As I write my last Chair’s Report, I can’t help but reflect on how much our Section has accomplished this year. In October alone, there have been significant contributions by our members.

On October 10, we had our Quarterly Meeting and CLE which was presented by Adam Gusdorff and Jennifer Kosteva. The topic was Star Wars inspired – the Estate of Han Solo: Administration Problems of Galactic Proportions. Education Committee Chair Amy Quigg and Committee member Kate Crary were the course planners for that unique program.

On October 13 and 14, the Section had three well-attended CLE programs at the 2017 Bench-Bar Annual Conference – Judge Carrafiello, Judge Overton, Tim Holman and Howard Vigderman presented on Conflicts In and Around the Orphans’ Court; Anastasia De Paz and Linda Hee of the Elder Law and Guardianship Committee participated in a Hoarding Intervention and Response program with David Wengert, MSW from Community Legal Services; and former Section Chair Bob Louis and I were on a panel discussing Charitable Giving Techniques, presented jointly by the Philadelphia Bar Foundation and the Probate and Trust Law Section.

The month rounds out with the Tax Committee, chaired by Brian Gilboy and Bob Maxwell, hosting a meeting on October 24. Officials from the Pennsylvania Department of Revenue Inheritance Tax Division will update the Section on current inheritance tax issues. CLE credit is available at this meeting.

In other news, The Justinian Society of Philadelphia is honoring Judge Carrafiello with a portrait unveiling for his 22 years of service as a Judge of the Philadelphia Court of Common Pleas. I am pleased to report that the Section has made a contribution to the portrait fund. Judge Carrafiello’s portrait will be unveiled in October at a special ceremony.

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:

Heike K. Sullivan
email: sullivanh@ballardspahr.com

continued on page 3
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THE PENNSYLVANIA SUPREME COURT’S TAYLOR TRUST OPINION 
REQUIRES A LEGISLATIVE FIX

BY TIMOTHY J. HOLMAN, ESQUIRE | SMITH KANE HOLMAN, LLC


The Supreme Court’s unanimous opinion banned modifying a trust to add a portability provision. For the benefit of anyone unaware of the lingo, I note that, in its opinion, the Supreme Court described a portability provision as one which “permits a settlor or beneficiary to change the corporate fiduciary named in a trust at any time without judicial intervention, causing the trust to be ‘portable’ from one trustee to another.”

Taylor Trust, 164 A.3d 1147, at FN1 (citing In re McKinney, 67 A.3d 824, 826 (Pa. Super. 2013)).

The Supreme Court correctly decided the legal issue that it chose to frame for resolution. Although I do not concede that the Court actually framed the issue properly, I will not in this article reiterate the procedural history of Taylor Trust, nor will I exhaustively address the mechanics of the Supreme Court’s opinion. For a thorough analysis of the procedural history of Taylor Trust and of the legal reasoning underlying the Supreme Court’s opinion, I highly recommend you to Adam T. Gusdorf’s excellent article featured in this same newsletter (see Case Summary on Page 20).

Relevant to this article, however, I note that in reaching its conclusion, the Supreme Court concluded that 20 Pa. C.S. §§ 7740.1 (related to the modification or termination of noncharitable irrevocable trusts by consent) and 7766 (which identifies various “causes” warranting court removal of a trustee) contradict each other materially, especially because “[n]o language in the UTA indicates whether section 7740.1 may be utilized to modify statutorily imposed requirements (like those in section 7766).” Taylor Trust, 164 A.3d at 1157. Having found a statutory ambiguity, the Supreme Court decided Taylor Trust not based on any specific facts related to the Taylor Trust itself, but via “the application of the canons of statutory construction to ascertain the intent of the General Assembly.” Id.

The Supreme Court’s Taylor Trust opinion correctly analyzes the tension and interplay between 20 Pa. C.S. § 7740.1 and 20 Pa. C.S. §7766. Although the Supreme

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Court considered the historical intent of the Pennsylvania Legislature, it did not substantively discuss, nor does the opinion suggest that it had considered or even understood, all of the public policy ramifications of its decision, some of which are quite negative and wide-reaching. Indeed, Taylor Trust ensures a plague of litigation upon the Orphans’ Court and our appellate courts for centuries to come.

Because portability is critical to better performance and outcomes in the class of trusts discussed in this article, and because the Taylor Trust opinion itself tells us not what the Legislature actually thinks about this specific subset of trusts, but instead what the Supreme Court thinks the Legislature thinks about all trusts in general, I propose a legislative “fix” to address a specific subclass of trusts swept into the extraordinarily broad reach of Taylor Trust. I propose that the Pennsylvania Legislature amend 20 Pa. C.S. § 7740.1 to add section (b.2) to avoid the draconian ramifications of the Supreme Court’s unanimous decision on the class of trusts described below.

My proposed 20 Pa. C.S. §7740.1(b.2), will read as follows:

(b.2) Portability Clauses. A non-charitable irrevocable trust executed by the Settlor on or before December 31, 1985, may be modified, upon the consent of all beneficiaries, to include a portability clause which allows the beneficiaries to remove and replace the corporate trustee of the trust no more than once every five (5) calendar years, but only if:

1. The trust contains no language speaking expressly to the removal and replacement of the corporate trustee;
2. No evidence outside the trust document itself proves that anyone explained portability to the Settlor and that Settlor expressly intended when executing the trust at issue to deprive the beneficiaries of the right to remove and replace the corporate trustee; and
3. The beneficiaries appoint a successor corporate trustee licensed to conduct trust operations in Pennsylvania and holding assets under management of at least $500,000,000.00.

In this article, I will discuss the logic behind my proposal. I will then address and respond to the most common arguments of those who find abhorrent and “illegal” modifying trusts to add portability provisions to trusts lacking them.

Some Relevant History

To frame my discussion, I note that a significant number of trusts drafted before the mid-1980s contained no portability clause. Why? Likely because no one mentioned portability to the settlors who created and funded the trusts (often at the suggestion and via form trust documents handed to them by banks or by lawyers paid by banks to draft the trusts), and settlors did not know to ask. Back in the day, settlors often had long-time, close and trusting personal relationships with the employees of the banks they appointed as their corporate trustees.

Even a sophisticated settlor would never have foreseen the repeated ensuing waves of banking acquisition and consolidation. Nor would that settlor have foreseen the advent of smaller yet remarkably well capitalized, stable, sensible and highly regarded even in the Orphans’ Court trust companies that have come into existence since the mid-1980s.

During each merger, corporate trustee duties and powers have always passed from the original banks directly to the much larger – and often quite different – institutions that acquired them. Pennsylvania law dictates that
successors by merger are deemed in the law to be one and the same as their predecessors. See, e.g., 15 Pa. C.S. § 336.

Accordingly, although a settlor may have named and intended a community bank to serve as the corporate trustee of her trust, through mergers and acquisitions, most community banks are dead – eaten alive by very large banks (“VLB”). Although settlors did not name the VLB as their corporate trustees, VLB now contend that, absent an express portability clause, settlors nevertheless “intended” that VLB serve through trust termination (or forever in perpetual charitable trusts) even when VLB acquired the relationship by merger or acquisition.

How Big Is This Game Anyway?

