enjoyment of the assets transferred to the FLP and there was an implied agreement that the FLP assets would be used for the Decedent’s benefit.

The executors of Decedent’s estate set forth two non-tax purposes for the FLP: (1) keeping all of the Abbott Laboratories stock in a single block and (2) allowing for “continuity of management” of Decedent’s assets by the same nephew who managed the FLP assets. The Tax Court rejected both arguments, stating that the FLP did not have legitimate non-tax goals that would require the creation of an FLP, since both goals could have been achieved by keeping the assets in Decedent’s existing revocable trust and naming the nephew as trustee. It also noted that the two goals stated by the executors were not found on the list of twenty-eight goals in the partnership agreement. The Tax Court also held that the bona fide sale exception to IRC §2036(a) was not applicable because the Decedent did not receive adequate and full consideration in exchange for the assets transferred to the FLP because the FLP did not establish capital accounts for each of the partners.

Liability for Unpaid Federal Estate Tax

U.S. v. Paulson, Case No. 15cv2057 AJB (NLS) (S.D. Cal. Sep 6, 2016)

The IRS sought to recover over $10 million in unpaid federal estate tax from Mrs. Pickens, the beneficiary of the Estate of Allen Paulson. As continued on page 20
a result of a settlement action reached among the beneficiaries of the Estate, she had received her distribution from the estate and placed it in her revocable trust twelve years earlier, in 2003. The Estate, pursuant to IRC § 6166, had agreed to pay its federal tax obligations in installments over a fifteen-year period. Mrs. Pickens, who was the third wife of the Decedent, was not involved in the administration of the Estate or of the revocable trust from which the bequests were made, and by the time that the IRS brought its claims, there was no executor acting on behalf of the Estate.

After terminating the installment plan because of non-payment, the IRS brought suit in 2015 against Mrs. Pickens under IRC §§ 2202 and 2203. IRC § 2203 provides that if no executor is then acting, then for tax purposes any person “in actual or constructive possession of any property of the decedent” can be considered the executor and under IRC § 6324(a)(2), which provides that, a “beneficiary” rather than as a “beneficiary.” As trustee, she was liable in her individual capacity for the value of the transferred assets. The Court held that she could not be considered a “beneficiary” under this statute, because the term “beneficiary” had been limited by case law to beneficiaries of insurance policies.

QTIP Election

IRS Revenue Procedure 2016-49 (September 27, 2016, date of publication of advance version)

This Revenue Procedure modifies and supersedes Rev. Proc. 2001-38, 2001-24 I.R.B. Revenue Procedure 2001-38, 2001-24 I.R.B. sets forth the circumstances under which the IRS will treat as null and void a QTIP election to qualify property for the estate tax marital deduction when the QTIP election is unnecessary to reduce the federal estate tax liability to zero. Rev. Proc. 2016-49 excludes estates making a portability election pursuant to IRC § 2010(c) from the provisions of Rev Proc 2001-38. Thus, an estate may now make a QTIP election solely to increase the amount of deceased spousal unused exemption (DSUE) transferred to the surviving spouse.

Rev. Proc. 2016-49 also narrows the circumstances under which a QTIP election may be revoked. Revocation is allowed only if (1) the estate liability was zero whether or not a QTIP election was made; (2) no portability election was made under IRC § 2010(c); and (3) the requirements of Rev. Proc. 2016-49 are otherwise met. When no portability election is made, an unnecessary QTIP election may be revoked under the following circumstances: a) at the request of the executor of the predeceased spouse on a supplemental federal estate tax return; b) on a federal gift tax return filed by the surviving spouse; or c) by the executors of the surviving spouse on his or her federal estate tax return.

Modified Carryover Basis

T.D. 9811 (January 19, 2017)

The IRS has issued amendments to final regulations in order to incorporate the modified carryover basis rules under IRC § 1022 (now repealed) into existing regulations involving the basis of property acquired from a decedent. The amendments ensure that the modified basis rules will continue to be applicable to all property inherited from the estates of decedents dying in 2010 whose spousal unused exemption (DSUE) transferred to the surviving spouse.

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executors chose to make the election to apply the modified basis rules of IRC § 1022, until such property is sold or otherwise disposed of.

These amendments conform to the proposed regulations issued by the IRS in May, 2015, whose intent was to ensure that references to basis in the IRC also include basis under the former IRC § 1022.

Estate Tax Closing Letter

IRS Notice 2017-12 (January 9, 2017)

In the case of federal estate tax returns filed after June 30, 2015, the IRS no longer issues an estate tax closing letter for every return. Before that date, the IRS issued an estate tax closing letter for every return, except for returns filed solely to elect portability under IRC §2010(c) (5)(A) when the portability election was denied. For estate tax returns filed after June 30, 2015, the IRS will only issue an estate tax closing letter upon the request of the authorized representative of the estate.

By filing Form 4506-T, Request for Transcript of Tax Return, the authorized representative of an estate may request an account transcript, providing current account data, instead of an estate tax closing letter. The account transcript, which is free of charge, is a computer-generated report providing current account data.

Requests for account transcripts and estate tax closing letters should be made no earlier than four months after the filing of the estate tax return.

