REPORT OF THE CHAIR

BY RISE NEWMAN, ESQUIRE / DRUCKER BECKMAN SOBEL, LLP

Welcome to the 2018 Probate and Trust Law Section of the Philadelphia Bar Association. It is a privilege to serve as the Chair of this Section.

Our Bar Association was founded in 1802. To stay au courant after so many decades (or centuries) means we have witnessed and weathered many changes. Since my involvement with the Section, I have watched the evolution of our Elder Law and Guardianship Law Committee, the disbanding of our Corporate Fiduciaries group, the exponential growth of our Orphans’ Court Litigation Committee, the introduction of our Diversity Committee and most recently, the formation of our Technology Committee.

Our ten Committees help us move from change in law or practice to understanding that change. Our Committees help us transform challenges into insights. One technique that helps us with change, for example, is the presentations by our Education Committee. The Education Committee puts on three CLE seminars each year. The first 2018 CLE will be Monday, March 26. The topic is Tax Cuts and Jobs Act Summary and Analysis-Estate Tax and Other Planning.

Other Committees make enormous contributions. Our new fearless Newsletter Committee leader is tasked with asking people to contribute timely articles of interest. Our Legislative Committee is bursting with projects including commenting on proposed Pennsylvania legislation about legal advertising, delinquent guardianship reports and additional probate surety. A newly birthed subcommittee of the Legislative Committee is examining the results of a 2017 Section survey about POD/TOD accounts and discussing ways to cure a situation where a POD/TOD account owner has an existing detailed estate plan in place.

Our Rules and Practice Committee continues to dissect new Supreme Court Rules and to create local rules and forms. Thanks to our Tax Committee, we heard a review, in

continued on page 3

IN THIS ISSUE

03 Case Summary from the Orphans’ Court Litigation Committee
07 The Intersection of Authorities Under a Durable Power of Attorney and Revocable Trust
13 Technology Committee Update: Getting the Ludd Out
15 Ethics Column
19 Drafting Tip: Impact of the Tax Cuts and Jobs Act
21 Quarterly Meeting Notice
22 Practice Point: Navigating the New Public Access Policy in the Five-County Area
23 Tax Update

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:

Michael Breslow
email: mbreslow@htts.com
For special needs clients, the settlement is only the beginning.

Our team offers effective and creative options for the administration of special needs trusts and guardianships as families cope with complex and challenging situations. We provide hands-on help and access to a wealth of resources that minimize burdens on your clients and their families before, during, and after resolution of litigation.

Please contact:
PETER J. JOHNSON, ESQ.
SENIOR VICE PRESIDENT
DIRECTOR OF SPECIAL NEEDS TRUSTS AND GUARDIANSHIPS
610.975.4308
johnson@penntrust.com

Above, left to right:
Susan L. Bartels
Senior Vice President
Peter J. Johnson, Esq.,
Senior Vice President
Felicia D. Butler
Account Administrator
Jacqueline E. Duffy-Cardinal,
Account Administrator

PENNTRUST.COM
RADNOR, PA
CASE SUMMARY FROM THE ORPHANS’ COURT LITIGATION COMMITTEE


BY MARGARET E.W. SAGER, ESQUIRE AND JOHN T. STINSON, JR., ESQUIRE
HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

In a case of first impression, the Pennsylvania Supreme Court reversed the Pennsylvania Superior Court and the Court of Common Pleas of Bucks County, Orphans’ Court Division, and held that the enactment of the Pennsylvania Uniform Trust Act (“UTA”) in 2006 did not expand the scope of assets used to calculate the “pretermitted” spousal share by including the assets of the predeceased spouse’s funded revocable trust. The Orphans’ Court had concluded that because of the 2006 enactment of 20 Pa. C.S. §7710.2, which provides that the rules of construction that apply to testamentary trusts also apply “as appropriate” to inter vivos trusts, the assets of the predeceased spouse’s funded revocable trust were subject to 20 Pa. C.S. §2507(3), which entitles the pretermitted spouse to claim the share of the deceased spouse’s estate to which the pretermitted spouse would have been entitled if the deceased spouse had died intestate. Trust Under Deed of David P. Kulig, 5 Fid. Rep. 3d 93 (O.C. Bucks 2014). The Superior Court affirmed the Orphans’ Court. Trust Under Deed of David P. Kulig, 131 A.3d 494 (Pa. Super. 2015). In reversing the lower courts, Justice Wecht wrote the majority opinion for the Supreme Court, joined by Justices Todd and Dougherty. Chief Justice Saylor wrote a dissenting opinion, joined by Justice Baer. Justices Donohue and Mundy did not participate because they had served on the Superior Court panel in the case.

REPORT OF THE CHAIR, CONTINUED

January, of the seminars featured at the Heckerling Institute. T

Our Diversity Committee is headed by a new chair who is busy planning a project with Senior Law Center. Our newest committee, Technology, will help us implement and promote our changes (#phillyprobatetrust). Our Orphans’ Court Litigation Committee continues to stun with their timely monthly presentations, including their January 2018 presentation on Public Access Policy.

Finally, we would not be the Section we are today if not for the support and knowledge of our esteemed Orphans’ Court Judges and their respective staff.

Implementing change and growth is challenging. It takes thought, training and mentoring. We are fortunate to practice at a time when past practitioners and Section members blazed a probate and trust trail. I encourage you to take an active role in our Section, and to continue to blaze the trail. The rewards are countless. In one way or another, you will increase your personal gross estate.

To get involved, please feel free to contact me directly at mnewman@dbslawllp.com; 267-765-7332.

Dedicated to the memory of Morey S. Rosenbloom, Esquire.

1 The Orphans’ Court Litigation and Dispute Resolution Committee will provide summaries of recent litigation cases in each quarterly newsletter. The new chair of the Committee is Bradley D. Terebelo, Esquire.

2 © 2018 Heckscher, Teillon, Terrill & Sager, P.C. All Rights Reserved. In the interest of full disclosure, Heckscher, Teillon, Terrill & Sager, P.C., represented the successful Appellants in this case.
In 2001, Husband created a revocable trust to benefit his then wife, Joanne, and their two children and other descendants upon Husband’s death. Joanne passed away in 2010, after 35 years of marriage. Shortly after Joanne’s death, Husband signed a new will leaving his estate to his children. Husband married his second wife, Mary Jo, in 2011, but died 35 days later. Husband was survived by Mary Jo and his two children from his prior marriage. As of his death, Husband had a probate estate worth about $2.1 million, assets held by his revocable trust worth about $3.25 million (and funded before his marriage to Mary Jo) and a qualified benefit plan worth $1.5 million (which undisputedly passed to Mary Jo pursuant to ERISA).

Mary Jo was not mentioned in Husband’s will or revocable trust, both of which predated their marriage and neither of which were made in contemplation of the marriage. Under well-established Pennsylvania law, Mary Jo had the option of making a claim against Husband’s estate in one of two ways. First, she could have claimed an elective spousal share of Husband’s estate under 20 Pa. C.S. §2507(3), which provides as follows: “If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share or unless it appears from the will that the will was made in contemplation of marriage to the surviving spouse.” In this case, because Husband was survived by a spouse who was not the mother of his children, Mary Jo would have been entitled to one-half of Husband’s intestate estate. 20 Pa. C.S. §2102(4). The intestate estate is “all or any part of the estate of a decedent not effectively disposed of by will or otherwise.” 20 Pa. C.S. §2101(a).