Remember, in Pennsylvania, corporate trustees are statutorily authorized to invest trust assets in mutual funds sold by those corporate trustees. See 20 Pa. C.S. § 7314.1. Accordingly, corporate trustees in Pennsylvania, especially VLB corporate trustees, typically invest 100% of trust assets in VLB-owned and operated mutual funds, which provide additional revenue to VLB on top of the quite handsome trustee, tax preparation, and other fees that VLB pay themselves from the trust assets they control. If you wondered, then, why Wells Fargo took the Taylor Trust beneficiaries to the Pennsylvania Supreme Court, the answer likely lies there.

Since roughly the mid-1980s, trust portability provisions have become the norm in estate planning. Portability clauses make the trust administration marketplace more efficient. How? They incentivize banks and trust companies to compete for trust business and provide superior investment attention (and outcomes) and excellent customer care. Otherwise they may be replaced. Banks confident in their investment performance and client relationship skills should – and do - welcome this competition.

Public Policy Considerations

Many opponents of allowing beneficiaries of old trusts to modify them to add portability provisions argue that beneficiaries only seek such clauses to assert dominance and wrest control of the trust or to immediately remove the corporate trustee. That argument insults trust beneficiaries. Indeed, that paternalistic thinking assumes that all trust beneficiaries are motivated 100% by greed, and not, for example, by the fact that any given VLB in any given trust might be found lacking in investment performance or customer service or both, and that a corporate trustee subject to potential removal will surely respond more efficiently and effectively than one holding the post effectively forever.

Portability clauses ensure that corporate trustees don’t become complacent about their investment decisions or their customer service. Indeed, without portability clauses, banks and trust companies have little incentive to provide their best service to trusts and their beneficiaries.

No bank or trust company conducting its business with proper regard for its investment and trust administration duties need ever fear portability clauses. Indeed, prior to Taylor Trust, plenty of banks and trust companies welcomed portability clauses into documents that had never contained them previously. Under my proposal and in common “NJSA” practice pre-Taylor Trust, when one corporate trustee is removed, it will be replaced by another reputable corporate trustee. One bank’s loss of a trust will be another bank’s gain. If a bank delivers good investment returns and good service, then it will gain business when beneficiaries have the right to modify their trusts either judicially or via nonjudicial settlement agreements to add portability clauses.

Below I will address a series of arguments made by those who exalt in the extraordinarily

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broad impacts of the Taylor Trust ruling and who believe that a beneficiary’s only means of corporate trustee removal should be “for cause” pursuant to 20 Pa. C.S. § 7766 - and never via the modification of a trust to add a portability clause.

First, allowing beneficiaries to add a portability clause to a trust is completely consistent with “Settlor’s Intent.” VLB and their counsel often accurately proclaim the paramount importance of “Settlor’s Intent.” Yet, VLB also typically and inaccurately contend that settlor specifically “intended” for VLB to serve as the trustee of the trust, and that adding a portability clause to the trust therefore violates a material purpose of the trust. Curiously, VLB typically base that argument not on any actual affirmative evidence of any given settlor’s alleged intent for perpetual VLB service. Instead, VLB contend that the absence of a portability provision in a trust document means that the settlor “intended” to deny the trust beneficiaries that right, and that giving those trust beneficiaries portability would therefore violate a material purpose of the trust.

But weren’t these documents prepared by lawyers? Yes. Shouldn’t we then assume that those lawyers told their clients about portability? No. In fact, many such trusts were drafted by or in heavy consultation with the very banks named in those documents as corporate trustees, or by “outside” counsel who were in fact so dependent on VLB for business that they were effectively “in-house” counsel to VLB, and countless settlors signed trust documents at the bank with no lawyers present.

Therefore, is anyone so surprised that many older trusts lack portability provisions? Does anyone honestly believe even one bank seeking trust business prior to 1986 would ever have suggested or even talked for one minute about portability, much less included it in the form documents those VLB or the helpful counsel identified to the client by VLB had them sign?

Second, allowing beneficiaries to add a portability clause to a trust need not mean that beneficiaries can remove and replace a corporate trustee repeatedly and frequently until they find a bank willing to bend to their unreasonable demands. Many of those opposed to giving beneficiaries the right to add portability provisions to trusts contend that if beneficiaries are given that unqualified right, then the beneficiaries can and will tear apart the whole fabric of the trust at their “mere whim,” and will never rest until they find an utterly subservient corporate trustee to aid and abet them in looting the trust.

That argument assumes a reality in which only two possibilities exist: that beneficiaries can either a) never remove and replace a corporate trustee, or b) remove and replace a corporate trustee constantly and aggressively, until the beneficiaries finally locate a completely subservient trustee which will distribute all of the assets out immediately to or otherwise improperly reward the current beneficiaries at the expense of the remainder beneficiaries. Proponents of that argument, presumably hoping to co-opt the
Pennsylvania Attorney General on this issue, usually claim that, somehow, charities will also be hurt unless all of the money currently locked up by Taylor Trust in the vaults and mutual funds of VLB stays right there.

The realities of this issue require a middle ground. Of course, some beneficiaries of a trust armed with the unlimited and unfettered option of removing and replacing a corporate trustee might potentially attempt to use their right to remove and replace as leverage to attempt to persuade the corporate trustee to “give in” on any given issue.

But must our law and society assume the worst of everyone at all times? Of course not. We need not let the prospect that any given trust beneficiary may have impure motives to dictate our public policy. As estate planners say, “we can draft around that problem.”

With that in mind, my proposed legislative “fix” limits the exercise of the portability provision to no more than once in five calendar years. Limiting the frequency with which beneficiaries can exercise the trust’s added portability clause eliminates the alleged concern that beneficiaries will wield the portability clause to effectively become the puppet-masters of the corporate trustee.

In balancing the public policy considerations discussed above, the value of allowing competition among trust companies and the value to society of better-administered trusts surely outweighs the risk that an unknown yet surely small number of trust beneficiaries may attempt to “abuse” their newfound portability clauses if my proposed legislation becomes law. By requiring beneficiaries who exercise their removal and replacement right to thereafter have at least a five year long relationship with the new corporate trustee, beneficiaries and corporate trustees will by necessity work through any disharmony they encounter. While ensuring that corporate trustees can administer trusts without risking sudden removal for invalid reasons by impetuous beneficiaries, this proposal also ensures that corporate trustees will not hold trusts and their beneficiaries forever “captive” without effective review of or accountability for their investment performance or client relations.

Third, legislation can eliminate all risk of a beneficiary’s removal and replacement of a large, well-known corporate trustee with a subservient or otherwise disreputable trust company. Related to my second comment above, another common argument against allowing beneficiaries to add portability provisions to older trusts is that an irrational beneficiary with risky investment ideas could remove a large and reputable corporate trustee and appoint an unknown, risky, subservient, or otherwise ill-advised financial institution as a replacement. Words like “Las Vegas Trust Company” tend to get thrown around in this argument. Because settlors create trusts to protect the trust fund from rash behavior by beneficiaries, that would be a nightmare, and no one wants that outcome.

But that argument, too, is made of straw. Common sense tells us that we can structure a portability regime to prevent that absurd outcome. Why not restrict beneficiaries exercising a portability clause such that they can only replace a corporate trustee with another corporate trustee licensed to conduct trust business in the Commonwealth of Pennsylvania, and which holds at least $500,000,000.00 in assets under management?

Requiring that the successor corporate trustee be licensed to conduct trust business in the Commonwealth of Pennsylvania prevents a beneficiary from appointing as corporate trustee, for example, a bank or trust company which has never administered a Pennsylvania-situs trust, or a trust company unfamiliar with Pennsylvania practice.
Requiring that the successor corporate trustee hold at least $500,000,000.00 in assets under management eliminates the risk that a beneficiary will appoint an inexperienced or risky successor corporate trustee.

