Report of the Chair

By ROBERT I. FRIEDMAN
COZEN O’CONNOR

As I write, we have just held our Section’s Annual Meeting and the year is racing to an end.

At our Meeting we elected Susan G. Collings as Vice Chair and Karen Stockmal as Secretary, and we elected Michelle Huang, Peter Johnson, Margery Schneider, Daniel Ross and Michael Stein to next year’s Executive Committee. At the same time, we thanked outgoing Executive Committee members Joan Agran, Steven Klammer, Karin Kinney, Olivia Stoner and Sharon Wilson. We also thanked Kathleen Stephenson, the outgoing chair of the Legislative Committee.

The Annual Meeting was very well attended and I think enjoyed by all those who were able to be there. We especially thank our sponsors, Intervention Associates and Sotheby’s, for allowing us to hold our meeting and reception in the comfortable surroundings of the Warwick Hotel and enjoy the excellent food and drink it provided. At our meeting I was able to highlight a number of notable accomplishments for the year, including the release of the Guardianship Manual which is now available on our Section’s page of the Bar website, and our ongoing and cooperative work with the Orphans’ Court on proposed revisions to Rule 2039.1 relating to compromises involving minors and incapacitated persons.

We were also able to crow a little about the successful passage of Act 85 of 2010, signed into law by the Governor in October, which includes some long pending changes and clarifications to the Pennsylvania Uniform Trust Act and also includes provisions relating to the interpretation of tax formula clauses in the wills and trusts of 2010 decedents in light of the repeal of the federal estate tax and part of the federal generation-skipping tax. Fittingly, the report on this was made by Ted Watters, who is the current Chairman of the...
Summary of Pennsylvania Act No. 85 of 2010

On October 27, 2010, Governor Rendell signed Act No. 85 of 2010 (the “Act”) into law. The Act allows Pennsylvania to join the ranks of the various other states with statutory laws that interpret formula clauses in documents of 2010 decedents. The Act also contains the much anticipated amendments to the Pennsylvania Uniform Trust Act along with some other changes to the PEF Code.

Set forth below is a brief summary of the new laws and amendments implemented by the Act. (Unless otherwise stated below, the effective date of the provisions of the Act is December 26, 2010.)

I. Formula Clauses for Federal Tax Purposes

The Act adds a new Chapter 28 to the PEF Code to address the application of formula clauses in 2010. Generally, this new chapter creates a rebuttal presumption that a decedent who dies after December 31, 2009, and prior to the reinstatement of the federal estate tax and GST, intended that the provisions of his or her will, trust or other dispositive document should be interpreted as if the federal estate tax and GST in effect on December 31, 2009, are still applicable, unless the will, trust or other dispositive instrument provides otherwise. The personal representative, trustee or beneficiary of a decedent has standing to rebut this presumption by presenting other evidence of a decedent’s intent to the court for consideration. A proceeding under Chapter 28 to rebut the presumption must be commenced within one year of the decedent’s death.

Chapter 28 became effective on October 27, 2010. Chapter 28 is not intended to eliminate the use of any post-mortem mechanisms, such as disclaimers, that preserve any potential benefit that may result from the repeal of the federal estate tax and the GST.

II. Other Changes Implemented by the Act

In addition to the formula clause provision, the following changes have been made by the Act:

1. Sections 2106, 2507, 6111.1 and 6111.2 of the PEF Code, regarding the effect of a divorce or pending divorce upon an estate, contain conforming modifications to prior changes made to the Domestic Relations Code, as set forth in Title 23.

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Report of the Chair, continued

Decedents’ Estates Laws Advisory Committee of the Joint State Government Commission, and who was instrumental in coordinating with our own Legislative Committee to accomplish this timely legislative action. They said it couldn’t be done.

As I write Congress has yet to pass a new tax bill for 2011, and whether something is enacted by the time this report is published or not, the Section will no doubt continue to have an issue to keep it busy on the educational front, if not the legislative front, in the new year.

On a somber note, at our meeting we acknowledged with sadness the death of Orphans’ Court Judge Theodore Gutowicz, on December 5, and we extend our sympathy to his family.

Looking ahead, it is clear that all of our Committees are active and will continue to be engaged in valuable projects in 2011.

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Summary of Pennsylvania Act No. 85 of 2010, continued

2. Section 3162 of the PEF Code, regarding the advertisement of the grant of letters, has been amended to provide that a personal representative who has advertised the grant of letters, forward the proof of the advertisement to the trustee of a trust established by the decedent, provided that the trustee has given notice of the trust to the personal representative.

3. Section 3301(c) of the PEF Code, regarding the time for filing of an inventory, has been revised to confirm that the court may direct a personal representative to file an inventory of estate assets without requiring a party to make a motion.

4. Section 3706 of the PEF Code, regarding the apportionment of federal estate tax, has been amended to clarify that the parties liable to pay federal estate tax are required to pay the apportioned amounts by the date the tax is due to be paid, without extensions. If a fiduciary pays the apportioned amount of any beneficiary, the fiduciary may seek recovery of the amount from the beneficiary, together with five percent (5%) interest per annum, from the date of payment by the fiduciary. Also, a fiduciary may delay distribution to a beneficiary who has not paid the apportioned share of federal estate tax. This statutory change specifically overrules the holding of In re Estate of Zambrano, 875 A.2d 307 (Pa.Super. 2005), in which the Superior Court held that a beneficiary did not have to pay his apportioned share of federal estate tax until the fiduciary had first paid the amount in full and the estate tax return had been fully processed by the Internal Revenue Service.

5. Section 5603(p) of the PEF Code, regarding insurance transactions completed under a power of attorney, has been amended to provide that when an agent has completed a beneficiary designation of a life insurance policy for the principal, the agent and beneficiary shall be liable to the extent that a court determines that a beneficiary designation is inconsistent with the known or probable intent of the principal.

6. Section 5603(q) of the PEF Code, regarding retirement plan transactions completed under powers of attorney, has been amended to provide that an agent may not designate himself as a beneficiary of a retirement plan, unless the agent is a spouse, child, grandchild, parent or sibling of the principal. Moreover, an agent and a beneficiary of a retirement plan shall be liable to the extent that a court determines that the beneficiary designation made by an agent is inconsistent with the known or probable intent of the principal.