Mary Jo claimed the pretermitted spousal share, letting the elective share period lapse. However, in making the claim, she asserted that the basis for calculating the pretermitted share changed in 2006, with the enactment of 20 Pa. C.S. §7710.2, such that the “intestate estate” subject to the pretermitted spousal claim now included not only half the assets of Husband’s probate estate, but also half the assets of his funded revocable trust. Specifically, she argued that the UTA enacted in 2006 extended 20 Pa. C.S. §2507(3) to inter vivos trusts as well as probate assets, based on the text of 20 Pa. C.S. § 7710.2 (“The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts”) and its comments.

Husband’s children filed a petition for declaratory judgment in the Orphans’ Court to address this question of first impression regarding the UTA. At all stages of the litigation, the parties agreed that Mary Jo’s reading of 20 Pa. C.S §2507(3) after the enactment of 20 Pa. C.S §7710.2 would cause a change to 70 years of black letter Pennsylvania law. In other words, they agreed that prior to the UTA a pretermitted spouse would have no claim to the assets of the deceased spouse’s funded revocable trust, except by claiming the elective share.

The Orphans’ Court ruled in favor of Mary Jo, finding that the enactment of 20 Pa. C.S. §7710.2 subjected Husband’s revocable trust to the reach of the pretermitted share. The Orphans’ Court observed that the 2005 Joint State Government Committee Comment to §7710.2 “imports Section 2507’s protections for pretermitted spouses to inter vivos trusts,” and relied heavily on the Uniform Law Comment, noting the “functional equivalence

continued on page 5
between the revocable trust and a will,” such that “the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust.” The Orphans’ Court concluded that the “General Assembly intended to place revocable inter vivos trusts on an equal footing with testamentary instruments and afford pretermitted spouses with an opportunity to claim an intestate share of said trusts.” The Orphans’ Court directed that Mary Jo was entitled to receive a one-half share of Husband’s probate estate and a one-half share of his revocable trust – in addition to receiving the ERISA benefit plan (without offset).3

The Superior Court stated that it was “constrained to affirm” the Orphans’ Court, concluding that based on the “comments and the plain unambiguous text of Section 7710.2” the Legislature intended to apply the pretermitted spouse claim to inter vivos trusts. The Superior Court rejected the notion that §7710.2 should be read in pari materia with the statutes pertaining to the elective share and pretermitted share because “they relate to different concerns.” The Superior Court specifically declined to address the effect §7710.2 (and thus its ruling) would have on irrevocable (as opposed to revocable) inter vivos trusts. Kulig, 131 A.3d 494, fn. 7 (Pa. Super. 2015).

As stated in its majority opinion, the Supreme Court granted review “in order to consider whether the Superior Court erred in construing Section 7710.2 by reference to the commentary while deeming that provision unambiguous – and by extension whether the Superior Court erred in ruling that Section 7710.2 compelled inclusion of the Trust in the Estate subject to the pretermitted spousal share.” The Supreme Court also noted that it was considering “for the first time the effect of 20 Pa.C.S. § 7710.2, enacted in 2006, upon the scope of the assets used to calculate the pretermitted spousal share.”

In its analysis, the Supreme Court focused on the starting point (agreed to by the parties) that, for decades, Pennsylvania has had (1) a spousal election statute that creates a detailed formula for what a surviving spouse is entitled to take from probate and non-probate assets, irrespective of what the decedent’s documents say; and (2) a separate and independent protection for pretermitted spouses that addresses, as set forth in Pennsylvania’s intestacy statute, any property “not effectively disposed of by will or otherwise.” The Supreme Court then focused its inquiry on the point of disagreement: “whether the General Assembly’s enactment of Section 7710.2 was intended to change what long had been the status quo by extending the scope of a Subsection 2507(3) estate, defined by reference to an intestate estate, to encompass inter vivos trusts – this, despite the fact that such a trust is addressed textually only in [the elective share statute].”

Justice Wecht noted that legislative changes to existing law are never presumed unless expressly declared by their provisions. Further, “[r]ecognizing that the PEF Code is an elaborate machine with many moving parts,” Justice Wecht then concluded that the various provisions at issue had to be read in pari materia because they concern the same subject matter: inheritance protections for surviving spouses. In looking at such spousal protections together, and examining the lower

---

3 As noted above, at his death, Husband’s probate estate was worth about $2.1 million and the assets of his revocable trust were worth about $3.25 million. In addition, his qualified benefit plan was worth $1.5 million and undisputedly passed to Mary Jo pursuant to ERISA. The decisions in this matter do not expressly state the value of the competing computations of the pretermitted share. However, based on the values here, the pretermitted share would either be half the probate estate, or $1,050,000 (in addition to the ERISA plan), or half of the probate estate and the revocable trust assets, or about $2,675,000 (again, in addition to the ERISA plan). Accordingly, the holdings below increased the pretermitted share by $1,625,000. In other words, including the ERISA plan, Mary Jo would have received total assets of either $2,550,000 or $4,175,000.
CASE SUMMARY, CONTINUED

courts’ rulings, the majority found ambiguity because “there are competing, reasonable readings of the content and intended effect of Section 7710.2.”

The majority then proceeded to three key conclusions regarding 20 Pa. C.S. §7710.2. First, notwithstanding a Joint State Government Commission Comment that §7710.2 “imports” 20 Pa. C.S. §2507, there is nothing in the text or commentary of §7710.2 that expresses any legislative intent to change the pre-2006 framework of spousal inheritance protections. Second, the language of §7710.2 is consistent with prior precedent, “suggesting a codification, rather than a modification, of longstanding interpretative law” regarding wills and trusts. Third, Pennsylvania’s spousal election statute contains a “lengthy enumeration of categories of non-probate assets” subject to election (e.g., joint accounts with right of survivorship, payable on death accounts, annuities), suggesting that the lack of such categories in §2507(3) was deliberate. “In short, we could hardly ask for more evidence that the General Assembly long has understood the import and effect of 2203 [spousal election] and 2507, and has remained unperturbed by it.” The majority concluded its analysis by noting that Mary Jo’s reading of §7710.2, as adopted by the lower courts, would lead to some questionable, if not absurd, outcomes, not least that pretermitted spouses would be able to reach revocable trust assets but no other category of non-probate assets, and might be able to reach irrevocable inter vivos trusts, including charitable trusts and trusts for disabled dependents. The majority reversed the lower courts and ruled that it could not reasonably infer from the General Assembly’s enactment of §7710.2 that the statute was intended to substantially revise the long-standing distributive scheme for surviving spouses absent clear indications to that effect.

In his dissent, Chief Justice Saylor stated agreement with the lower courts, noting that if 20 Pa. C.S. §7710.2 is ambiguous, as the majority concluded, then resort to the Joint State Government Commission Comment and the Uniform Law Comment is appropriate to determine the intent of the General Assembly.
THE INTERSECTION OF AUTHORITIES UNDER A DURABLE POWER OF ATTORNEY AND REVOCABLE TRUST

BY PHYLLIS HORN EPSTEIN, ESQUIRE | EPSTEIN, SHAPIO & EPSTEIN, P.C.