The account transcript contains transaction codes and descriptions of the codes. Transaction code “421” and the explanation “Closed examination of tax return” serves as the functional equivalent of an estate tax closing letter.

An estate tax closing letter sets forth the amount of net estate tax, the state death tax credit or deduction, and the estate’s liability for generation-skipping transfer tax. It also confirms whether the return has been accepted by the IRS as filed or accepted after an adjustment agreed to by the IRS and the estate. But the issuance of an estate tax closing letter does not mean that the IRS is foreclosed from reexamining the estate tax return if there is evidence of fraud, malfeasance, collusion, concealment, misrepresentation of a material fact, substantial error based on an established IRS position, or other circumstances that would indicate that it would be a serious administrative omission if the IRS failed to reopen the case.

NEW JERSEY

New Jersey Estate Tax

P.L. 2016, Ch. 57 (October 14, 2016)

For New Jersey residents dying in calendar year 2017, the exemption amount from New Jersey State estate tax, which was previously $675,000, has been raised to $2 million per person. The estate tax will be completely eliminated for persons dying on or after January 1, 2018.

However, the New Jersey inheritance tax remains intact.
The Pennsylvania Supreme Court recently determined in *Estate of Agnew v. Ross*, __ A.3d __, 2017 WL 262065, No. 76 MAP 2015 (Pa. January 19, 2017) that beneficiaries who are named in an unsigned trust document lack standing to bring legal malpractice claims against the trust settlor’s attorney on grounds that they were intended third-party beneficiaries of the contract for legal services. In doing so, the Supreme Court reversed the Superior Court’s ruling (*Estate of Agnew v. Ross*, 110 A.3d 1020 (Pa. Super. 2015)), which was in favor of the plaintiffs, and reinstated a grant of summary judgment for the defendant attorneys issued by the Court of Common Pleas of Chester County. Four Justices joined Justice Dougherty’s opinion reversing the Superior Court and remanding for reinstatement of the order granting summary judgment to the attorney and dismissing all claims. Chief Justice Saylor joined the Court’s holding and wrote a concurring opinion.

Robert Agnew (“Mr. Agnew”) worked with the same law firm on his estate planning from 2003 until his death in January 2011. The firm originally prepared a new Will and an amendment to a 1994 revocable trust (the “Trust”) for Mr. Agnew. It also prepared various amendments over the years. By 2010, Mr. Agnew’s Will included gifts to family members with the residue going to his Trust. The Trust stated that at Mr. Agnew’s death, substantial gifts were to be paid to each of four colleges for scholarships, with any remaining residue then paid over to three of the colleges.

Mr. Agnew was subsequently diagnosed with cancer. In August 2010, he met with his attorneys to discuss changes to his planning – amending his Will, creating a new trust for a Florida property, and amending the Trust. Mr. Agnew indicated that he wanted to give more to his family and less to charity. At Mr. Agnew’s direction, his niece was to provide the details on the changes to the Trust. On August 21, 2010, his niece informed the attorneys that Mr. Agnew wanted the Trust residuary beneficiaries to be changed to family members, not the three colleges currently named.

The attorneys made all the requested changes, including the changes to the Trust, and sent drafts for Mr. Agnew’s review. At a September 2010 meeting, Mr. Agnew executed the new Will and Florida trust, but not the Trust amendment. The lead attorney testified that he did not bring the document (calling it an “oversight” and a “mistake”), and Mr. Agnew did not ask about it. Mr. Agnew died a few months later in early 2011, after which the attorneys informed his niece (then executor) that the Trust amendment was never signed.

The family members named in the unsigned Trust amendment (the “Family Plaintiffs”) sued the attorneys and the law firm for the sums they would have received if the amendment to the Trust had been signed. The issue in the appeal was the Family Plaintiffs’ claim, as “third-party intended beneficiaries,” that the attorneys had breached their...
The Family Plaintiffs appealed from the summary judgment ruling, and the Superior Court reversed. Agnew, 110 A.3d at 1028. The Superior Court rejected Gregg as inapposite and looked instead to Guy v. Liederbach, the case in which the Pennsylvania Supreme Court adopted the Restatement (Second) of Contracts § 302 as the doctrine governing third-party beneficiary claims against a scrivener for alleged failure to effectuate the intention of a decedent. Id. at 1027. Looking to a footnote in the Guy opinion, the Superior Court concluded that courts can go beyond whether a document was actually signed to determine if the particular circumstances create standing for a party as an intended beneficiary. Id. The Superior Court further concluded that the lead attorney’s admission that attending the September meeting without a Trust amendment was an “oversight” and a “mistake,” as well as other similar evidence, constituted the kind of circumstances creating third-party standing under Guy. Id. at 1028.

The Supreme Court granted allocatur to “consider whether individuals who are not named in an executed testamentary document have standing to bring a legal malpractice action against the testator’s attorney, as purported third-party beneficiaries to the contract for legal services between the testator and his attorney.” Opinion at 1. In examining the case law, in particular Guy, the Court held that “individuals who are named only in unexecuted, consequently invalid documents – such as appellees with respect to the 2010 Trust Amendment – may not claim status as third-party beneficiaries of the legal contract between the testator and his attorney, and may not achieve a legacy through alternate means, such as a breach of contract action.” Id. at 30.