Trusts are a thinking person’s estate planning vehicle. Pennsylvania trust law can thoughtfully prevent the nightmare scenario posited by those who view portability not as something to be admired but instead as something to be feared.

The reasonable legislation I propose in this article simply seeks to put beneficiaries of pre-January 1, 1986 trusts on similar footing with beneficiaries of trusts executed in the modern era. Those folks typically already have the right to remove and replace corporate trustees, or when that right is missing we can be more confident that settlor intentionally chose to deny the beneficiaries that right.

Fourth, although Pennsylvania has historically required “cause” to remove a corporate trustee, the dramatic changes in the landscape of financial institutions over the past century require a modern approach to portability provisions in this limited subset of trusts. Many opponents emphasize the long-standing Pennsylvania caselaw holding that a corporate trustee can only be removed for “cause.” Notwithstanding Pennsylvania’s embrace via its 2006 enactment of its version of the UTA of “no-fault trustee removal” explained in, among other cases, McKinney Trust, 67 A.3d 824 (Pa. Super. 2013), I acknowledge that, traditionally, the Orphans’ Court has indeed required “cause” to remove a corporate trustee.

The Appellants in Taylor Trust did not seek to remove Wells Fargo Bank as corporate trustee. Instead they merely sought to add a portability clause to the trust. And yet, the Orphans’ Court and the Supreme Court claimed the ability to read the beneficiaries’ minds, and based their rulings at least in part on their certitude that those pesky Taylor Trust beneficiaries were up to something sneaky and intended to fire Wells Fargo at the drop of a hat if given that right.

Is it so inconceivable to anyone that trust beneficiaries might wish to have the right to remove and replace the corporate trustee not to actually use it and remove the corporate trustee immediately, but instead because they honestly believe that the bank, knowing it can be removed, will step up its game? Does any good businessperson ever enter into a “forever” business arrangement with anyone?

And make no mistake here, although VLB at times portray themselves as “guardians of the legacy of Settlor X,” or couch their arguments in high minded and lofty rhetoric about alleged yet seldom proven “special bonds” or other completely opaque concepts which only VLB can apparently champion properly, trust administration is a business. Business is business. No properly functioning business guarantees permanent employment to anyone. Portability clauses level the playing field and ensure that no bank or trust company becomes complacent. Is that so wrong?

Although any given beneficiary may exercise that portability clause immediately (and then work with the successor corporate trustee for a minimum of five years), so what? The Taylor Trust opinion assumes bad intent of every beneficiary wishing to add a portability provision to an old trust. Why? On what evidence? The Taylor Trust opinion and its “no trust modification to add portability ever” holding is a hammer. My proposed legislative fix is a scalpel.

Let’s be honest. Community banks are awfully hard to find these days. For older trusts, in general, the corporate trustee identified in the trust has merged with or been acquired by a much larger bank. VLB are often therefore “legacy” trustees of the trusts most directly affected by my proposed...
legislation. Indeed, interesting enough, some VLB existed but were not chosen by any given settlor who created a trust. But years or decades later, VLB bought TinyTown Bank – its former competitor which won settlor’s business. And by virtue of that purchase, VLB is now the trustee of countless trusts even though the settlors of those trusts had the express choice of and rejected VLB.

In other words, continuing to assert that a settlor actually intended for any given VLB to serve as her trustee, when she in fact appointed a community bank many years ago, is utter fiction. The bank and trust company landscape has changed dramatically in the past one hundred years, with profound, landscape-altering changes since the 1980s. Pennsylvania law should match reality.

Why should a large bank which acquired a community bank through a series of five mergers, and thereby acquired a trust, be entitled to administer that trust forever? Because settlor actually wanted it that way? No – as discussed above, even the most prescient settlor could never have foreseen the drastic changes in the bank and trust company landscape wrought by the recent decades’ frenzy of VLB consolidation. It violates good public policy to allow VLB to hold older trusts hostage while trotting out their high-minded rationalizations which all end with VLB controlling all of the money forever, when the Legislature could set appropriate restrictions on beneficiaries’ rights to enforce portability clauses which will both increase competition between and among banks and trust companies and prevent beneficiaries from abusing those quite sensible and proper portability clauses.

Whatever their faults may be, VLB typically do not steal or otherwise so egregiously breach their fiduciary duties to the level requiring their removal. So, then, requiring “cause” in every single instance to remove a corporate trustee practically ensures that VLB keep their jobs as corporate trustees until trust termination (or, in the case of charitable trusts, for example, forever) without fear of competition. Thanks to Taylor Trust, VLB are free to commit a host of sins not large enough to get them removed “for cause,” but large enough to cause significant agitation, expense and potentially quite significant lost investment gains for trust beneficiaries. Our legislature can and must address this important issue now.

Fifth, although the Pennsylvania Legislature did not adopt Section 7765(b)(5) of the UTA, that fact has no bearing on the legislation proposed in this article. Certain opponents of trust modification to add portability clauses contend that the Pennsylvania Legislature has already rejected adding portability clauses when it did not adopt Section 7765(b)(5) of the UTA. That section authorized a court to remove a corporate trustee upon the unanimous agreement of the trust beneficiaries subject to three conditions: 1) the action best served the interests of all the beneficiaries, 2) the removal was not inconsistent with a material purpose of the trust, and 3) a suitable co-trustee or successor trustee was available.

The Pennsylvania Legislature’s failure to adopt Section 7765(b)(5) does not mean the Pennsylvania Legislature has ever even heard of, much less considered, the positions set forth in this article about the quite specific subset of trusts at issue. Nor does it mean that the Pennsylvania Legislature should deny the beneficiaries of the quite narrow class of trusts identified in my proposed legislation the right to modify trusts to add portability clauses subject to the reasonable restrictions discussed in this article. Rather than assume anything, let’s instead have a dialogue with our legislators about these important issues.
Conclusion

Now that the Taylor Trust court has stripped all beneficiaries of any right to modify trusts to add portability provisions, beneficiaries seeking to level the playing field or even just seeking to exercise some of their only truly effective legal rights, will initiate more litigation compelling their unwanted corporate trustees to file accounts. Those beneficiaries will then file objections, and many will also file related petitions to remove corporate trustees.

In other words, beneficiaries don’t need portability provisions to obtain and exploit “leverage” against their corporate trustees (leverage often hides in old trust administration files of VLB, for example), but my proposed legislative fix would surely lead to more peace and harmony in the Orphans’ Court and in Pennsylvania trust administration more broadly. It would also surely lead to more business for all trust companies licensed to do business in Pennsylvania, and would signal to individuals thinking about creating Pennsylvania-situs trusts that Pennsylvania respects and protects not just its biggest and most politically powerful and connected corporate entities, but even its lowly, PAC-less, trust beneficiaries. Everyone wins.

In closing, I note that I’m not a legislator. This is the first piece of legislation I’ve ever attempted to draw, so I’m open to your suggestions, pro or con. The cut-off date, the five year limit, and the $500,000,000.00 asset under management requirement are all, by definition, arbitrary, and I am excited simply to open the dialogue with those proposed terms. I do intend to move forward with this proposed legislation in the near term, so, if you are interested in joining me or sharing your insights into the drafting, submission and legislative approval process, then please contact me at tholman@skhlaw.com.