Martha, upon the advice of counsel, created a revocable trust into which she contributed substantial assets with the expectation that those funds would be available to her if needed in the event of her old age or infirmity. She named her daughter as her Agent under a durable power of attorney to make use of those funds in order that she would be cared for - hopefully in her own home without having to move into a nursing home. Now, more than ninety years of age, access to those funds has been limited by the Pennsylvania Superior Court and the Orphans’ Court of Montgomery County, Pennsylvania. Because so many elder citizens are advised to place assets into a Revocable Trust for either management purposes or to avoid probate it is critical that attorneys reconsider their advice to clients about the use of those Trusts. The outcome of this case is a lesson in careful drafting.

Well Intentioned Plans in Place

As many do - for either estate planning purposes or money management - Martha created a Revocable Trust and deposited substantial assets into the Trust over which she was the initial trustee. And then, like many other parents, Martha also executed a valid Durable Power of Attorney appointing her daughter as her Agent.

Under the terms of the Revocable Trust, Martha, reserved to herself rights to income and principal upon demand. It further provided that the “Trustee, or the successor Trustees, may distribute so much or all of the income and principal to or for Grantor as Trustee, or the successor Trustees, may, in their discretion, determine to be advisable for any reason whatsoever, and annually to add to principal any income not so distributed.”

Unfortunately, Martha’s health deteriorated and ultimately her doctor issued a letter of incompetency. The Revocable Trust provided for the automatic removal of Martha as the sole Trustee and the substitution of her daughter and PNC Bank as co-Trustees. Under the terms of the Revocable Trust, the Trustees have discretion to make distributions. This raised the question of whether Martha’s initial rights to income and principal upon demand were extinguished or whether they passed to her Agent. If extinguished, then only the Trustees, acting unanimously could access the funds in the Revocable Trust. To address that question, the language of Martha’s Power of Attorney became relevant.

Martha’s Power of Attorney was drafted in such a way as to afford her Agent rights of revocation and withdrawal from all trusts. Specifically her Agent was given the power and authority “to withdraw and receive the income or principal of the above Trust or of any Trust over which I have the power to make withdrawals” and “specifically to any Revocable Living Trust that I have established.” The Power of Attorney also granted her agent authority “....to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts (including the right to alter, amend, revoke or terminate); ...” (emphasis supplied)

In short, Martha’s Power of Attorney, by its specific terms, seemed to grant her Agent broad authority to withdraw funds from her Revocable Trust, to amend or revoke that trust, and to exercise all of the same powers over the trust property “as if it were my own property.”

continued on page 8
The stage was set for a conflict over whether the Trustees were the ultimate gatekeepers of Revocable Trust funds or whether the Agent had direct access to trust funds because of her authorities under the Power of Attorney.

Where Those Well Intentioned Plans Fall Apart

The Orphans’ Court found there to be “conflicting” authorities between the Power of Attorney and Revocable Trust. “The issue before this Court is whether or not the provisions of the Amended Trust, specifically appointing [Daughter] and [Bank] as co-trustees following a medical determination of incapacity, are nullified in light of the conflicting provisions of the Power of Attorney.” In similar manner the Superior Court pointed out that under 20 Pa.C.S.A. §5601.4 as a general rule an Agent under Power of Attorney has authorities specifically granted that are “not otherwise prohibited by another agreement or instrument.” The Superior Court concluded that the co-trustee arrangement in and of itself created a conflict that superseded the Agent’s authority even though the Agent’s authority was created a few years after the trust and relates back to that document. Essentially, the courts concluded that the authorities of the Trustees and Power of Attorney could not co-exist.

Recent Amendments to the Law Giving Greater Deference to Powers of Attorney Did Not Apply

The first question addressed was whether the banks were initially compelled to accept the authority of an agent under a valid power of attorney as required by the amendments to Pennsylvania law added by Act of July 2, 2014, P.L. No. 95 and found in the Pennsylvania Probate, Estates and Fiduciaries Code at 20 Pa. C.S.A. §5608 and §5608.1. As amended, the law provides assurances to third parties that they will not be subject to liability for relying upon an apparent valid power. It was specifically adopted to override the Pennsylvania Supreme Court decision in Vine v. Commonwealth, State Employees’ Retirement Board, 9 A.3d 1150 (Pa. 2010) which held third parties liable for acting upon a void power of attorney (“POA”) even without knowledge of its invalidity. The Superior Court held that the amended statute applying to Powers of Attorney is only prospective. That would mean that its provisions apply solely to Powers granted after July 2, 2014. But a careful look at Section 9 of the Act reveals the following language: “Except as provided by this section, the provisions of this act apply to powers of attorney created before, on or after the respective effective dates of such provisions.” The Agent’s attempt to withdraw funds from the revocable trust occurred after July 2, 2014 so it would seem that not only would the document itself be covered by the new statute but the Agent’s conduct would be covered as well. The implication is that third parties, like the banks holding Martha’s money, will not be liable for refusing to take instruction from a lawful Agent if the Power was created before July 2, 2014. The lower court simply held that in refusing to accept Martha’s Power of Attorney, the banks were acting “reasonably.” Therefore attorneys should consider whether every Power of Attorney executed before July 2, 2014 should be revised, rewritten and re-executed.

Rights of Withdrawal or Revocation Require Extreme Specificity

The second question addressed by the courts was whether the
INTERSECTION OF AUTHORITIES, CONTINUED

language of the Power of Attorney and Revocable Trust permitted the Agent to either withdraw funds from the Revocable Trust or revoke the trust entirely after the incapacity of the Grantor. For that we need to examine both the law and the documents. The specific language of the Power of Attorney is recited above and is consistent with Pennsylvania law which provides that a Power of Attorney may grant an Agent specific powers including the authority to “create, amend, revoke or terminate an inter vivos trust” (see 20 Pa.C.S.A. §5601.4 which replaced prior §5601.2) and “to withdraw and receive the income or corpus of a trust.”

These authorities utilize identical language found in the Uniform Power of Attorney Act or “UPAA” Section 201(a). For guidance, the statutes give us additional language so there can be no misunderstanding about what is meant. Section 5603(g) of the Pennsylvania Statute clarifies that the words “to withdraw and receive the income or corpus of a trust” mean that the Agent may “demand, withdraw and receive the income or corpus of any trust over which the principal has the power to make withdrawals.”

Mirroring the language of the Pennsylvania Statute, Martha’s Power of Attorney seems to afford her Agent rights of revocation and rights of withdrawal. The Orphans’ Court did not agree and wrote that greater specificity is required:

“While Appellant may argue that she, as Agent for her mother, is given the authority under item NINTH, there is nothing in the power of attorney instrument specifically referring to item Ninth of the Amended Trust.”

Therefore in drafting Powers of Attorney, lawyers are cautioned as to the ultimate degree of specificity that the court may demand. Reference to the Revocable Trust document in general terms (“any Revocable Living Trust that I have established”) was insufficient in our case. Reference to the actual paragraph number of the trust might be specific enough. This point was not touched on by the Superior Court on appeal so we have nothing to modify the level of specificity compelled by the lower court.

Not stopping there, the courts discussed the specific language that should appear in a revocable trust that would give an Agent those authorities enjoyed by the trust Grantor. The Orphans’ Court held that the Revocable Trust, in addition to the Power of Attorney, was not specific enough:

“Item NINTH of the Amended Trust, which reserves the right to revoke or amend the trust, does not make reference to this right passing to an agent under power of attorney; it only refers to the grantor.”