In Guy, a majority of the Supreme Court held that a beneficiary named in a signed Will had standing to sue the attorney who prepared it where that Will was invalidated owing to a legal mistake by the attorney. The majority adopted the Restatement (Second) of Contracts § 302 (“Section 302”) as reflecting Pennsylvania’s doctrine for determining when a third party can enforce a contract between attorney and client. In Guy, the Court summarized Section 302 as follows:

(1) the recognition of the beneficiary’s right must be “appropriate to effectuate the intention of the parties,” and (2) the performance must “satisfy an obligation of the promisee to pay money to the beneficiary” or “the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.”

459 A.2d at 751. The Court in Guy concluded that the first point above constituted a standing requirement to bring suit. Id. The majority opinion also included the following footnote:

There are, of course, beneficiaries under a will who are not named, and who may be either intended or unintended beneficiaries. The standing requirement may or may not be met by non-named but intended beneficiaries: the trial court must determine whether it would be “appropriate” and whether the circumstances indicate an intent to benefit non-named beneficiaries.
It follows that unintended third-party beneficiaries could not bring suit under § 302 against the drafting attorney. In making that determination the trial court should be certain the intent is clear. *Id.* at 752, n.8 (hereafter, the “Guy Footnote”).

The Superior Court in Agnew construed the Guy Footnote to require courts to conduct a detailed, fact-based standing inquiry when the document at issue is unsigned, but the Supreme Court disagreed. The Supreme Court established a clear line by holding that “an executed testamentary document naming an individual as a legatee is a prerequisite to that individual’s ability to enforce the contract between the testator and the attorney he hired to draft that particular testamentary document.” *Opinion* at 20. The Supreme Court concluded that the facts of Guy, which involved an executed (if defective) Will, were integral to the adoption of Section 302 and the holding. *Id.* at 21. The Court went on to say that the Guy Footnote was dicta that speaks to beneficiaries who are “generally identified in a manner other than by name, such as ‘my children’ or ‘my heirs’ or persons or entities to be identified after the testator’s death[.]” *Id.* at 22.

The Court also rejected the Superior Court’s ruling on grounds that “a testamentary instrument which is not signed, as required by statute, cannot be given effect.” *Id.* at 23. The Court noted that the Trust was signed and thus valid, and that it could be amended “by an instrument in writing” so long as it was signed as required by Pennsylvania law. *Id.* at 24. The justices concluded, as a matter of law, that the existence of the unsigned amendment was insufficient evidence of Mr. Agnew’s intent (and thus no basis for standing for the Family Plaintiffs) because there was no way to be sure that he actually intended to sign it and stick by it:

A testator may change an estate plan at any time, adding and subtracting legatees, increasing and decreasing bequests. Under such mercurial circumstances, we decline to confer standing to purported heirs to prosecute a breach of contract action against the testator’s attorney on the basis the attorney failed to ensure the testator signed the particular document making a potential bequest.

*Id.* at 27. The Court concluded that where a testamentary document is unsigned, would-be beneficiaries cannot “use extrinsic evidence to establish third-party beneficiary standing to bring a legal malpractice action[.]” *Id.* at 28.4

Chief Justice Saylor agreed with the Court’s holding, and wrote a separate concurrence to express concern only with some of the discussion supporting it. First, the Chief Justice noted that “the use of extrinsic evidence to adjudge the intent of a decedent and his attorney is [no] more problematic in this context than it would be in other similar settings in which intent may be proved through such evidence.” *Saylor Concurrence* at 2, n.2 (citing *Estate of Field*, 953 A.2d 1281, 1288 (Pa. Super. 2008)). Second, the Chief Justice sought to clarify the view of the Court that the identification of a beneficiary in an executed testamentary document “includes the express naming of such a person, as well as the provision for ‘non-named beneficiaries,’” *Id.* at 2 (citing the Opinion at 22 and n.12).

4 In footnotes, the Court mentioned that the decision does not alter Section 302 analysis “in the general commercial context” and does not “address the use of extrinsic evidence to prove a testator’s intent in other contexts.” *Id.* at 28.
THE PEPC INVITES THE PHILADELPHIA BAR ASSOCIATION PROBATE AND TRUST LAW SECTION TO JOIN OUR COUNCIL FOR MEMBERSHIP AND PROGRAMMING

February Luncheon Program
Tuesday, February 21, 2017
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “GRAT to Great: Efficient Wealth Transfer with Grantor Retained Annuity Trusts”
Speaker: Tara Thompson Popernick, CFA, CFP

March Luncheon Program
Tuesday, March 21, 2017
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Estate and Financial Planning for Chronic Illness”
Speaker: Martin M. Shenkman, CPA, MBA, PFS, AEP, JD

Annual Meeting & Reception
Thursday, May 18, 2017
3:00 – 8:00 p.m.
Museum of the American Revolution
101 S. 3rd Street, Philadelphia, PA
Speaker: Jonathan Blattmachr

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