7. Section 6107.1(b) of the PEF Code, regarding the repeal of the rule against perpetuities, has been amended to prevent the inadvertent triggering of the “Delaware Tax Trap” by the exercise of a power of appointment. This amendment became effective on October 27, 2010, and applies to any interest created after December 31, 2006.

8. Section 7725 of the PEF Code, regarding notice of virtual representation under a trust, has been amended to shorten, from 60 days to 30 days, the time that any person given notice that he or she is representing another has to decline representation. This section also includes a presumption of acceptance 30 days after the receipt of the notice, if no writing to the contrary is delivered to the trustee.

9. Section 7745(2) of the PEF Code, regarding creditors’ claims against settlors, has been amended to confirm existing law that the assets of an irrevocable trust are not subject to the claims of a creditor of a settlor solely because the trustee has the discretion to make distributions to the settlor (or directly to a taxing authority) to pay income tax owed by the settlor, which is attributable to trust income or principal. This amendment became effective on October 27, 2010, and has a retroactive application to November 6, 2006, the original effective date of the Pennsylvania Uniform Trust Act.

10. Section 7754(d) of the PEF Code, regarding actions contesting the validity of a revocable trust, has been amended to clarify that the rules regarding the competency of a witness in a will contest, shall apply to witnesses appearing in actions contesting the validity of a revocable trust.

11. Section 7755 of the PEF Code, regarding claims and distributions after a decedent’s death, has been amended to amplify the ability of a trustee to advertise a revocable trust established by a decedent.

12. Section 7766(b)(4) of the PEF Code, regarding the removal of a trustee, has been amended to provide that the corporate reorganization of an institutional trustee does not itself constitute a substantial change of circumstances that would warrant the removal of that trustee. This change incorporates into the statute language previously continued on Page 4
13. Section 7780.3 of the PEF Code, regarding a trustee’s duty to inform and report, has been revised to require a trustee to respond promptly to any inquiries made by the settlor as well as a beneficiary of the trust. A trustee also is required to respond promptly to any inquiries from the Pennsylvania Department of Welfare, when the settlor or beneficiary of the trust is a resident in a state-owned facility, or receiving cash or other benefits from the Department. The amendments also require a trustee to provide notice to the settlor whenever a trusteeship changes. In addition, the amendments clarify that the annual report to which a beneficiary is entitled may be comprised of several periodic reports and changes the language describing the report to the more general “periodic written financial reports concerning the trust.” This amendment became effective on October 27, 2010, and has a retroactive application to November 6, 2006.

14. Section 7780.6(a) of the PEF Code, regarding trustee powers, has been amended to add a new paragraph (33), which provides that a trustee may exercise elections with respect to federal, state and local taxes. This amendment became effective on October 27, 2010, and has a retroactive application to November 6, 2006.

15. Section 7785 of the PEF Code, regarding the limitation of actions against a trustee, has been revised to shorten the time for objections based upon periodic reports to two and one-half years after the report is sent. Further, this section provides that if the beneficiary still is not satisfied, the beneficiary must commence an action within five years of the initial report. This limitation period continues to require the trustee to provide regular financial reports to the beneficiary.

16. Section 8105(e) of the PEF Code, regarding the power to convert to a unitrust, has been amended to add a new paragraph (5.1), which provides that a trustee has the discretion to use a smoothing period of three, four or five years to average the net assets of a trust.

17. Section 8149 of the PEF Code, regarding retirement benefits, has been amended to provide that Section 8104 (pertaining to the power to adjust), Section 8105 (pertaining to the power to convert to a unitrust) and Section 8107 (pertaining to express trusts) may be applied to retirement benefits that are payable to a trust.

18. Section 5547(b) and 5548(b) of Title 15, regarding corporate trust property, contain conforming amendments to changes made in the PEF Code.

III. Text of the Act

The full text of the Act may be found at the following web page:

http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2009&sessInd=0&billBody=S&billTyp=B&billNbr=0053&pn=2228

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Philadelphia, Pa 19103-1895
Nina.stryker@obermayer.com

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IRS Extends a Helping Hand to Charitable Trusts that Erroneously Converted from Type III Supporting Organizations to Private Foundations

By RICHARD L. FOX
DILWORTH PAXSON LLP

In response to changes under the Pension Protection Act of 2006, many charitable trusts that were classified as Type III supporting organizations erroneously converted to private foundation status.

The IRS has now provided guidance as to how those trusts can now regain their supporting organization status and obtain a refund of any net investment excise erroneously paid.

The Pension Protection Act of 2006 (“PPA”) made a vast array of changes to the tax regime applicable to supporting organizations (“SOs”), including certain very

3 SOs are described in Internal Revenue Code Section (“Section”) 509(a)(3) and subject to special requirements under Section 509(f) (3). The statutory changes made to SOs under the PPA were in response to a variety of perceived SO abuses and, as a result, the PPA placed substantial new restrictions on SOs, thereby making an already difficult-to-understand tax regime even more challenging. Given the new restrictions on SOs and the increased complexities applicable

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important changes to so-called “Type III SOs.”

One major change affecting charitable trusts that were classified as Type III SOs prior to the enactment of the PPA was the elimination of the alternative “responsiveness test” available only to charitable trusts, which allowed a Type III SO organized as a charitable trust to rely solely on a supported organization’s right to enforce the trust and compel accounting under state law in order for the trust to be considered responsive to the needs or demands of the supported organization. This alternative responsiveness test had historically been available to charitable trusts and because of its relatively liberal standard virtually guaranteed that a charitable trust would meet the responsiveness test applicable to Type III SOs. Under the post-PPA Type III SO tax regime, charitable trusts became subject for the first time to the more strict standards of the “significant voice responsiveness test,” requiring the supported organization of the charitable trust to have a “significant voice” over the operations of the trust. The PPA did not, however, provide any specific guidance regarding a charitable trust meeting the significant voice responsiveness test, opting instead to direct the IRS to subsequently issue regulations in this area. This lack of guidance created an air of uncertainty as to whether existing charitable trusts whose function was limited to making distributions of funds to one or more supported organizations could meet the significant voice responsiveness test and, therefore, whether such a trust could continue to qualify as a Type III SO or, in the alternative, should convert to private foundation status. Prior to the issuance of regulations and without providing any further substantive guidance in this area, the IRS issued Notice 2008-6, which provided certain transitional relief in connection with the conversion to private foundation status of “certain charitable trusts that fail the responsiveness test for Type III supporting organizations” as a result of the elimination of the alternative responsiveness test historically available for charitable trusts prior to the PPA. Although Notice 2008-6 was procedural in nature, it clearly indicated a view by the IRS that with the elimination of the alternative responsiveness test, some charitable trusts that had been historically classified as Type III SOs were considered private foundations under the PPA, including specifically stating that “trusts previously classified as Type III supporting organizations may be classified as private foundations as a result of the PPA.” Because of the elimination of the alternative