It is not in dispute that the Grantor reserved certain rights to herself in the Revocable Trust – specifically “the right by an instrument in writing – other than a Will – to revoke or amend part or all of this Revocable Living Trust.” This could, for example, be satisfied by another written declaration by her revoking the trust. The issue is whether an Agent has the same authority to make amend or revoke the trust consistent with the statute. Presumably, the Orphans’ Court would have been swayed in Martha’s case if, in addition to the very specific language of the Power of Attorney, the reservation of rights clause in the trust had been written as to read:

“Grantor reserves the following rights, each of which may be exercised BY HER OR HER LAWFUL AGENT whenever and as often as Grantor may wish” (The suggested additional words are in capitals.)

The lower court seems to say that the rights of the Agent cannot be implied but must be expressly articulated in both the Power of Attorney and Trust. To paraphrase the 6th Circuit court in Logan v. United States, 518 F.2d 143, 152 (6th Cir. 1975), one would need

continued on page 10
INTERSECTION OF AUTHORITIES, CONTINUED

to consult a lawyer (or a judge) to effectively misconstrue the language of both documents as presently crafted. To avoid potential doubt, attorneys should consider inserting the additional language suggested above into trust documents if indeed that is their client’s intention. Additional language should be added to a Power of Attorney as well, giving specific authority to amend or revoke a revocable trust to benefit the Grantor in the event of incapacity and the authority to make withdrawals. While Martha’s Power of Attorney and Trust seemed to have very specific language, neither was specific enough. One can speculate the result may have been different if the changes suggested above were made to the Power of Attorney and Trust.

Court Approval May be Required to Revoke or Withdraw from a Revocable Trust

Pennsylvania law further circumscribes an Agent’s powers of trust revocation and withdrawal under 20 Pa.C.S.A. §7752(e).

Under that provision an Agent has the authority “with respect to revocation or amendment of the non-dispositive provisions of or withdrawal of property from a trust... only to the extent expressly authorized by the trust instrument or the power.” emphasis added.

So it would seem to follow that an Agent has the power to withdraw funds from a trust without limitation or court approval, or to revoke or amend the non-dispositive provisions of a trust if those authorities appear in either the trust or the Power of Attorney (and not both as the lower court implied). It seems that a Power of Attorney that is quite specific so as to satisfy the Montgomery County Orphans’ Court should override a less specific Trust directive or vice versa. In our case neither was specific enough for the Court.

For revocation of dispositive provisions of a trust, Pennsylvania Statute 20 Pa. C.S.A. §7752 (e) states: “The agent under a power of attorney that expressly authorizes the agent to do so may amend the dispositive provisions of a revocable trust as the court may direct.” Section 7752 reflects the language of the Uniform Trust Code section 602 and is followed by this Comment making it quite clear that the power to revoke survives incapacity:

“A settlor’s power to revoke is not terminated by the settlor’s incapacity. The power to revoke may instead be exercised by an agent under a power of attorney as authorized in subsection (e), by a conservator or guardian as authorized in subsection (f), or by the settlor personally if the settlor regains capacity.”

The Superior Court concluded in the very first paragraph of its decision that this was a case “chiefly” about revocation rather than trust withdrawals. Therefore any action being contemplated by the Agent required court approval under 7752(e) and of course the lower court did not approve. The lower court also held that 7752(e) applied only to trusts settled after December 2006. Since Martha’s Revocable Trust pre-dated this section, they held that the trust could only be “amended” consistent with its terms. Therefore they immediately moved to an analysis of intent based upon the language of the trust, the timing of the Power of Attorney and the apparent conflict of terms. As a result, there was no qualitative review of how section 7752(e) might impact an Agent seeking the exercise of authoritative powers recalling the first sentence of the statutory comment: “A settlor’s power to revoke is not terminated by the settlor’s incapacity.” This provides a word of caution to attorneys who have created trust documents prior to December 2006.

Following the Grantor’s Intent

What did Martha intend? There is no disagreement that under the law in Pennsylvania, a trust
INTERSECTION OF AUTHORITIES, CONTINUED

did the Settlor expect that her Agent would be able to access and manage her trust funds? The Superior Court held that any permissive language contained in the succeeding Power of Attorney would not “supersede” the Trust. Specifically the court reasoned that by creating a mechanism to add a corporate trustee to her trust, the Grantor intended that no one person would have “unfettered access” to the trust funds. The lower court similarly held that “The provisions in the Amended Trust identifying successor co-trustees and the requirements to terminate the trust early are indicative of Martha’s intent to have accountability with regard to the administration of this trust and to ensure that the trust is not terminated early unless the co-trustees determine it is necessary.” Never mind that the modifying Power of Attorney came later.

It appears that even if lawyers draft documents granting certain authorities, the courts may refuse to permit the actions contemplated if clients add additional trustees to their revocable trust in the event they become incapacitated. Such circumstances are quite common. The Settlor is often the sole trustee of her trust during her lifetime and others may be added under certain circumstances like incapacity. Considering the statutory language and the views of the courts, the articulation of rights should as specific as possible including reference to paragraph numbers of each document and appear in both Power of Attorney and Trust rather than one or the other as allowed by the statute. This could prevent a court from concluding that the documents were in conflict.

Ultimately the Best Interests of our Client Have Not Been Met

The ultimate dispute lies in whether the best interests of the Settlor are met by satisfying her current needs rather than in some way preserving a contemplated estate plan by preserving the assets in a trust - albeit a revocable trust. It seems self-evident that the needs of the Settlor in her lifetime are primary and take precedence over those of the contingent beneficiaries as she created a revocable rather than irrevocable trust in order to have access to these resources. For Martha, any assets outside of the Revocable Trust will eventually be paid into the Revocable Trust upon her death thereby preserving her contemplated estate plan.

settlor’s intent is determined from the language found “within the four corners” of the trust instrument. Farmers Trust Co. v. Bashore, 498 Pa. 146, 150, 445 A.2d 492, 494 (1982). The court will look solely at the language of the document itself so long as intent can be ascertained with “reasonable certainty.” Estate of Taylor, 361 Pa. Super. 395, 400, 522 A.2d 641, 643 (1987); In Re: Estate of Field, 953 A.2d 1281, 2008 Pa Super 167 (Pa. Super. 2008). Furthermore, “where there are two or more instruments relating to a trust, they should be construed together to effectuate the settlor’s intent.” Estate of Taylor, 361 Pa. Super 400.

Martha as Settlor, reserved the right to make withdrawals from her Revocable Trust, retained a life interest in the property of the trust, and named herself as trustee. All three elements required of revocable testamentary trusts are present in her Revocable Trust and any other interpretation would contradict the plain language of the document. See Estate of Maria Crudele, O.C. NO. 619 IV of 2004, CCP Phila., November 18, 2004; In re Tunnell’s Estate, 325 Pa. 554, 560, 190 A. 906, 909 (1937). One might well argue - and we did albeit unsuccessfully - that she intended to give this right of revocation to her Agent.

So the question was posed: In the event of her incapacity...

continued on page 12
INTERSECTION OF AUTHORITIES, CONTINUED

Withdrawing the assets – all or part of them – from the trust does not undermine that plan except to the extent that the funds are used for her benefit. The balance will, upon her death, return to the Trust. Any contrary holding seems to conflict with Pennsylvania Law 20 PA.C.S.A. §5601.3 (b) which compels an Agent to give precedence over a settled estate plan to her principal’s “foreseeable obligations and need for maintenance.”