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AGENT FOR A TRUSTEE

BY DAVID ROWE, ESQUIRE | RETIRED SENIOR FIDUCIARY OFFICER

One of the most important decisions to be made by the settlor of a trust is the nomination of the trustee. When the trustee is to be an individual rather than a corporate trustee, consideration is more often given to relationship or friendship rather than whether the nominee is qualified to undertake, or is even aware of, the myriad duties imposed upon a trustee. As attorney for either the nominee or the settlor, you might be asked whether a trustee should, or should be empowered to, delegate some duties to a corporate fiduciary as agent for trustee. This article will look at some of the issues to be considered by the trustee, settlor and agent.¹

The duties of a trustee are found in common and statutory law, and in the provisions of the trust document to be implemented. Generally those duties can be classified as either administrative or investment. And, while all actions require some level of decision or discretion, both administrative and investment duties can be further classified as either ministerial or discretionary. In most cases, whether and to what extent duties may be delegated is a function of the degree of discretion involved.

Broadly speaking, administrative duties include the duty to keep

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¹ §7777 of Pennsylvania’s Uniform Trust Act lays out the provisions for the delegation of duties by a trustee.
AGENT FOR A TRUSTEE, CONTINUED

accurate records, to render accurate accounts, to make distributions in accordance with the trust provisions, to provide information to beneficiaries and to prepare and submit required tax filings; and investment duties include the duty to establish, implement and monitor an investment policy, and to control, protect and make productive the assets of the trust. Over all of the particular duties of a trustee lies a duty of loyalty to the beneficiaries.

For many years, bank custody departments have offered Custodian for Trustee services. In this limited agency, the bank undertakes many of the ministerial tasks of holding assets and keeping records of investments and other transactions. At the direction of the trustee, the custodian might also make disbursements and distributions. In this relationship, all discretion remains with the trustee.

Also for many years, bank trust and investment departments (as well as other investment managers without trust powers) have entered into agreements as Investment Manager for a Trustee. The manager provides investment advice to the trustee on both asset allocation and security selection. A bank manager usually provides custodial services as well for the assets subject to the management agreement. (A non-bank manager often has a custodial relationship with another corporate entity.) In this relationship, it is not necessary for all of the assets of a trust to be managed by one manager: e.g. one trust could have a large-cap equity manager, a small/mid-cap equity manager and a bond manager. This is also the case if the trust is to hold a unique or hard to value asset that would not normally be included in the mix of an investment professional. And, it is possible that the trustee and manager might agree on over-all allocation and targets, but leave to the manager the selection of securities within those parameters.

Both custody and investment management services include accurate record keeping, which is of greatest importance for tax and other accounting. Whichever of these arrangements a settlor might provide for, and/or a trustee might choose, the trustee still has a duty to oversee all the actions of the manager. And, a settlor can take comfort in the knowledge that the practical ministerial requirements of trusteeship are being attended to by qualified professionals.

More recently, a number of institutions with trust powers have offered services as Agent for Trustee as an add-on to the services already being offered. Some entering into this market began by offering such additional basic trustee services as the preparation of tax returns and accountings. Historically each trust bank had its own tax department advising the trust department on tax matters and preparing the returns required to be filed by it as trustee. Each bank would also have a court accounting group. For a time, these banks could and would offer these services to individual trustees: today, many corporate fiduciaries have out-sourced one or both tasks. Those that have out-sourced these services will often offer to facilitate the relationship between an individual trustee and their chosen preparers. (Additionally, if an entity is to offer tax preparation services, registration is required with the IRS as a preparer subject to IRS regulations.)

Corporate fiduciaries also began to act as agent in trusts with limited discretionary requirements, for example a revocable trust, especially one in which the settlor is the trustee, or a charitable foundation or trust with named beneficiaries. In the former, the settlor/trustee, while competent, retains complete control; in the latter, there is little or no discretion to be exercised in regard to the distributions if they are limited to income, whether traditional or set as a percentage of market value.² Corporate fiduciaries are

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AGENT FOR A TRUSTEE, CONTINUED

It would seem, then, that this would be a perfect match of need and ability. However, this discretion cannot be delegated. Any course of action that an agent might decide upon on its own can be no more than a recommendation to a trustee. It is also possible that the rendering of such a recommendation might constitute giving legal advice and practicing law without a license. And, of course, any communication between a trustee and an agent would not be privileged but would be subject to scrutiny by disappointed beneficiaries and their counsel. As in any principal/agent relationship, a trustee, as principal, would retain ultimate responsibility. However, a trustee who exercises due diligence by communicating and meeting regularly with the agent can be protected from liability for the actions of the agent.

Whether because of a lack of understanding of a discretionary process or a personal reluctance to make a decision that might disappoint or, worse yet, anger a beneficiary who is a friend or relative, many individual trustees simply fail to act or fail to act within the provisions of the trust document, thus denying to beneficiaries their rights and frustrating the will of the settlor. On the other hand, corporate fiduciaries usually have the systemic policies, procedures and people in place to exercise discretion in a deliberate manner while maintaining the necessary documentation and record of the action taken.

As in all trust matters, planning ahead is the most efficient and effective way to achieve the goals of the settlor and guarantee the rights of the beneficiaries.

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2 Corporate fiduciaries have more frequently served as agent for the executor or administrator of a will, or the guardian of an incapacitated person’s estate. In each of these roles, the actions of the principal are generally more circumscribed or, as in the case of a guardian, subject to the oversight of the court, so that the agent is acting primarily in ministerial matters.
As assisted reproductive technology (ART) has begun to play a larger role for couples starting families, it has become increasingly important for estate planning attorneys to speak with clients about whether they (or other family members, especially their descendants) have preserved any genetic materials, and if so, whether that impacts how their estate planning documents are drafted.

For example, this may affect how the term “descendants” is defined or who inherits or controls the genetic materials. Although ART is a topic that frequently arises with middle-aged or same-sex couples, an increasing number of young couples in their 20s and 30s are turning to in vitro fertilization (IVF) because they are either experiencing difficulties getting pregnant or are being proactive in cautiously planning for their family’s future. The 2015 ART National Summary Report issued by the Centers for Disease Control and Prevention (the most recent published report) estimates that the majority of women in the United States using ART are age 37 and younger (nearly 60%) with 38.1% of women being under age 35, which represents the largest group of women using ART.

In light of the shifting trend and increased use of ART services, we as practitioners should be asking all of our clients whether they have stored any genetic material (or intend to) and how they wish to provide for the control, use and/or disposition of such material if they are incapacitated or deceased. This may include extending powers to agents under general powers of attorney with respect to the control and/or use of any genetically stored material. We also should consider more carefully how we define “children”, “grandchildren” and “descendants” in wills and trusts to ensure that the potential beneficiaries are as the client intends. Consider, for example, the possibility of having a descendant born after the death of the parent/donor.

Although custodial arrangements contracted to between couples in the event of separation or divorce may be outside the scope of our practice as estate planning attorneys, we should of course review any lifetime planning contracts that the client has executed (and possibly recommend consulting a family law attorney to have such documents drawn up) to ensure that the provisions do not conflict with the powers granted under a general power of attorney or in their overall estate plan.

Recognizing that clients experiencing infertility may be sensitive to this topic, we should be mindful of how we present the issue. One option is to include questions about stored genetic material on asset questionnaires or other intake forms as a minimally intrusive way to present the issue and assist in discerning whether any custom drafting may be necessary in preparing their estate planning documents.