4 A Type III SO must meet both a “responsiveness test” and “integral part test.” Reg. 1.509(a)-4(i)(1)(i). In general, the responsiveness test requires that the Type III SO be responsive to the needs or demands of its supported organization. A complete discussion of the “responsiveness test” and the “integral part test” for Type III SOs is beyond the scope of this article. For a complete discussion of these tests, both before and after the PPA, see Fox, Prop. Regs. Provide New Guidance for Type III Supporting Organizations, ETPL (March 2010).

5 As discussed below, the alternative responsiveness test applicable to a charitable trust was met if: (1) it is a charitable trust under state law; (2) the supported organization is a beneficiary of such trust; and (3) the supported organization has the power to enforce the trust and compel an accounting. Reg. 1.509(a)-4(i)(2)(iii).

6 The “significant voice responsiveness test,” found at Reg. 1.509(a)-4(i)(2)(ii), was historically the general responsiveness test that had to be met by all Type III SOs, with the sole exception of charitable trusts, which were subject to the more liberal alternative responsiveness test under Reg. 1.509(a)-4(i)(2)(iii).

7 2008-3 IRB 275 (12/21/2007).

8 As discussed further below, under Notice 2008-6, charitable trusts classified as Type III SOs that became private foundations during 2007 by virtue of their failure to meet the responsiveness test as a result of the elimination of the alternative responsiveness test for charitable trusts were permitted to continue to file Form 990, Return of Organization Exempt from Income Tax, and were not subject to the Section 4940 net investment excise tax for taxable years beginning before January 1, 2008.

9 The notice did indicate, however, that a charitable trust will continue to qualify as a Section 509(a)(3) SO if it meets the significant voice responsiveness test for Type III SOs, although it did not provide guidance on this issue.

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responsiveness test, the lack of specific guidance or examples regarding the application of the significant voice responsiveness test to charitable trusts, potential exposure to penalties for the failure to comply with the private foundation tax requirements, and in light of Notice 2008-6, many trustees converted these trusts from Type III SOs to private foundations, thereby subjecting such trusts, for the first time, to the Chapter 42 excise tax rules, including the excise tax on net investment income under IRC Section 4940.

On September 24, 2009, more than three years after the enactment of the PPA on August 17, 2006, the Treasury issued long-awaited proposed regulations applicable to Type III SOs. These regulations made it clear that notwithstanding the elimination of the alternative responsiveness test historically available for charitable trusts, certain Type III SO charitable trusts could comply with the significant voice responsiveness test (and, therefore, could maintain their Type III SO status) and provided examples illustrating the application of this test to charitable trusts. As a result, after the issuance of the proposed regulations, a question was raised as to the action that should be taken with respect to those charitable trusts that had converted from Type III SO status to private foundation status after the PPA, only to later discover that based on the subsequently issued proposed regulations, the trusts could have retained their Type III SO status in the first instance. Fortunately, the IRS has addressed this issue in Announcement 2010-19, which included procedures for requesting a ruling for a charitable trust that had "erroneously" converted from Type III SO status to private foundation status to regain its Type III SO status and the procedures to seek a refund of taxes paid on net investment income previously paid under Section 4940. This article provides background on the changes to the responsiveness test applicable to charitable trusts historically classified as Type III SOs prior to the PPA, discusses the requirements under the proposed regulations for a charitable trust to meet the significant voice responsiveness test under the post-PPA Type III SO tax regime, and addresses the requirements of Announcement 2010-19. It also addresses the issue of whether a charitable trust having converted to private foundation status should consider deferring a ruling request as to its Type III SO status until the proposed regulations are issued in temporary or final form.

11 2010-14 IRB 529.

12 Paragraph D under the "Procedures" set forth in Announcement 2010-19 also clarifies the procedures that a charitable trust that became a private foundation due to the changes of the PPA should follow if such trust subsequently changes its operations such that it will qualify as a Type III SO.

13 The proposed regulations apply to taxable years beginning after the date they are published in the Federal Register as final or temporary regulations. As of the writing of this article, neither temporary nor final regulations have been issued.

SOs Generally

A SO is one of the most complex, technical, and least understood of all IRC § 501(c)(3) tax-exempt organizations.

It has also been one of the most controversial and scrutinized tax-exempt organizations. Although it may resemble a private foundation in that it may be funded by a single donor and provide support for one or more "publicly supported organizations," a SO is excluded from the definition of a "private foundation" and is, therefore, itself classified as a public charity, essentially on a derivative basis. The support provided by a SO may take the

14 Note that a non-exempt charitable trust under Section 4947(a)(1), which is not a Section 501(c)(3) tax-exempt organization, may also qualify for SO status.

15 For example, a front page article in the New York Times on April 25, 2005, entitled "Big Tax Break Often Bypasses Idea of Charity," presented a highly critical view of SOs, which was followed by a joint press release issued by Senators Grassley and Max Baucus stating that they planned to propose reforms "to stop the use of supporting organizations for generous tax breaks rather than charitable purposes." A Staff Discussion Draft released by the Senate Finance Committee prior to its July 22, 2004 hearing on governance and best practices of charitable organizations proposed the elimination of Type III SOs, as "[t]his has been an area of significant abuse."