In our case we argued the Revocable Trust and Power of Attorney were not contradictory documents but were intended to work perfectly together in a well thought out plan to afford access to funds during Martha’s lifetime while preserving the testamentary clauses of her Revocable Trust. Our arguments were unsuccessful.

Conclusion

It now appears that we are left with the bizarre result that Martha can not access funds in a revocable trust placed there by her for her own care during her lifetime without asking permission of PNC Bank. This is not the time or place to expound upon the bureaucracies and expense of bank trusteeships. The outcome of this case - although non-precedential - will impact not only this family but all Pennsylvanians who seek the advice of legal counsel for the preparation of Powers of Attorney and Revocable Trusts, expecting that in their senior years, that they will have access to their own funds for their care. Given that many clients choose to place their assets in revocable trusts for the purpose of “avoiding probate” the unintended consequence of losing access to those funds during their lifetime raises an alarm. It will come as a shock to many to learn that they and their representatives will be denied access to those funds during their old age and that banks may ignore their attorney advised and drafted Powers of Attorney dated prior to July 2, 2014. Lawyers who advise clients to create powers of attorney and revocable trusts for either asset management purposes or estate planning, apparently must now also disclose that those assets may become inaccessible for their care in their lifetimes or available only with court approval which can be expensive and time consuming and uncertain.

NOTES

1 § 5601.4. Authority that requires specific and general grant of authority.

(a) General rule.—An agent under a power of attorney may do the following on behalf of the principal or with the principal’s property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

1. Create, amend, revoke or terminate an inter vivos trust other than as permitted under section 5602(a)(2), (3) and (7) (relating to form of power of attorney).

2. Make a gift.

3. Create or change rights of survivorship.

4. Create or change a beneficiary designation.

5. Delegate authority granted under the power of attorney.

6. Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

7. Exercise fiduciary powers that the principal has authority to delegate.
INTERSECTION OF AUTHORITIES, CONTINUED

NOTES

§ 5603. Implementation of power of attorney.

(g) Power to withdraw and receive.—A power “to withdraw and receive the income or corpus of a trust” shall mean that the agent may:

(1) demand, withdraw and receive the income or corpus of any trust over which the principal has the power to make withdrawals;

(2) request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distribution to or on behalf of the principal; and

(3) execute a receipt and release or similar document for the property received under paragraphs (1) and (2).

§ 5601.3. Agent’s duties.

(b) Other duties

(6) Attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interest based on all relevant factors, including:

(i) The value and nature of the principal’s property.

(ii) The principal’s foreseeable obligations and need for maintenance.

(iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes.

(iv) Eligibility for a benefit, program or assistance under a statute or regulation.

TECHNOLOGY COMMITTEE UPDATE:
GETTING THE LUDD OUT

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

Note: This is the first installment from the Probate Section’s newly formed Technology Committee. The first Committee meeting will be held on March 8th and will be open to all interested participants. Additional RSVP details are listed at the end of the article.

In the early 19th century, a band of English textile workers and weavers collectively vowed to oppose and destroy various articles of machinery, the use of which had suspended or diminished manual labor in their industry. You may know this group as the Luddites - a name derived from their fictitious leader, General Ned Ludd. Today the word Luddite has become synonymous with one who is unable to understand modern technology or stubbornly refuses to adapt to technological advancements. It is often used with a derogatory tone, but for some self-described Luddites, it is a badge of honor. However, today’s meaning of the word Luddite is continued on page 14
GET THE LUDD OUT, CONTINUED

a far cry from the motivations of the rebellious gang from the early 1800’s.

Despite their modern reputation, the original Luddites were neither afraid to use new technology nor too ignorant to understand it. In fact, many were skilled machine operators in the textile industry. So, what were they after and why did they try to destroy machines if they weren’t opposed to technology? To drastically over-simplify the answer (after all, you didn’t come here for a 200-year-old history lesson or, for that matter, poorly punned subtitles), at the core of what the Luddites were fighting against was the idea of industrial capitalism, where the economic gains of technological efficiency were reaped by the machines’ owners and not shared with the workers. In other words, the Luddites weren’t interested in stopping advancements in technology, they simply wanted greater control over the use of the machines and a share of the profits derived from them.

This may seem like a strange way to start a recurring column devoted to technology and its impact on the trust and estates community. But, the original Luddite ideals (other than an affection for acts of vandalism) largely coincide with my general philosophy regarding the future role technology in the legal field: Thanks to technology, the practices of estate planning and trust and estate administration will change more drastically over the next decade than they have in the last 200 years, and over time the attorneys that understand and truly embrace advances in legal technology – essentially, those that control the technology – will be far more successful than those that choose to ignore these changes.

I hope that the Technology Committee will become a resource that is able to encourage and assist all Probate Section members to play a greater role in how technology shapes our practice.

There are numerous reasons why any profession may be reluctant to adapt to new technology, but all those reasons are compounded for attorneys. Embracing new technology takes time, and most attorneys have a limited number of non-billable hours they can devote to investigating a new idea or technique, unless it is essential to their practice, a proven time saver, or a reliable fee generator. But regardless of any reluctance to change, an evolution of the practice will continue indefinitely and these advancements will come more and more rapidly in the coming years.

A few examples of the influence that technology has had on the practice of trust and estates law include: dealing with and the acceptance of digital signatures, notaries and wills; how to administer and determine tax consequences involving digital assets - including crypto currencies (such as bitcoin) and electronic files; new software that can aid the administration of trust and estates; competing with online providers such as Legalzoom; adapting to changing probate rules involving electronic filings.

A primary goal of the Tech Committee will be to monitor advancements in technology that could impact (positively or negatively) the trust and estates practice and to communicate these advancements with Section members. Additionally, the Tech Committee will attempt to educate the legal community on broader technology topics to increase the knowledge base of practicing attorneys.

The potential topics the Committee could initially focus on are numerous and wide-ranging, from the straightforward (what is the law regarding electronic wills around the country), to the complex (how do you administer digital assets in a decedent’s estate) to the downright confusing (what is blockchain and how will it impact my practice in the future).

But we need your help in shaping future content – whether it be topics for the newsletter or CLEs you’d like us to present on, we continued on page 15
ETHICS COLUMN
BY TIMOTHY J. HOLMAN, ESQUIRE | SMITH KANE HOLMAN, LLC

When Your Client Loses Capacity and Seems in Jeopardy, How Can You Help Without Violating Your Ethical Duties?

Many estate planners will eventually encounter a client who seems to lack legal capacity to manage her personal or business affairs or a client whose health or assets seem to be at risk due to an undue influencer. What are your ethical obligations or prohibitions when that scenario presents itself to you? If you conclude that your client needs a guardian, who, if anyone, can you represent in seeking to have him or her adjudicated an incapacitated person? Are there any steps you can or cannot take?

These are important questions, and I offer some examples to help shed light on the answers.

The Situation

Assume that five years ago, you prepared a Durable General Power of Attorney, Health Care Power of Attorney, and Will for “Annie,” who was then 72 and recently widowed. The Power of Attorney documents identify Annie’s two adult children as her agents. Over the ensuing five years, you have modestly updated her estate plan a few times. A few months ago, and without your knowledge, Annie begins dating her much younger neighbor, Bert, whom Annie also recently named as her Agent under Power of Attorney – via a document which you did not draft.