**DRAFTING TIP:**

**WHAT TO EXPECT WHEN YOUR CLIENT IS EXPECTING**

BY BRITTANY J. CAMP, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

As assisted reproductive technology (ART) has begun to play a larger role for couples starting families, it has become increasingly important for estate planning attorneys to speak with clients about whether they (or other family members, especially their descendants) have preserved any genetic materials, and if so, whether that impacts how their estate planning documents are drafted.

For example, this may affect how the term “descendants” is defined or who inherits or controls the genetic materials. Although ART is a topic that frequently arises with middle-aged or same-sex couples, an increasing number of young couples in their 20s and 30s are turning to in vitro fertilization (IVF) because they are either experiencing difficulties getting pregnant or are being proactive in cautiously planning for their family’s future. The 2015 ART National Summary Report issued by the Centers for Disease Control and Prevention (the most recent published report) estimates that the majority of women in the United States using ART are age 37 and younger (nearly 60%) with 38.1% of women being under age 35, which represents the largest group of women using ART.

In light of the shifting trend and increased use of ART services, we as practitioners should be asking all of our clients whether they have stored any genetic material (or intend to) and how they wish to provide for the control, use and/or disposition of such material if they are incapacitated or deceased. This may include extending powers to agents under general powers of attorney with respect to the control and/or use of any genetically stored material. We also should consider more carefully how we define “children”, “grandchildren” and “descendants” in wills and trusts to ensure that the potential beneficiaries are as the client intends. Consider, for example, the possibility of having a descendant born after the death of the parent/donor.

Although custodial arrangements contracted to between couples in the event of separation or divorce may be outside the scope of our practice as estate planning attorneys, we should of course review any lifetime planning contracts that the client has executed (and possibly recommend consulting a family law attorney to have such documents drawn up) to ensure that the provisions do not conflict with the powers granted under a general power of attorney or in their overall estate plan.

Recognizing that clients experiencing infertility may be sensitive to this topic, we should be mindful of how we present the issue. One option is to include questions about stored genetic material on asset questionnaires or other intake forms as a minimally intrusive way to present the issue and assist in discerning whether any custom drafting may be necessary in preparing their estate planning documents.
The petition is filed, and the citation awarded. You’ve served it, and filed a proof of service of record. The response time has run, with no word from the respondent. Time passes. Nothing happens.

This scenario may be familiar to you if you practice before the Philadelphia Orphans’ Court regularly. If you are more at home in the Civil Trial Division, or in other counties, it may be perplexing—obviously the petition is unopposed, you say. Relief should be granted as a matter of course... so why does the Court not act? And indeed the Court may enter default relief after all response times have run and the respondent has not opposed the petition—and in some counties this happens automatically. In Philadelphia, however, this is not the custom.

The prior local Philadelphia Orphans’ Court Rules (effective before September 1, 2016), explicitly provided that “when a person to whom the citation is directed has not filed an answer or preliminary objection, a motion for a default order may be presented to the Court without further notice,”¹ and the Court could then “enter a decree granting the prayer of the petition.”² Of course, these local rules went the way of the dinosaur when Supreme Court O.C. Rule 1.5³ became effective on September 1, 2016, and nothing comparable appeared in the new Philadelphia local rules.

Seasoned practitioners will know to request relief in default, but those less accustomed to Philadelphia Orphans’ Court practice may wait in vain. While Petitioners who find themselves in this situation have the same options now as under the old local rules, a little guidance might help avoid frustration among the bar, and angry phone calls to chambers.⁴

So what to do when there’s been no action by Respondent or the Court? Some judges may respond to a letter requesting relief, while others may require the request be made in a separate petition for default filed of record. A letter has the advantage of no filing fee, but a petition builds the record, and some judges will not act on a letter alone.

Whether you file a petition or send a letter, the information you need to communicate is: (1) when the citation was granted and when it was returnable, (2) when and how it was served, (3) when the proof of service was filed, and (4) that the return date has passed without Respondent filing any responsive pleading.

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¹ Phila. O.C. Rule 3.5.B. (3) (eff. until September 1, 2016).
² Phila. O.C. Rule 3.2.B. (1) (eff. until September 1, 2016).
³ “All previously promulgated local rules are hereby vacated, effective September 1, 2016.” O.C. Rule 1.5(a).
⁴ When this author clerked on the Philadelphia Orphans’ Court, he was on the receiving end of many such phone calls from frustrated petitioners wondering why their unopposed petition had not been granted.
Under IRS Revenue Procedure 2017-34 (June 26, 2017), a simplified (and less expensive) procedure now exists for allowing the late election of portability. With this new Revenue Procedure, there is now a more liberal time frame for certain estates to make the federal estate tax portability election. The additional time to make the portability election is only available for estates that are not otherwise required to file a federal estate tax return because the value of the total gross estate plus adjusted taxable gifts is below the filing threshold (i.e., under the decedent’s remaining federal estate tax exemption amount, which, for 2017, is $5.49 million).

The portability election was first introduced as part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRUIRJCA), and later made permanent by the American Taxpayer Relief Act of 2012 (ATRA). The portability rules affect the estates of married decedents dying on or after January 1, 2011, and enable a surviving spouse to essentially “inherit” the decedent’s unused federal estate tax exemption amount and, thus, treat both exemptions (the surviving spouse’s exemption along with the exemption of the first spouse to die) as available to the marital unit. Thus, to the extent that the first deceased spouse does not make full use of his or her available federal estate tax exemption, an election can be made to add (or “port”) the decedent’s unused exemption to the surviving spouse’s exemption. The amount of the exemption ported to the surviving spouse is called the deceased spousal unused exclusion, or “DSUE”, amount.

The portability election is made by timely filing a properly completed IRS Form 706 (federal estate tax return), which must include a computation of the DSUE amount. Until the issuance of Rev. Proc. 2017-34, timely filing always meant that the return needed to be filed 9 months after the decedent’s date of death or the last day of the period covered by a timely filed extension request, which could extend the filing deadline for another 6 months (for a total of 15 months).

There have been many cases where the deadline to file for portability was missed because surviving spouses did not learn about the availability of the portability election until more than 9 months after the death of their spouses. However, before the issuance of Rev. Proc. 2017-34 there were two opportunities for filing effective portability elections after missing the deadline. First, Rev. Proc. 2014-18, 2014-7 I.R.B. 513 provided blanket extensions to all surviving spouses of decedents with estates below the filing threshold for returns filed before December 31, 2014. After that date, the only remedy for taxpayers was through a private letter ruling request for an extension pursuant to Reg. § 301.9100-3 (“Section 9100 relief”). Section 9100 relief could be granted if the taxpayer established that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the government. Private letter rulings, while liberally granted on this issue, can nevertheless be quite costly and the results are uncertain.

Because of the numerous private letter ruling requests to the IRS for extensions of time to elect portability in recent years, both as an accommodation to taxpayer and to free up resources at the IRS, under Rev. Proc. 2017-34 the IRS has now provided a permanently available simplified method for estates below the filing threshold for an estate tax return to make the estate tax portability election more than nine months after the death of the decedent.

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SIMPLIFIED PROCEDURE, CONTINUED

Now, for a portability election to be effective, such returns will be due the later of January 2, 2018 or the second anniversary of the decedent’s date of death. In order to secure this automatic extension, the personal representative filing the federal estate tax return to elect for portability simply needs to specify in capital letters on the top of the Return that it is being “FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A).” Should the estate fail to meet the deadline within two years of the decedent’s death (or file before January 2, 2018), then the personal representative would have to proceed with a private letter ruling request to try to obtain Section 9100 relief, and that can be both costly and uncertain.