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form of performing the functions, or carrying out the purposes, of one or more publicly supported organizations or, in the alternative, by making annual distributions of money to such organizations. A SO is formed as a nonprofit corporation or as a charitable trust under state law and, therefore, is a distinct legal entity, separate and apart from the one or more publicly supported organizations it supports. In order to ensure that a publicly supported organization has the ability and motivation to properly oversee the activities of a SO, a SO must have one of three possible relationships with its supported organization. This relationship requirement establishes three types of supporting organization, known, respectively, as Type I, Type II, and Type III, depending on which one of the three possible relationships exist.16

16 An SO that is “operated, supervised or controlled” by one or more supported organizations is commonly known as a Type I supporting organization. The relationship of a Type I SO with its supported organizations is comparable to that of a corporate parent-subsidiary relationship. A SO that is “supervised or controlled in connection with” one or more supported organizations is commonly known as a Type II SO. The relationship of a Type II supporting organization with its supported organization(s) is comparable to a corporate brother-sister relationship. A SO that is “operated in connection with” one or more supported organizations is commonly known as a Type III SO.  

Responsiveness Test Requirement for Type III SOs Prior to the Enactment of the PPA

The Type III SO, whose relationship with the supported organization is tested under the “operated in connection with” standard under Section 509,17 has the least intimate relationship with its supported organization and, as a result, there is a lower threshold of supported organization participation in the SO’s operations. The trustees of a Type III SO are not selected by the supported organization and its board of trustees need not be composed of any individuals who are also on the board of the SO.

Because it has the least connection to its supported organizations of any type of SO, the Type III SO has traditionally been subject to the most IRS scrutiny, and the most complexity. The regulations in effect prior to the enactment of the PPA provided detailed rules in connection with a Type III SO meeting the responsiveness test.18 Under a general rule19, the responsiveness test was met where: (1) the supported organization appoints or elects one or more of the officers, directors, or trustees of the SO; (2) one or more members of the governing body of the supported organization serve as officers, directors, or trustees of, or hold other important offices in, the SO; or (3) the officers, directors, or trustees of the SO maintain a close continuous working relationship with the officers, directors, or trustees of the supported organization.20 In all three cases, the relationship must result in the supported organization having a significant voice in the investment policies of the SO, the timing and the manner of making grants, the selection of the grant recipients of the SO, and direction over the use of the income or assets of the SO.21 Under an alternative test available only to charitable trusts, the responsiveness test was also met where: (1) the SO is a charitable trust under state law; (2) each specified supported organization is a named beneficiary under the charitable trust’s governing instrument; and (3) each supported organization has the power to enforce the trust and compel an accounting under state law.22 Thus, even where a charitable trust did not meet the general responsiveness test by virtue of the supported organizations having a significant voice over its operations, provided it met the alternative responsiveness test available to charitable trusts, it nonetheless was considered to be responsive to the needs or demands of its supported organizations.

Elimination of Alternative

17 Section 509(a)(3)(B)(iii).

18 SOs supporting a publicly supported organization prior to November 20, 1970 were allowed to have additional facts and circumstances, such as a historical and continuing relationships taken into account when determining whether the SO met the responsiveness test. See Reg. 1.509(a)-(4)(i)(1)(ii).

19 SOs supporting a publicly supported organization prior to November 20, 1970 were allowed to have additional facts and circumstances, such as a historical and continuing relationships taken into account when determining whether the SO met the responsiveness test. See Reg. 1.509(a)-(4)(i)(1)(ii).

20 Reg. 1.509(a)-(4)(i)(2)(ii)(a), (b) and (c).

21 Reg. 1.509(a)-(4)(i)(2)(ii)(d).

22 Reg. 1.509(a)-(4)(i)(2)(iii).

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Responsiveness Test for Charitable Trusts under PPA and Notice 2008-6

Effective August 17, 2007, the PPA eliminated the special alternative test historically available to charitable trusts as a means of meeting the responsiveness test, thereby requiring such trusts to meet the general responsiveness test that otherwise applies to all Type III SOs.23 Thus, rather than being able to rely on a supported organization’s enforcement rights under state law to meet the responsiveness test, in order to continue to qualify as a Type III SO, a charitable trust is required to meet the general “responsiveness test” by being responsive to the needs and demands of the supported organizations by virtue of the supported organizations having a significant voice in its operations. Following the elimination of the alternative responsiveness for charitable trusts, the IRS issued Notice 2008-6,24 which provided transitional relief in connection with the conversion to private foundation status of “certain charitable trusts that fail the responsiveness test for Type III supporting organizations.” Notice 2008-6 provided that because of the need for affected charitable trusts to adjust record-keeping systems to reflect private foundation status, and the administrative difficulties in processing returns reflecting a mid-year change of status, charitable trusts classified as Type III SOs that became private foundations during 2007 by virtue of their failure to meet the responsiveness test as a result of the elimination of the alternative responsiveness test for charitable trusts were permitted to continue to file Form 990, Return of Organization Exempt from Income Tax, for taxable years beginning before January 1, 2008. Under Notice 2008-6, therefore, a charitable trust that was required to convert from Type III SO status to private foundation status was not required to file Form 990-PF or pay excise taxes on investment income under Section 4940 until its first taxable year beginning on or after January 1, 2008.26 Although

23 Section 1241(c) of the PPA eliminated the alternative responsiveness test for charitable trusts, effective August 17, 2007.


25 The annual information return filed by a private foundation is Form 990-PF, Return of Private Foundation. The annual information return filed by a Type III SO, which is considered a public charity (not a private foundation) is Form 990, Return of Organization Exempt from Tax.

26 The notice further provides that for “the first taxable year beginning on or after January 1, 2008, organizations should file paper Form 990-PF and should write “Notice 2008-6 status change” at the top of Form 990-PF. Normal due dates and submission rules for filing Form 990-PF otherwise apply.” There is no specific authority in the case where notwithstanding the issuance of Notice 2008-6, a charitable trust previously classified as a Type III SO, for whatever reason (including not being aware of Notice 2008-6), erroneously filed a Form 990-PF prior to its first taxable year beginning on or after January 1, 2008. In those situations, it would appear that, consistent with Announcement 2010-19, discussed below, the charitable trust should file a Form 990 for the year in which it erroneously filed a Form 990-PF and simultaneously with filing such Form 990, file a Form 843, claiming a refund of the Section 4940 tax paid with the erroneously filed Form 990-PF, indicating on line 7 of the 843 that under Notice 2008-6, the organization should have filed a Form 990 for such year and was not required to file Form 990-PF or pay the Section 4940 tax for such year.