Annie’s two adult children contact you. They tell you of Annie’s recent involvement with Bert, say they were suspicious of Bert from day one, and tell you that Annie’s bank notified them yesterday that Bert had replaced them as Annie’s Agents and terminated their on-line access to Annie’s bank statements. They say that they had been growing suspicious even before losing their on-line access to Annie’s bank accounts because last week they observed alleged large expenditures made from Annie’s bank account. They claim that those expenditures could not possibly have been made for Annie’s benefit. They tell you that when they called Annie about their concerns, Annie, uncharacteristically, yelled at them to “mind their own business” and hung up on them.

You thank the children for sharing their concerns with you (without volunteering any information to them and without telling them of your intentions, because they are

GET THE LUDD OUT, CONTINUED

need to know what is interesting and important to you in the world of technology. Many of you have likely developed a laundry list of tips and tricks that you use to be more efficient and productive; please share those ideas so that the collective wisdom of the group can benefit, which will help us all fend off the idea that our practice will become outdated and obsolete.

If you’re interested in joining the conversation and helping to shape the future of this committee, I encourage you to participate our first quarterly meeting which will be held on March 8th, 2018, at the Brother Brothers Harriman office at One Logan Square, 14th floor. If you are unable to attend in person a conference line will be provided. For more information (including a dial in number), to RSVP, or to share your questions, ideas, and advice, please contact me at ross.bruch@bbh.com or 215 587 6315.

1 Special thanks to Daniel R. Boose, Esquire for his assistance with preparing this column.

continued on page 16
not your clients). You then call Annie immediately, and although she tells you that she has found a new lawyer, she agrees to your request to visit her at home the next morning.

When you meet with Annie, you tell her that her children told you about alleged recent large expenditures from her bank account. Annie denies knowledge of those transactions, and also says that she is shocked that her children are making allegations “against Bert” – something Bert had warned her they might do. During your conversation with Annie, she repeats herself and displays extreme forgetfulness. Because you know that Annie’s execution of a new Power of Attorney suggests that Annie may also have signed a new Will, you ask Annie about that. Annie responds that it is “none of your business because I have a new lawyer now.” You conclude that if Annie asked you to prepare or change an estate planning document for her that day, you would not do so because you are concerned about her capacity/susceptibility to undue influence.

Annie’s children call you later that day and tell you they are fearful that Bert will steal all of their mother’s assets unless a guardian is appointed to protect Annie. They ask if they can hire you to represent them in a guardianship action seeking to have Annie adjudicated an incapacitated person. Under these hypothetical facts, you share the children’s concern that Annie is being financially exploited by Bert, or at least that Annie is susceptible to financial exploitation. What, if anything, can you do?

Your Authority and Limitations

First, because Annie is your client, you may not represent her children in filing or prosecuting a guardianship action against Annie. Pennsylvania Rule of Professional Conduct 1.7(a)(1) forbids an attorney from representing one client in a matter who will be directly adverse to another client. You must not tell Annie’s children what you have seen and heard during your attorney-client privileged meeting with Annie, lest you violate Pa. R.P.C. 1.6(a)’s prohibition against breaching client confidentiality. Instead, you must tell them only that, because you represent Annie, you cannot now represent them in a guardianship action.

You can and should tell Annie’s children, however, that they can retain other counsel to pursue a guardianship action. If Annie’s children tell you that they intend to hire another lawyer and file that guardianship action, then ask them to give you the name of the lawyer when hired and to provide you with a copy of that Petition when it is filed. You can thereafter monitor the situation and, assuming the children file the guardianship action, then you can rest easy knowing that the Orphans’ Court will soon figure out the situation and appoint a guardian if needed. You may end up a witness at that guardianship hearing, but you cannot represent the children, for the reasons discussed in greater detail below.

The Situation, Slightly Modified

Now, let’s change the facts just a bit, and instead assume that Annie’s children alerted you to the situation but are unable or unwilling to pursue a guardianship action. Or, assume that Annie has no children and that you learn of Annie’s situation via a call from Annie’s concerned long-time friend. The friend is fearful of Bert and unwilling to go “on the record” in this matter by filing a guardianship action herself. In all events under this slightly modified hypothetical, assume that Annie has no other friends or family members – or at least none willing to get involved. Can you do anything to protect your client? Indeed, you can.

Your Authority and Limitations

Pursuant to Pa. R.P.C. 1.14(b), “[w]hen 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 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.”

The American Bar Association’s Analysis of the Conflict

The American Bar Association (“ABA”) addressed the first “situation” raised in this article in Legal Ethics Opinion (“LEO”) 96-404 by noting that a lawyer may seek the appointment of a guardian for her own client but may not represent another person in doing so. That Opinion stated that “[a] lawyer who finds himself in this awkward position may prefer that someone else file the petition. In practice, too, it is not uncommon for the lawyer to be approached by a family member or other third party with a request that the lawyer represent that third party in pursuing the petition.” ABA LEO 96-404 at pp. 7-8. The ABA emphasized that Rule 1.14(b) does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client because “[s]uch a representation would necessarily have to be regarded as ‘adverse’ to the client and prohibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client’s best interest…” ABA LEO 96-404 at pp. 7-8.

Who Decides What’s In Your Client’s Best Interest?

When presented with concerns about your client, be sure when analyzing the situation to refrain from attempting to substitute your judgment for that of your client. After all, clients who have legal capacity and are not being unduly influenced have the right to make whatever decisions they believe are best for them. Those decisions may or may not meet with the personal approval of you or others in your client’s orbit (for example, a decision to begin a new relationship and perhaps provide financial benefits to that new partner), but that is not the test here. You must instead focus on whether your client is in fact unable to adequately act in his own interest. Indeed, the ABA notes that “[a] client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.” ABA LEO 96-404 at p. 4.

In both fact patterns set forth above, Annie displayed signs that she suffered from diminished capacity and was susceptible to undue influence. Although you might have reached the same conclusion after speaking only on the phone with Annie, if a situation like Annie’s presents itself to you then you should do everything in your power to meet personally (and alone) with your client so that you can form your opinions based on your direct observations. Never rely solely on anything that someone tells you over the phone about your client. Guardianship actions, when successful, strip

---

2 The Pennsylvania Rules of Professional Conduct are modeled on the ABA’s Model Rules of Professional Conduct.

---

continued on page 18

Probate and Trust Law Section Newsletter | NO. 146
away the Constitutional rights of a person to manage her own personal and financial affairs, and you should never file a guardianship action without a deep understanding of the alleged incapacitated person’s medical, social, and financial conditions.

**Your Options**

If you conclude after meeting with Annie that no viable, less restrictive alternative exists to guardianship, and that unless you take action then Annie will be harmed, then you must decide how best to reasonably protect Annie. Pursuant to Pa. R.P.C. 1.14(b), you may take “reasonably necessary protective action,” including by reporting your concerns to the Philadelphia Corporation for Aging (or, as they are known in the counties – the X County Area Office on Aging), which will investigate the situation and will file a guardianship action if it believes a guardianship is necessary. You can also file the guardianship petition yourself, identifying yourself as the Petitioner.

When confronted with a fact pattern like this, it’s important to be mindful that the folks surrounding your client may well be operating with economic or emotional agendas of their own – agendas which may or may not be apparent to you. Never allow a heartfelt plea from anyone about your client lead you to forget who you represent. If you believe after your own investigation that your client will be harmed without intervention, then the Rules of Professional Conduct authorize you – all by yourself – to take appropriate action to protect your client.