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The Section’s Committees depend on the steady flow of people, energy and ideas. Join one!

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TAX UPDATE

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

FEDERAL ESTATE TAX

Estate of Sower vs. Commissioner, 149 TC No. 11 (September 11, 2017)

The Tax Court ruled that the IRS may audit the first spouse’s estate tax return if the second spouse’s return relies on portability. More specifically, the IRS can examine the return of the predeceased spouse with respect to each transfer made by the surviving spouse to which a deceased spousal unused exclusion (DSUE) amount has been applied.

The estate of the first spouse, who died in 2012, reported a DSUE amount of $1.2 million and elected portability of that amount to the surviving spouse, who died in 2013. The IRS accepted the return of the first spouse as filed and issued Letter 627, Estate Tax Closing Document. Neither spouse reported taxable gifts made by both spouses in 2003 and 2005 on their respective estate tax returns, although these gifts had been reported on federal gift tax returns. Upon examining the federal estate tax return of the second spouse to die, the IRS determined that the DSUE amount available to her was reduced by the taxable gifts that should have been reported on the federal estate tax return of the predeceased spouse.

Among the holdings in the case were the following:

• The IRS acted within the authority granted by I.R.C. §2010(c)(5)(B) in examining the estate tax return of a predeceased spouse to determine the correct DSUE amount.

• A letter from the IRS stating that the estate tax return of a predeceased spouse has been accepted as filed is not a closing agreement under I.R.C. §7121 and does not prevent the IRS from examining the return of the predeceased spouse.

• The examination of the estate tax return of a predeceased spouse in which the IRS reviews the record already in its possession and claims no additional tax is not an improper second examination within the meaning of IRC §7605(b). In any case, only the examined party, which in this case is the estate of the predeceased spouse, can seek to be protected under IRC §7605(b).

• The IRS is not prevented from examining the estate tax return of the predeceased spouse by the applicable regulations under IRC §2010. Although the gifts were made before 12/31/2010, the effective date of IRC §2010, the IRS could adjust the DSUE amount when the decedent died after 12/31/2010 and the DSUE amount applied to a pre-2010 transfer.

• The statute of limitations on the assessment of estate tax against the predeceased spouse's estate does not apply to an adjustment of the DSUE amount of the predeceased spouse, even if such adjustment might result in an increase in the estate tax owed by the estate of a later-deceased spouse.

Deductibility of Gift Tax on Net Gift Made Within Three Years of Death

Estate of Sommers v. Commissioner, 149 T.C. No 8 (August 22, 2017)

The Tax Court ruled that, for federal estate tax purposes, a decedent’s estate cannot deduct federal gift taxes paid by the donees of a net gift made within three years of death. The decedent’s estate was increased by the amount of the gift tax paid by the donees.

The decedent made an agreement with his three nieces stating that, in exchange for the transfer to them in tax years 2001 and 2002 of membership interests of an LLC containing artwork, the nieces would be responsible for any gift taxes resulting from the transfer. Prior to his death in November, 2002, the decedent filed suit against the

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nieces (see Estate of Sommers v. Commissioner, T.C. Memo 2013-8, January 10, 2013), arguing that the transfers were not completed gifts for federal tax purposes because the transfer documents were not completed until a few months after they were signed. The Tax Court held that these transfers were completed gifts.

In this case, the decedent’s estate sought determinations from the Tax Court, in pertinent part, that the gift tax owed at decedent’s death on these gifts is deductible under I.R.C. §2053(a) because the estate was obligated to pay the gift tax, and that if any federal estate tax is due it must be apportioned to the nieces.

The Court held that the gift tax was not deductible under I.R.C. §2053(a) and that the federal estate tax due cannot be apportioned to the nieces. Whether the gift tax was paid before or after the donor died is immaterial. The court stated that allowing the decedent’s estate to deduct the gift tax owed at his death in computing estate tax liability would “frustrate the policy underlying section 2035(b)” and that a claim against an estate can be deducted “only to the extent that it exceeds any right to reimbursement to which its payment would give rise.” 149 T.C. 8, at pp. 16-17. (Citations omitted). Since the nieces had agreed to pay the gift tax arising from the gifts, if the estate had paid the gift tax the estate would have been entitled to reimbursement from nieces. The right of reimbursement would have been included in determining the amount of the taxable estate.

The Tax Court further ruled that no federal estate tax was apportionable to the nieces under New Jersey law, because New Jersey law only allows apportionment to transferees who received property includable in the gross estate.

**Simplified Procedure for Late Portability Election**

IRS Revenue Procedure 2017-34 (June 9, 2017)

Prior to the issuance of this Revenue Procedure, after the death of the first spouse, the executor of the first spouse to die generally had only nine months, plus a six-month automatic extension, to elect portability. In order to obtain an extension, it was necessary to submit an expensive and time-consuming Private Letter Ruling request under Treas. Regs. §301.9100-3. Thanks to Rev. Proc. 2017-34, the executor of estate of a spouse who died any time after December 31, 2010 and is not required under I.R.C. §6018(a) to file a federal estate tax return now may file Form 706 on or before the later of January 2, 2018 or the second anniversary of the decedent’s date of death to elect portability. The decedent must have been a citizen or resident of the United States and must have been survived by a spouse. The estate may not have filed a prior estate tax return. However, the surviving spouse cannot use the deceased spousal unused exclusion (DSUE) amount obtained through the new extension to claim a credit or refund of overpayment of gift or estate tax after the expiration of the statute of limitations on the claim.

The executor must state the following at the top of Form 706: “FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY UNDER §2010(c)(5)(A).”

If a Private Letter Ruling requesting an extension to make a portability election is pending, on June 9, 2017 the IRS closed the file and refunded the fee paid. Taxpayers may continue to file Private Letter Rulings after the second anniversary of a decedent’s death to request the late election of portability. (See Simplified Procedure for Late Election Portability on Page 15).
TAX UPDATE, CONTINUED

FEDERAL GIFT TAX

2018 Increase in Gift Tax Annual Exclusion

IRS Revenue Procedure 2017-58

The §2503 Gift Tax Annual Exclusion has been increased $15,000 in 2018. This is the first increase since 2013.

IRS Formally Withdrew Proposed Valuation and Discount Regulations under IRC §2704

IRS Notice 2017-38 (June 14, 2017) and Second Report to the President on Identifying and Reducing Tax Regulatory Burdens:

In the Second Report to the President, issued on October 2, 2017, the Treasury Department expressed its intention to withdraw the proposed IRC §2704 regulations. It stated that the proposed regulations would have made the transfer of family-owned businesses to the next generation difficult and costly. It also agreed with commentators on the proposed regulations that they were unclear and unworkable.

On October 17, 2017, the IRS officially withdrew its proposed IRC §2704 regulations.