27 Prop. Reg. 1.509(a)-4(i)(3).
X, an organization described in IRC § 501(c)(3), is a trust created under the last will and testament of Decedent. The trustee of X is a bank (Trustee). Under the trust instrument, X supports M, a private university described in IRC § 509(a) (1). The trust instrument provides that Trustee has discretion regarding the timing and amount of distributions consistent with the Trustee’s fiduciary duties. Representatives of Trustee and an officer of M have quarterly face to face meetings, at which they discuss M’s projected needs for the university and ways in which M would like X to use its income and invest its assets. Additionally, Trustee communicates regularly with the officer of M regarding X’s investments and plans for distributions from X. Trustee provides the officer of M with quarterly investment statements, the information required to be furnished to the SO, and an annual accounting statement. Based on these facts, X meets the responsiveness test.

This example shows the importance attached to regular communication and interaction between the SO and its supported organization in establishing that a charitable trust is responsive to its supported organization. This should include such things as instituting regular meetings with their supported organizations, having regular discussions regarding the needs of the supported organizations, taking into account and, where deemed appropriate, following the recommendations of the supported organizations in connection with the operations of the SOs, including with respect to such things as investment of assets, the timing of payments to the supported organizations, and other matters pertaining to the operations of the SOs. The reference to face-to-face meetings in the example is merely an illustration, not a requirement of the proposed regulations. To clarify, however, that face-to-face meetings are not a requirement, the IRS has been asked for the example “to specify that other means of having regular interaction, beyond the participants being physically present in the same location, may satisfy the test.”

In the absence of regular communication and interaction between an SO and its supported organization, the responsiveness test will not be met, as illustrated by the following example in the proposed regulations:

Y is an organization described in Section 501(c) (3) and is organized as a trust under state law. The trustee of Y is a

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28 One commentator recommended exempting trusts managed by institutional trustees from the responsiveness test. The commentator stated that institutional trustees employ strict rules to manage trusts, thereby making abuse of these trusts highly unlikely. Preamble to Prop Regs. 09/24/2009, Fed. Reg. Vol. 74, No. 184, p. 48672. No such exemption was provided under the proposed regulations, however.

29 1.509(a)-4(i)(3)(iv), Ex. (1).

30 Letter dated April 27, 2010 from the ABA Section of Taxation to IRS Commissioner Douglas Shulman. Specifically, the letter suggested that the example, when finalized, provide that “representatives of the trustee and an officer of the supported organization have quarterly face-to-face meetings, ‘or meetings via interactive technology that allows all persons participating in the meeting to communicate with one another.’” (Emphasis in original.) The ABA Section on Real Property, Trust and Estate Law made a similar suggestion in a letter to the IRS dated December 23, 2009.

31 1.509(a)-4(i)(3)(iv), Ex. (2).
bank, Trustee. Y supports charities P, Q and R, each an organization described in Section 509(a)(1). Y makes annual cash payments to P, Q and R. Once a year, Trustee sends to P, Q, and R the cash payment, the annual disclosure information, and an accounting statement. Trustee has no other communication with P, Q or R. Y does not meet the responsiveness test.

**Announcement 2010-10: Requesting a Ruling that a Charitable Trust that Erroneously Converted to Private Foundation Status Constitutes a Type III SO**

Announcement 2010-19 applies to charitable trusts that met the requirements to be classified as a Type III SO through the end of the 2008 taxable year, including by meeting the significant voice responsiveness test for periods after August 16, 2007, “but erroneously filed Form 990-PF and paid section 4940 tax for the 2008 taxable year.”

It provides specific procedures that such a trust should follow to request a ruling from the IRS that it was and continues to be a Type III SO described in Section 509(a)(3) and to obtain a refund of any Section 4940 net investment excise tax paid with respect to its 2008 taxable year.

32 2010-14 IRB 529.

33 Interestingly, the author has learned that the IRS is issuing determination letters to existing charitable trust Type III SOs confirming their Type III status, even where such organizations did not previously opt to convert to private foundation status. Such determinations may further include a determination of whether the trust is a “functionally integrated Type III SO” or a “functionally integrated Type III SO”.

Procedures to Request a Ruling

Under Announcement 2010-19, a trust may request a ruling that it qualified and continues to qualify as a Type III SO for taxable years beginning on or after January 1, 2008, by submitting a written request to the IRS National Office.

34 The integrated Type III SO” or a “functionally integrated Type III SO”. Because these organizations did not convert to private foundation status, Announcement 2010-19 does not apply and a request for confirmation of Type III status is, therefore, not sent to the address listed in Announcement 2010-19, but should instead be sent to: Internal Revenue Service, EO Determinations, P.O. Box 2508, Rm. 4024, Cincinnati, OH 45201. Although there is no formal guidance, it appears advisable to provide the same type of information required by Announcement 2010-19 to demonstrate that the charitable trust meets the significant voice responsiveness test. Obtaining a determination letter confirming that a charitable trust continues to qualify as a Type III SO is not required, but some trustees may deem obtaining such a determination prudent so as to ensure continued qualification (of course, there is no guarantee that the determination will be favorable) and further may deem it prudent to have certainty regarding whether the trust is a “functionally integrated Type III SO” or a “functionally integrated Type III SO” so the trustee may comply with potential future distributions requirements.

35 2010-1 I.R.B. 122. Rev. Proc. 2010-4 explains how the IRS provides guidance to taxpayers on issues under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division, including through the issuance of a letter ruling. A sample format of a request for a letter ruling is provided in Appendix A to the revenue procedure.
requirements of the significant voice responsiveness test. For example, such documentation may include minutes or other documentation of meetings, telephone calls, conversations, e-mail exchanges, and policies that demonstrate a close and continuous working relationship between the Type III SO and the supported organization based upon which the supported organization has a significant voice.