---

**WHAT WOULD YOU LIKE TO SEE IN FUTURE ETHICS COLUMNS?**

Send your questions and ideas to:

Rise Newman
email: rnewman@dbslawllp.com

The Probate and Trust Law Section is pleased to introduce its new hashtag:

#phillyprobatetrust

Please use the hashtag #phillyprobatetrust when posting on social media about news or events that might be interesting to section members!
Many of us have been inundated with client inquiries about the Tax Cuts and Jobs Act (Pub. L. 115-97) signed into law by President Trump on December 22, 2017 and how the significant tax law changes may affect them both now and in the future. Of course many of the changes will have an immediate effect on clients from a personal income tax perspective, such as the $10,000 cap on deductions for state, local and real estate taxes, and are, thus, at the forefront of their minds. The changes under the new law from an estate planning perspective, however, are considerable and cannot be understated.

Perhaps the most talked about change is with respect to the doubling of the federal estate, gift and generation-skipping transfer tax exemption from the $5,490,000 amount applicable in 2017 to approximately $11,180,000 for 2018 and adjusted for inflation going forward (at least until the scheduled reversion to the 2017 amount – adjusted for inflation – beginning in 2026). While this huge increase in the exemption amount now allows married couples to shield upwards of $22,000,000 from the federal estate tax, further limiting the number of clients whose planning is estate tax driven, there are a variety of ways in which clients’ current plans may be impacted by this change, which we, as drafters, need to consider. One such drafting consideration is with respect to the funding of residuary trusts based on formulas using the applicable federal estate tax exemption. Some clients may have been comfortable funding a residuary trust with their exemption amount when it was in the $5 million range but may not be thrilled with funding such a trust with more than $11 million for a multitude of reasons. This increased funding amount might significantly reduce or even prevent the distribution of a share of the estate outright to a surviving spouse or to a marital trust for his or her benefit. It might also result in a much larger inheritance tax bill than initially anticipated if the trust is not a “sole use” trust and benefits descendants or other beneficiaries.

Even if the increased exemption amount has eliminated federal estate tax concerns for many of our clients, if they have such formula based plans, they need to understand how this tax law change might alter the interests of their intended beneficiaries. They may be inclined to affirmatively include a cap on the application of formulas in their plan or they may even prefer a disclaimer trust plan for added flexibility. While the Tax Cuts and Jobs Act will expand tax planning opportunities for some of our wealthiest clients, there are, as always, many non-tax planning considerations that we need to continue to discuss with our clients to be sure that their plans work as they intend.
We need You!

Philadelphia VIP serves low-income clients who are facing critical legal issues, but cannot afford an attorney.

Only through volunteer attorneys like you is this pro bono service possible.

Volunteers are needed to represent clients and to serve as mentors to other volunteers.

Members of the Probate and Trust Law Section already have the knowledge to help in a few key areas of need:

- **Estate and administration** - For clients who have inherited a property from a deceased relative and need title in order to enter a payment plan or obtain a repair grant; generally, the only asset is a primary residence.
- **Guardianship** - For clients who need legal authority to take care of the most basic needs of a disabled adult, child or elderly parent.
- **Estate planning** - For clients who need a Will to devise their home, and/or clients who need a Power of Attorney or Advance Healthcare Directive.

VIP supports its volunteers by:

- Providing malpractice insurance coverage
- Offering detailed training guides and sample forms
- Connecting volunteers with staff, attorneys, and other mentors for technical support.

Current available cases can be found at: [https://www.phillyvip.org/case-listings/](https://www.phillyvip.org/case-listings/)

Contact Kelly Gastley, Managing Attorney (215-523-9566), kgastley@phillyvip.org to volunteer or discuss any questions or concerns.

Thank you for saying YES to a client in need!

Philadelphia VIP / 1500 Walnut Street, Suite 400 / 215-523-9550 / www.phillyvip.org
ATTENTION PROBATE & TRUST LAW SECTION MEMBERS

SAVE THE DATE!

March 2018 Quarterly Meeting and CLE
Philadelphia Bar Association – Probate & Trust Law Section

DATE & TIME
Monday, March 26, 2018; 12:30pm-2:30pm
Lunch and Registration begin at 12:00pm

LOCATION
Loews Philadelphia Hotel,
1200 Market Street, Philadelphia, PA 19107

TOPIC
Tax Cut and Jobs Act Summary and Analysis – Estate, Tax and Other Planning

COURSE PLANNERS
Kathryn Crary, Esq., Gadsden Schneider & Woodward LLP
Amy C. Quigg, Esq., Valley Forge Financial Group

FACULTY
Dennis Reardon, Esq., Reardon & Associates, LLC
Michael Rogers, Esq., Salvo, Rogers, Elinski & Scullin
NAVIGATING THE NEW PUBLIC ACCESS POLICY IN THE FIVE-COUNTY AREA

BY NEIL G. WILEY, ESQUIRE | ALEXANDER & PELLI, LLC

As you know, the new Public Access Policy and the Orphans’ Court rule implementing it, Pa.O.C. Rule 199, both became effective as of Monday, January 8. If you’ve filed anything in court since then, you may have noticed changes to the e-filing system as a result. The policy is far reaching, and applies in all Courts of Common Pleas, the Philadelphia Municipal Court (but not Traffic Division), Superior and Commonwealth Court, and the Supreme Court. Notably, however, it does not apply to the Register of Wills.

The broad strokes of the new Policy have been ably reported elsewhere, but because the Policy leaves latitude for each court—and therefore each county-level Judicial District—to implement it by its own local rule or administrative order, broad-stroke information isn’t very useful to the practitioner with a pleading to file. Therefore, local, county-level practice bears discussing.

The biggest impact to attorneys comes from Sections 7.0 and 8.0 of the Policy. Section 8.0 requires that certain documents be filed separately under a “Confidential Documents Form” as a cover sheet. Most notably for Orphans’ Court practitioners, these include “Financial Source Documents” (including checks, financial institution statements, and tax returns, among other things) and “Medical/Psychological records.” Section 7.0 forbids the un-redacted inclusion of the confidential information in anything filed of record. “Confidential information” includes social security numbers, full account numbers, and the full names and dates of birth of minors, to name just a few that the Orphans’ Court practitioner might have cause to include. The list is longer—check the policy for the rest.

How to proceed if you need to include any of this information will depend on the county. The default approach provided by the Policy is to include the confidential information on a separate “Confidential Information Form,” to be filed with your redacted pleading. However, Section 7.0(C) provides that each court can instead allow the filing of a redacted version for the public record and an unredeacted version for use by the court and appropriate parties.

Which is a perfect segue into a county-by-county breakdown, because the local counties are split on which procedure they adopt.

---


2 Available at: http://www.pacourts.us/assets/files/page-1089/file-6575.pdf

3 Available at: http://www.pacourts.us/assets/files/page-1089/file-6574.pdf
Selling Great Estates since 1744.
Understand the Value of
Your Client’s Jewelry Collection.

Now Inviting Jewelry Consignments.
We make selling easy and rewarding.
Contact us to schedule a confidential appointment.
CAROLYN.NAGY@SOTHEBYS.COM
+1 610 649 2600  SOTHEBYS.COM/CONSIGNJEWELRY
SOTHEBY’S, INC. LICENSE NO. 035003. © SOTHEBY’S, INC. 2017
TAX UPDATE

BY MARGERY J. SCHNEIDER, ESQUIRE | WYNNEWOOD, PA

FEDERAL ESTATE TAX

The Tax Cuts and Jobs Act of 2017

The Tax Cuts and Jobs Act (the “Act”) was signed into law on December 22, 2017 and became effective on January 1, 2018.