CASE SUMMARY FROM THE ORPHANS’ COURT LITIGATION COMMITTEE1

Trust under Agreement of Taylor, 164 A.3d 1147 (Pa. 2017)

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

In perhaps the most closely followed trust litigation since Pennsylvania enacted its Uniform Trust Act (the “UTA”) in 2006, the Pennsylvania Supreme Court recently determined that an irrevocable trust may not be modified under 20 Pa. C.S. §7740.1 to add a provision by which a trustee may be removed and replaced. In so ruling, the Court stated that Section 7766 of the UTA provides the exclusive means to remove a trustee when the trust instrument is silent with respect to removal. While the opinion provides clarity on this frequently debated issue, the implications of the decision may be more far-reaching, as discussed at the end of this article. All three phases of the litigation are discussed below, with special emphasis on the Supreme Court decision.2

Edward Winslow Taylor created a trust in 1928 that he amended twice before his death in 1939. The corporate trustee named in the document was “The Colonial

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

2 More complete discussions of the decisions reached by the Orphans’ Court and Superior Court can be found in edition No. 137 (September 2014) and edition No. 140 (November 2015) of this newsletter, respectively.
Trust Company or its successor.” By 2009, following a series of mergers, the trustee was Wells Fargo Bank, N.A. The trust did not include an explicit provision permitting the trustee to be removed, although it did contain a provision for the appointment of a successor corporate trustee in the event the trustee was removed, explicitly stating that the successor trustee must be a “recognized banking institution in the City of Philadelphia, Pennsylvania.”


Three of the four income beneficiaries filed a petition with the Clerk of the Philadelphia Orphans’ Court requesting that the trust be modified pursuant to 20 Pa. C.S. § 7740.1(d) to permit, inter alia, the sui juris income beneficiaries to remove and replace the corporate trustee. Section 7740.1(d) permits the court to approve a modification with the consent of some beneficiaries, provided that: (1) the modification could have been approved under Section 7740.1(a) or 7740.1(b) if all beneficiaries had consented, and (2) the interests of the non-consenting beneficiaries are adequately protected. It is not clear whether the fourth beneficiary took a position with respect to the petition.

Wells Fargo, the corporate trustee, opposed the modification and filed a motion for judgment on the pleadings, arguing that “the petitioners improperly rely on Section 7740.1(d) of the PEF code to modify the trust agreement when the exclusive provision for removing trustees under the PEF code is 20 Pa.C.S. §7766.” The beneficiaries filed their own motion for judgment on the pleadings, in which they argued that modification to add a remove and replace provision was appropriate under 20 Pa. C.S. §7740.1 because the proposed modification was not inconsistent with a material purpose of the trust and because the interests of beneficiaries who did not consent were adequately protected.

In an unpublished decision, the Orphans’ Court ruled that the trust could not be modified as requested. The Orphans’ Court found that “the interrelationship between sections 7740.1 and 7766 create [sic] a clear ambiguity within the Pennsylvania Uniform Trust Act which spans both of these sections.” The court determined that 20 Pa. C.S. §7740.1 was a “general” statutory provision, through which modification could accomplish various types of actions, whereas 20 Pa. C.S. §7766 was a “specific” statutory provision that addressed trustee removal. In such instances, “the special provisions shall prevail and shall be construed as an exception to the general provision[…]” (quoting 1 Pa. C.S. §1933).

The Orphans’ Court further stated that it “clearly was not the manifest intention of the Pennsylvania legislature to allow beneficiaries to remove a trustee based on [the beneficiaries’] agreement and without satisfying the requirements of section 7766 where the settlor made no provision for trustee removal. The beneficiaries’ attempt to use the broad modification provisions in section 7740.1 to eviscerate section 7766 must therefore yield to the specific removal provisions of section 7766.”


The petitioning beneficiaries appealed the decision of the Orphans’ Court. In a 2-1 decision, the Superior Court reversed the Orphans’ Court. The majority opinion framed the issue as whether the Orphans’ Court erred when it “imported” the removal language in Section 7766 into its analysis of the modification provisions of Section 7740.1.

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3 A copy of this opinion can be found at http://www.courts.phila.gov/PDF/opinions/orphans/193903563IV.pdf.

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continued on page 22
The majority identified a distinction between modifying the trustee provisions of a trust instrument to “provide flexibility to allow the beneficiaries to remove the trustee” and the actual removal of a particular trustee. As such, the modification at issue would provide a mechanism for the beneficiaries to remove the trustee “if, at some future point, they saw fit to do so” and that there was no current plan to remove. The majority then concluded that Section 7740.1 is “unambiguous on its face” with respect to its broad grant of modification authority and stated that the Orphans’ Court’s interpretation of the statute was “strained.” Under its reading of Section 7740.1(d), the Superior Court stated that modification by some beneficiaries is permitted in the same manner as would have been allowed under Section 7740.1(b) (i.e., if all beneficiaries had consented and the modification is not inconsistent with a material purpose of the trust).

The majority further observed that Section 7740.1 “contains no language excluding from its ambit the modification of trustee-removal provisions.” It stated that the Legislature could have limited the modification of trustee removal provisions by creating an exception or even by simply cross-referencing Section 7766, but “chose not to do so.” In concluding its review of the statutory language, the majority found that the Orphans’ Court had inappropriately speculated that the petitioning beneficiaries would, in fact, remove the trustee, and stated that “[i]t is not for the courts to impose additional restrictions as they may seem fit, regardless of what the court may perceive as the petitioners’ underlying motives.”

Finally, the majority rejected the corporate trustee’s “heavy reliance on the statutory comments.” They noted that consideration of the comments was unnecessary – and that resort to the canons of construction in this case was improper – because “the words of section 7740.1 are clear and unambiguous on their face.”

The dissenting judge agreed with the analysis of the Orphans’ Court that the specific Section 7766(b) trumped the general Section 7740.1, and further noted that the two sections of the UTA “require different modes of analysis and could very likely result in different outcomes depending on which section controls.” He perceived a very different message in the UTA, i.e., that the “Legislature had the opportunity to expand the grounds for removal of a corporate trustee, to allow for removal upon consent of some or all of the beneficiaries, when it adopted several provisions of the [UTA] and declined to do so.”

The dissenting judge charged the majority with “judicial activism” because, in his view, their ruling “eviscerated” Section 7766. He wrote that “[t]he Majority ignores the obvious implications of its decision. … Under the Majority’s reasoning, any beneficiary seeking to avoid the more onerous provisions of section 7766 could simply petition the court to modify the trust under section 7740.1, arguing to the court that it was not seeking to remove a trustee but merely to modify the trust agreement.”


On April 12, 2016, the Pennsylvania Supreme Court granted the corporate trustee’s petition for allowance of appeal. The question on appeal was “[w]hether the Superior Court erred in holding that trust beneficiaries may circumvent the requirements for removal of a trustee in Section 7766 of the Trust Act, 20 Pa.C.S.A. §7766, by amending the trust under 20 Pa.C.S.A. §7740.1.”

In a unanimous opinion, the Supreme Court reversed and concluded “that the UTA does not permit the removal and replacement of a trustee without Orphans’ Court approval in accordance with section 7766.” Specifically, “the scope of section
7740.1 of the UTA does not extend to modification of trust agreements to permit the removal and replacement of trustees. Instead, as the [Uniform Trust Code] comment to section 7740.1 reflects, section 7766 of the UTA is the “exclusive provision regarding removal of trustees.”

In the Supreme Court appeal, Wells Fargo, inter alia, argued that the Superior Court had erred in reviewing Section 7740.1 in isolation, without consideration of the UTA as a whole and Section 7766 in particular. Wells Fargo further argued that, if the Supreme Court affirmed, then beneficiaries would be able to remove trustees without going through the more burdensome Court removal process and, therefore Section 7766 would be rendered superfluous. In addition, Wells Fargo pointed out the Superior Court’s failure to consider the [Joint State Government Commission] comment following section 7740.1, which provides that section 7766 is the “exclusive provision on removal of trustees,” and the legislative history by which Pennsylvania’s General Assembly declined to adopt a provision from the Uniform Trust Code (the “UTC”) allowing a trust’s beneficiaries to unanimously remove a trustee. Wells Fargo also argued that “Pennsylvania has always shown great deference to the settlor’s selection of the trustee and has never allowed trust beneficiaries to amend a trust to add a portability clause.”