Like all requests for a ruling, the request must be signed under penalties of perjury by the trust’s officer, director, trustee, or other authorized official, and request should be mailed to:

Internal Revenue Service
Attention: EO Letter Rulings
P.O. Box 27720
McPherson Station
Washington, D.C. 20038

There is no user fee for this ruling request. No deletions statement is required because determinations regarding foundation status are public pursuant to Section 6104. The Checklist in Appendix B of Revenue Procedure 2010-4 is also not required.

Request for Refund of Net Investment Excise Tax Under Section 4940

After a charitable trust obtains a ruling from the IRS National Office that it qualified and continues to qualify as a Type III SO for taxable years beginning on or after January 1, 2008, it may then request a refund of tax paid under Section 4940 for its first taxable year beginning on or after January 1, 2008. This is done by filing a Form 843, Claim for Refund and Request for Abatement, that meets the following requirements:

1. The Form 843 must be accompanied by a copy of the ruling received from the IRS under the procedures set forth in Announcement 2010-19.

2. The Form 843 must be submitted by mail or delivered to:

   Internal Revenue Service
   Attention: EO Letter Rulings
   P.O. Box 9941
   MS: 6710
   Ogden, Utah 84409-0074

3. The Form 843 must be completed as follows:

   a. Write “Announcement 2010-19 status change” at the top of Form 843,

   b. On line 6 of Form 843, check the box for “990-PF,” and

   c. On line 7 of Form 843, write “Announcement 2010-19 status change by Type III supporting organization.”

2008 Form 990

A charitable trust that receives a ruling that it is a Type III SO under the procedures set forth under Announcement 2010-14 must file a Form 990 for its first taxable year beginning on or after January 1, 2008, within 120 days of the date of the ruling letter. The top of page 1 of the Form 990 should bear the following legend in bold, underlined, or all capitals font: “ANNOUNCEMENT 2010-19.” Although Announcement 2010-19 specifically only applies to the first taxable year beginning on or after January 1, 2008, it would appear that, consistent with Announcement 2010-19, if a charitable trust which has obtained a ruling that it is a Type III SO under Announcement 2010-19 has also “erroneously” filed a Form 990-PF for a taxable year beginning on or after January 1, 2009, it should also file a 990 for such year and file a Form 843 to obtain a refund of any Section 4940 tax paid with the erroneously filed Form 990-PF.

Consideration of Whether to File a Ruling Request Under Announcement 2010-19 Pending Proposed Regulations Being Issued in Temporary or Final Form

The proposed regulations apply to taxable years beginning after the date they are published in the Federal Register as final or temporary regulations, which have not yet been issued, although the proposed regulations may be relied upon for purposes of establishing the significant voice responsiveness test for purposes of Announcement 2010-19. The Treasury has requested public comments with respect to the proposed regulations, including “comments regarding a specific responsiveness rule for trusts” that would be consistent with the existing responsiveness test and the Congressional intent behind the PPA’s elimination of the alternative responsiveness test historically available for charitable trusts.36

In response, the IRS received recommendations that charitable trusts formed prior to the date of enactment of the PPA be permitted to rely on additional facts and circumstances, such as a historic and continuing relationship between organizations, to show compliance with the responsiveness test.37


37 See, e.g., the ABA Section on Real Property, Trust and Estate Law
IRS Extends a Helping Hand, continued

For some trustees of a charitable trust that previously converted to private foundation status as a result of the elimination of the alternative responsiveness test historically available to charitable trusts, the question of whether to file under Announcement 2010-19 may be relatively simple. For example, the trustee of a large trust may be deem it prudent to file in order to obtain a refund of the 2% excise tax imposed on net investment income under Section 4940. In more limited cases, the letter to the IRS dated December 23, 2009. This letter specifically states: “We also recommend that the exception for pre-November 20, 1970 organizations contained in Prop. Reg. 1.509(a)-4(i)(3)(v) be extended to organizations formed before the PPA was enacted. Just as supporting organizations formed before the Tax Reform Act of 1969 were given special treatment when the supporting organizations regulations first were enacted, so too organizations that may have been in existence for over 35 years when the PPA was enacted should be able to demonstrate their historic and continuing relationship with supported organizations and other additional facts and circumstances, in order to meet the requirements of the responsiveness test. This is particularly true for trusts, which were not previously subject to the responsiveness test, but may be able to demonstrate additional facts and circumstances that would not establish their compliance. It seems anomalous for regulations promulgated in 2009, with respect to an act enacted in 2006, to limit its transition relief to entities formed over 35 years before the statute was enacted.”

trustee may have a concern regarding some of requirements imposed upon private foundations under Chapter 42 of the Internal Revenue Code. For example, a charitable trust may want to make grants to individuals for travel, study or similar purposes and such grants require advance approval from the IRS in order for such payments not to be taxable expenditures if made by a private foundation. In such cases, the trustee may deem it more prudent to file under Announcement 2010-19 to be treated as an Type III SO rather than request advance approval regarding its individual grant-making procedures from the IRS as a private foundation.

However, some trustees may deem it prudent not to currently request a ruling under Announcement 2010-19. For example, if there exists uncertainty as to whether the trust could actually meet the significant voice responsiveness test under the proposed regulations or if the charitable trust is small and being a private foundation does not cause additional issues, obtaining a refund of the 2% excise tax imposed on net investment income under Section 4940 may not create enough of a benefit for the trustee to file under Announcement 2010-19 prior to temporary or final regulations being issued. Instead, given the possibility that the responsiveness test applicable to charitable trusts may be broadened or otherwise changed and it is not clear what impact such change would have on trusts that received a ruling that relied on the proposed regulations, the trustee may decide to defer taking any action until the proposed regulations are issued in temporary or final form. In such a case, the trustee should continue to file Form 990-PF and pay the Section 4940 tax. Interestingly, there is no time limitation imposed on requesting a ruling under Announcement 2010-19, such that it still may be possible to file a ruling request and seek a refund of Section 4940 taxes under Announcement 2010-19 upon the proposed regulations being issued in temporary or final form. The more likely result, however, is that such temporary or final regulations will provide specific guidance on this very issue. While it is hoped that the proposed regulations will soon be issued as either temporary or final regulations, as the Treasury has not provided any formal guidance as to when that will occur, trustees that elect not to file under Announcement 2010-19 should monitor when the statute of limitations will expire for any 990-PF that was filed for any tax year commencing after January 1, 2008.