The Act does not repeal the federal estate tax. The IRC §2010(c)(3) estate, gift, and generation-skipping transfer tax basic exclusion amounts have been increased in 2018 to approximately $11.18 million per person, or $22.36 million per married couple (so long as a timely portability election is made after the death of the first spouse to die). The basic exclusion amounts will be indexed for inflation based on the “chained” consumer price index (the “chained CPI”). With certain exceptions, the tax rate on gifts, estates and GST transfers above the exclusion amount remains at 40%.

The increased basic exclusion amounts will expire on December 31, 2025 and return to their current levels, indexed for inflation based on the chained CPI with a base year of 2016. The Treasury is directed by the Act to promulgate regulations under IRC §2001(g)(2) concerning the clawback of gifts continued on page 25

PRACTICE POINT, CONTINUED

Philadelphia: Redacted/Unredacted (See amended Phila. O.C. Rule 4.7A)

Bucks: Confidential Information Form (See Admin. Order No. 88)

Chester: Confidential Information Form (See Admin. Reg. No. 20-2017)

Delaware: Confidential Information Form (See Delaware County Public Access Policy Local Rule under Docket No. 17-5120)

Montgomery: Redacted/Unredacted (See Pa. Mont. O.C. Local Rule 1.99A)

The last piece of the puzzle for the filer is certification of compliance. Section 7.0(D) requires a certification of compliance to accompany each filing, but just what that will look like will depend on how and where you file. At least in Philadelphia, if you file your document electronically, you will be able to certify compliance by checking a box in the e-file portal. If you are filing in person, however, a written certification will be necessary. Montgomery County already had a similar requirement in place under their local rules.

Of course, like every good rule, this one has an exception. Sections 7.0 and 8.0 both include the caveat that “this section is not applicable to cases that are sealed or exempted from public access pursuant to applicable legal authority.” Under Sections 9.0 and 10.0, filings in certain case types, including proceedings under Chapter 55 of the PEF Code (guardianships) are now totally off limits to the public. Therefore, at least in guardianship cases and the others that the Policy makes inaccessible to the public, no redaction is needed.

This is just an overview of how the Policy applies to filing parties. Have a look at the Policy, and check your local rules—and stay tuned, because some effects of its implementation remain to be seen.
TAX UPDATE, CONTINUED

that exceed the basic exclusion amount at the donor’s death. The regulations will determine whether the IRC § 2001(b)(1) offset for gift taxes payable would use the estate and gift tax exemption amount applicable at the time of the gift or at the time of the client’s death.

The Act makes no changes to tax provisions permitting appreciated property to pass to heirs with a stepped-up income tax basis.

FEDERAL GIFT TAX

Proposed Valuation and Discount Regulations under IRC §2704

The proposed regulations under IRC §2704, released on August 2, 2016 and published in the Federal Register, August 4, 2017 (81 Fed. Reg. 51413), were withdrawn on October 20, 2017 (82 Fed. Reg. 48779).


Increased Gift Tax Annual Exclusion Amount

Rev. Proc. 2017-58 contains the 2018 inflation adjustments for tax items, which include:

• a $1,000 increase in the gift tax annual exclusion amount. As of January 1, 2018, therefore, the first $15,000 of qualifying gifts to any person is excluded from the calculation under IRC §2503 of taxable gifts made during a calendar year

• A $3,000 increase in the exclusion amount for qualifying gifts to a non-citizen spouse made in a calendar year. The first $152,000 of qualifying gifts, which are gifts other than gifts of future interests in property, is now excluded under IRC §2503 and §2523 (i)(2).

NEW JERSEY ESTATE TAX

Phase-Out of New Jersey Estate Tax

As a result of the New Jersey tax reform law, which was signed on November 1, 2016, for decedents dying in 2017 the New Jersey Estate Tax was imposed only on estates greater than $2 million. For estates of decedents dying on or after January 1, 2018, the New Jersey Estate Tax has been phased out entirely.

Prior to 2017, the New Jersey Estate Tax was imposed on estates valued in excess of $675,000.

New Jersey Tax Court Not Bound by IRS Decisions

Estate of Oberg vs. Director, Division of Taxation, NJ Tax Court, Docket No. 000240 (October 24, 2017)

The New Jersey Tax Court (the “Tax Court”) upheld the New Jersey Division of Taxation’s assessment of New Jersey estate tax, finding that it was not bound by the rulings made in the closing letter issued to the estate by the IRS. The Tax Court disagreed with the assent by the IRS to the estate’s much delayed election of the alternate valuation date and with the decision of the IRS that a loan made by the decedent to her daughter via an undocumented self-cancelling installment note (“SCIN”) was not includible in her estate. As a result, the New Jersey estate tax assessed on the estate properly exceeded the amount of the federal death tax allowance reported on federal Form 706.

In an oral agreement made in 2000, the decedent made a loan of $150,000 to her daughter and only heir, with the promise that the loan would be forgiven at decedent’s death. The loan was not reported on either the federal or the New Jersey estate tax return.

The assets comprising the decedent’s gross estate at her date of death of June 20, 2008 were $3.1 million. On the alternate valuation date six months later, the assets had a value of $2.6 million. The estate filed Form 706 on February 19, 2013, more than three years after the due date. As the result of an appeal, the return

continued on page 26
was accepted as filed. The assets reported on federal Form 706 were valued as of the alternate valuation date and did not include the principal amount of the $150,000 loan in the gross estate. The IRS’s closing letter confirmed net tax due for federal purposes of $111,000, with a New Jersey state tax credit of $129,000.

The New Jersey estate tax return was filed on February 21, 2013. However, the New Jersey Division of Taxation issued a notice of assessment for a deficiency of $54,000, disallowing the election of the alternate valuation date allowed by the IRS and including the loan forgiveness of $150,000 in the taxable estate. The Tax Court found that the IRS had erred in the application of IRC §2032 and 26 C.F.R. §20.2032-1(b)(1), which provide that an alternative valuation date election is valid only when the return is either filed timely or filed within one year of the due date of the return. The estate tax return had been filed too late to claim the alternate valuation date.

The Tax Court also found that the estate had not satisfactorily proven that the undocumented loan made to decedent’s daughter was actually a SCIN and therefore was cancelled at death. The Tax Court stated that the transaction failed to meet the requirements for a qualifying SCIN transaction set forth in Estate of Moss v. Commissioner, 74 T.C. 1239 (1980) and that, as an intrafamily transaction, could be presumed to be a gift because there was no proof of a real expectation of repayment of the principal of the loan.

The Tax Court concluded that New Jersey “is not bound by a federal determination that results from federal estate tax principles incorrectly applied.” (p.33)
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 13, 2018
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Why is Everyone Talking About Delaware Trusts?”
Speaker: Michael Gordon, Esq.

March Luncheon Program
Tuesday, March 20, 2018
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Practical Planning for Art Collectors and Their Advisors”
Speaker: Ramsay H. Slugg

Annual Meeting, Seminar & Reception
Thursday, May 3, 2018
3:00 – 8:00 p.m.
One North Broad, Philadelphia, PA
Speaker: Michael Kitces

For more information on joining the Philadelphia Estate Planning Council or to register for any upcoming programs, please visit www.philaepc.org.