The beneficiaries argued that trustee portability clauses are common in modern trust instruments, particularly in light of the substantial restructuring of the banking industry in recent decades. They argued that they should be given the same flexibility of beneficiaries of modern trusts, and that the settlor could not have contemplated the changes in the banking world or that the local trustee he named, The Colonial Trust Company, would ultimately become San Francisco-based Wells Fargo. The beneficiaries also argued that Section 7766 was a “default rule” in circumstances in which a trust agreement was silent on trustee removal. Moreover, Section 7766 does not limit modifications under Section 7740.1, including the addition of a trustee portability clause. Thus, they argued, Wells Fargo created a statutory conflict that does not exist, so the issue should be resolved under the plain meaning of Section 7740.1, without resort to the rules of statutory construction.

The Supreme Court initially concluded that the Superior Court erred by not applying rules of construction to Section 7740.1(b). The Court stated that when interpreting one section of a statute, it must be read with reference to all sections of the statute (i.e., the entire UTA), because that puts the section at issue into context. As such, it determined that it must construe and consider together Section 7740.1 and Section 7766.

The Court concluded that a latent ambiguity existed because both parties’ interpretations of the statutes were plausible. Moreover, neither statute specifically addressed the issue before the Court. As such, it resorted to the canons of construction.

The Court noted that the standards for modification under Section 7740.1 require the beneficiaries to show only that the modification was not inconsistent with a material purpose of the trust and, where less than all beneficiaries joined in the request, that the interests of the non-consenting beneficiaries would be adequately protected. It also set forth the numerous requirements for removal under Section 7766, which requires the moving party to prove by clear and convincing evidence that (a) removal is in the best interest of the beneficiaries; (b) removal is not inconsistent with a material purpose of the trust; (c) the beneficiaries have identified a

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4 As discussed below, the language in question actually appears in the comment to Section 411 of the Uniform Trust Code, upon which Section 7740.1 of the UTA was based.

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suitable successor; and (d) at least one of the following conditions is present: (i) the trustee has committed a serious breach of trust; (ii) there is a demonstrated lack of cooperation between cotrustees that substantially impairs the administration of the trust; (iii) the trustee has not effectively administered the trust as a result of unfitness, unwillingness or persistent failures; or (iv) there has been a substantial change in circumstances, other than a corporate reorganization, such as a merger or consolidation. The Court observed that a modification under Section 7740.1 would avoid the numerous findings of fact and conclusions of law that would be required in a removal action pursuant to Section 7766.

To bolster its analysis – and recognizing that the General Assembly may have been ambiguous with respect to where it would to allow modification – the Supreme Court considered pre-UTA Pennsylvania common law and the legislative history. It reviewed prior statutes and case law whereby removal and replacement of a trustee was permitted under circumstances when the Orphans’ Court found good cause existed to do so, and concluded that “[t]he enactment of section 7766 reflects the General Assembly’s intent to retain these principles in connection with the removal and replacement of a trustee.” With respect to legislative intent, the Court turned to Section 706(b)(4) of the UTC (upon which Section 7766 of the UTA was based). That section permits a court to remove a trustee upon the unanimous consent of the trust beneficiaries, provided the removal serves the best interests of all the beneficiaries, is not inconsistent with a material purpose and a suitable successor trustee is available. The Joint State Government Commission recommended adopting this provision, but it was rejected by the Senate Judiciary Committee. The Supreme Court also observed that two other states that have also adopted the UTC – Iowa and Ohio – included explicit language that their modification provisions may not be used to effect the removal of a trustee, citing Iowa Code Ann. §633A.2203 and Ohio Rev. Code Ann. §5804.11.

Finally, the Supreme Court referred to the UTC comment to its section 411, upon which Section 7740.1 was based. It noted that the prefatory comment to the UTC provides that “sections of the UTC that are substantially similar to their UTC counterparts are indicated by a reference to the UTC section number in the UTA section headings, and that the UTC comments for these designated provisions ‘are applicable to the extent of the similarity.’” Because the heading to Section 7740.1 contains a reference to UTC section 411, the Court concluded it may consider the comment to section 411. That comment, which also references modification under section 65 of the Restatement (Third) of Trusts, provides that “Section 706 is the exclusive provision on removal of trustees.” Thus, the Supreme Court concluded that

[b]y enacting section 7740.1 of the UTA in light of this comment, the legislative intent with respect to the interplay between sections 7740.1 and 7766 is clear – the scope of permissible amendments under section 7740.1 does not extend to modifications to add a portability clause permitting beneficiaries to remove and replace a trustee at their discretion; instead, removal and replacement of a trustee is to be governed exclusively section 7766.

The Court rejected the beneficiaries’ argument that the comment to section 411 of the UTC regarding exclusivity must be considered in light of the fact that the UTC permits beneficiaries to unanimously remove the trustee, whereas the UTA does not. The Court stated that the exclusivity language was intended

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to distinguish the Restatement’s broader treatment of modification with those in the UTC, under which the beneficiaries’ ability to modify trusts is more limited.

**Unintended Consequences?**

At least two questions are left unanswered by the Supreme Court’s decision. In *Taylor*, the modification was sought under Section 7740.1(d) (consent by some beneficiaries with court approval). However, the Supreme Court held broadly that “the scope of section 7740.1 of the UTA does not extend to modification of trust agreements to permit the removal and replacement of trustees.” How does that impact Section 7740.1(a), whereby the living settlor and all the beneficiaries of an irrevocable trust may modify or terminate a trust even if such modification or termination is inconsistent with a material purpose of the trust? Did the Supreme Court really intend to take away a settlor’s ability to modify his or her own trust to add a remove-and-replace provision? In such a situation, which is highly distinguishable from the facts of *Taylor*, the settlor could simply terminate (and decant) the trust based on other language in Section 77401(a) to sidestep the *Taylor* holding.

Second, how does *Taylor* impact the ability of all of the trustees and beneficiaries of a trust to modify the trust by nonjudicial settlement agreement? Section 7710.1 provides that matters that can be resolved by agreement include “modification or termination of a trust” and “[a]ny other matter concerning the administration of a trust.” 20 Pa. C.S. §7710.1(d) (11), (13). While, on the surface, it would seem that this should not be a problem if all parties in interest (including the trustees) are in agreement, consider that a nonjudicial settlement agreement is valid “only to the extent it is not inconsistent with a material purpose of the trust and includes terms and conditions that could properly be approved by the court under this chapter or other applicable law.” Id. §7710.1(c) (emphasis added). In light of *Taylor*, could a court approve a modification to add a remove and replace provision? It doesn’t seem so. One solution, where the disinterested trustee and beneficiaries are in agreement, would be for them to enter an agreement – as opposed to a modification of the trust – by which the disinterested trustee would agree to resign upon request, whether by its co-trustees, the beneficiaries or both.
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11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: “Planning in Uncertain Times”
Speaker: Robert W. Finnegan, JD, CLU

Holiday Celebration
Wednesday, December 6, 2017
5:30 – 7:30 p.m.
Union Trust
717 Chestnut Street, Philadelphia, PA

January Luncheon Program
Tuesday, January 9, 2018
11:45 a.m. - 1:45 p.m.
The Union League
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Topic: “Business Succession Planning”
Speaker: Turney P. Berry

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