Conclusion

By following the procedures set forth in Announcement 2010-19 and relying upon the proposed regulations regarding the significant voice responsiveness test, charitable trusts that erroneously converted from Type III SO status to private foundation status may regain their Type III SO status and obtain a refund of Section 4940 tax. However, for certain trusts that previously converted to private foundation status that are uncertain as to whether they can meet the responsiveness test under the proposed regulations or the current benefit of obtaining clarification as to its status is not significant and in light of the possible changes to this test for charitable trusts, deferring any action on this issue may be the prudent course of action pending the issuance of the proposed regulations in temporary or final form.

38 Section 4945(g).
CASE SUMMARIES FROM THE ORPHANS’ COURT LITIGATION AND DISPUTE RESOLUTION COMMITTEE

By TIMOTHY J. HOLMAN, ESQUIRE AND BRADLEY D. TEREBELO, ESQUIRE
HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

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In re: Hirt Trust, 30 Fid. Rep. 2d 365 (O.C. Erie 2010), concerned the attempt of a co-trustee and beneficiary to seal the record following the filing of the first and partial account of a trust. The Court in Hirt Trust sets forth a comprehensive analysis of when records may (or, in this case, may not) be sealed in certain Orphans’ Court proceedings.

Audrey Hirt executed a revocable trust dated July 30, 2008. She died on March 13, 2009, and as a result of her death the trust became irrevocable. Following Audrey Hirt’s death, the trustees of the trust were Laurel Hirt, National City Bank (now PNC Bank, N.A.) and Louis Harrison. Louis Harrison resigned, leaving Laurel Hirt and National City as trustees. Following Louis Harrison’s resignation, National City filed its first and partial account with the Register of Wills of Erie County, with a redacted copy of the trust instrument.

Following the filing of the account, Laurel Hirt petitioned to seal the record for the following four reasons: (1) the account and unredacted version of the trust contained “‘sensitive information,’ which would not otherwise be made available for public inspection[,]” such as the value of the trust assets and the trust’s holdings; (2) the trust document provides that the trustees should attempt to keep all distributions anonymous; (3) “if the identity of the donee charitable organizations is made public, these organizations will experience a decrease in the receipt of charitable donations”; and (4) because many of the beneficiaries are elderly, “if their identity is made public, they could possibly be taken advantage of or put at risk by designing persons.” Id. at 367.

The Attorney General opposed the motion to seal the record, as did Times Publishing Company (which was granted permission to intervene in the matter), which owned the Erie Times-News. Elizabeth Vorsheck, a beneficiary of the trust, also opposed Laurel Hirt’s motion to seal the entire record, but she requested that the names and addresses of the beneficiaries be redacted.

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

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Case Summaries, continued

The Court temporarily sealed the record. Following a hearing and briefs, the Court denied Laurel Hirt’s petition to seal the record as well as Elizabeth Vorsheck’s motion to redact the names and addresses. The Court then reopened the proceedings to the public.

The Court first noted that while Pennsylvania courts have the power to deny access to court proceedings where appropriate, “the common law, the First Amendment to the United States Constitution, and the Pennsylvania Constitution, all support the principle of openness of all judicial proceedings. Id. at 367-368 (citing Interest of M.B., 819 A.2d 59 (Pa. Super. 2003); ChildCare, LLC v. Flood, 887 A.2d 309 (Pa. Super.). If an interested party, including the press, seeks to access a judicial proceeding, “the party seeking to keep the proceedings closed must rebut the presumption of openness[.]” Hirt Trust, 30 Fid. Rep. 2d at 368 (citing M.B., 819 A.2d at 60; ChildCare, 887 A.2d at 312).

In analyzing requests to seal judicial proceedings, the Court stated that there are two methods to consider, both with a presumption of openness – the constitutional analysis pursuant to the First Amendment of the United States Constitution and the common law analysis. The party moving to seal the records must rebut the presumption of openness through both analyses for the Court to seal the records.

Under the constitutional analysis, the party requesting that the proceeding be sealed must establish that sealing the record serves an important governmental interest and there is no less restrictive way to serve that interest. The moving party must demonstrate that the “material is the kind of information that the courts will protect and that there is good cause for the order to issue.” . . . A party established good cause by showing that opening the proceedings will work a clearly defined and serious injury to the party seeking closure[.]” Hutchinson v. Luddy, 581 A.2d 578, 582 (Pa. Super. 1990), rev’d on other grounds, 594 A.2d 301 (Pa. 1991).

The Court then addressed Laurel Hirt’s first argument, that sensitive information would be disclosed. The Court noted that the only “sensitive information” not already available to the public would be the names and addresses of the beneficiaries and the specific gifts contained in the trust. Therefore, the Court found that Laurel Hirt’s first argument failed under the constitutional analysis (because no important government interest existed in keeping the information closed) and under the common law analysis (because it did not rebut the presumption of openness).

The Court next addressed Laurel Hirt’s second argument, that Audrey Hirt’s intent to keep donations anonymous would be frustrated by unsealing the record. The Court stated that a “party’s desire to have closed proceedings is not enough to close the proceedings.” Hirt Trust, 30 Fid. Rep. 2d at 370. Furthermore, the Court noted that the trust requested that the trustee make every effort to keep distributions anonymous, but it was not an absolute requirement.

Therefore, the Court dismissed Laurel Hirt’s second argument.

With respect to the third argument, that donations to charities would decrease if donations from the trust to the charities were made public, the Court found that there “was absolutely no credible, definitive evidence offered to support petitioner’s argument that charitable organizations will realize a decrease in donations if this matter is unsealed.” Id. at 371.

The Court then turned to Laurel Hirt’s final argument, that the identities of beneficiaries would be placed at risk if they were made public. With respect to the constitutional analysis, the Court held that there “was absolutely no credible, definitive evidence offered to support petitioner’s argument that any beneficiary will be harmed if this matter is unsealed; and therefore, there is no legitimate government interest that needs protecting in this regard. . . . Petitioner cannot identify a clearly defined, specific injury that will result from opening the proceedings; and therefore, petitioner has not demonstrated good cause to close this matter.” Id. With respect to the common law analysis balancing test, the Court held that the evidence presented did not rebut the presumption of openness because Laurel Hirt “failed to prove that any beneficiary will be harmed if the information contained in any document in this matter is made available to the public. Any judgment concluding otherwise would be mere speculation, and this Court will not override the

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Case Summaries, continued

The Court then turned to Elizabeth Vorsheck’s motion to redact the names and addresses of the beneficiaries of the trust as a less-restrictive alternative. The Court noted that although the relief requested by Elizabeth Vorsheck was less restrictive, the reasons requested to redact the names and addresses were the same as the reasons put forth by Laurel Hirt, which the Court already held did not pass the constitutional test or the common law balancing test. However, following the stipulation of the parties, the Court did agree to redact the names of the minor beneficiaries of the trust and instead only use their initials, pursuant to the “custom used by the Pennsylvania appellate courts and the Orphans’ courts of using only the initials of minor children.” Id. at 373.

In our experience, it is not unusual for a party involved in an Orphans’ Court proceeding to ask whether the record can be sealed. The Hirt Trust opinion reminds practitioners of the very high burden of proof presented by such requests.

Practice Points

Offsite Probate

By BERNICE J. KOPLIN

When probating an estate, one of the first challenges encountered is the appointment of the fiduciary. Frequently either one or more of the fiduciaries do not reside near the county where the estate is being raised, or one or more of the fiduciaries is physically limited and experiences great difficulty traveling any distance to the Register’s Office. The Register of Wills has alternatives for these circumstances.

If the fiduciary does not reside locally, it may be more convenient for the fiduciary to take their oath at the Register of Wills in another Pennsylvania county or its counterpart (the local Probate Court Judge or the Surrogate) in another state. In such circumstance the Register of Wills will commission his counterpart in the county where the nominated fiduciary resides (or the most convenient local counterpart in a neighboring county). A commission constitutes an appointment by the Register of Wills where the estate will be probated of the counterpart - either another Register of Wills within Pennsylvania or the counterpart in another state - to administer the oath of office to the fiduciary and obtain the fiduciary’s signature on the Petition for Probate and Grant of Letters. Upon fulfilling these duties the documents are returned to the Register of Wills to complete the probate of the estate.

It is the responsibility of counsel for the fiduciary to contact the court which will execute the commission. Counsel should determine to whom the commission should be addressed as well as the accurate mailing address. It is also recommended that inquiries be made as to any additional requirements they may have, as well as whether the fiduciary must be a legal resident in their jurisdiction, or just find the offsite location convenient. Within the Commonwealth of Pennsylvania, the fiduciary may be appointed at any Register of Will’s office; there is no requirement that it be the county of the fiduciary’s legal residence. This may differ in other states.

When counsel requests a commission for a fiduciary, the Register of Wills will require all of the usual documents to probate the estate, plus a photo ID of the fiduciary and the address of the court receiving the commission. A check in payment of the probate fee plus the fee to issue a commission must also accompany the documents being sent to the Register of Wills. These documents are then sent to the court accepting the commission. If the contact information for the fiduciary is included with the documents, the court administering the oath will call and inform the fiduciary that the documents arrived. However, it is not unusual for the counterpart to forget to contact the fiduciary; therefore it is recommended that the fiduciary or counsel remain vigilant, and contact the local court and check on the arrival of the documents to avoid unnecessary delays and the possibility of the documents being lost or misplaced. Inaccurate addresses may delay commissions.

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Lawyers engaged in estate planning and estate and trust administration face increasing pressure to provide ever faster, more efficient and less expensive services for their clients. Lawyers who either lack the time or ability to properly handle such matters and resort to shortcuts can stumble into some little known ethical traps.

Take the matter of notaries. Many of the documents we prepare and are required to process, such as estate planning and estate administration documents, require the use of a notary. Typically, the notary must attest to the fact the document was signed in front of him or her or that the person signing the document has stated that the facts set forth are true and correct. Occasionally, lawyers succumb to the temptation to have the executed document notarized outside the presence of the client, and the lawyer’s certification of his own presence at the execution is either forgotten or not possible.

The Attorney E-Newsletter issued by the Disciplinary Board of the Pennsylvania Supreme Court in November 2010 commented succinctly and accurately on such practice. This is the opinion in full:

“Many attorneys put pressure on their employees who are notaries to notarize documents not signed in their presence, or otherwise inconsistent with their duties as notaries. This is an unacceptable practice. An attorney who directs or encourages an employee-notary to notarize documents not signed in the notary’s presence commits serious misconduct and could face discipline. Rule 8.4 of the Rules of Professional Conduct states that it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, do so, or do so through acts of another…;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice…”

Being a party to an improper... continued on Page 18
notarization violates all of these rules. In addition, the lawyer who files or uses a document knowing it was improperly notarized may ‘offer evidence that a lawyer knows to be false’, in violation of Rule 3.3(a)(3).”

Some practitioners, not familiar or comfortable with drafting estate planning documents, and reluctant to refer their client to an appropriate estate planning lawyer, sometimes ask the local trust company to draft the documents. Of course, trust companies often have experienced estate planning lawyers on staff who may even use the suffix “Esq.” or the academic decree (J.D.) to identify themselves as lawyers. Such trust officers may certainly provide guidance, comments and even forms to lawyers. However, if the trust officer actually meets with the client and leaves the client with the impression the trust officer is practicing law, Rule 5.4(d) is implicated. That Rule has been held to prohibit the practicing of law for the benefit of the public in the course of employment as a trust officer. See Formal Opinion 2002-80 of the Pennsylvania Bar Association’s Committee on Legal Ethics and Professional Responsibility. A lawyer who refers a client to a trust officer expecting the trust officer to provide estate planning services for the client violates at least two Rules: Rule 5.5(a) as a result of assisting the trust officer in engaging in the unauthorized practice of law and Rule 8.4(a), knowingly assisting or inducing the trust officer to violate the Rules of Professional Conduct.

Some practitioners, not that well versed in the administration of estates, rely on outside or unsupervised accountants and paralegals to help their clients with estate administration and even with the preparation and filing of probate petitions and other documents with the Register of Wills and Clerk of the Orphans’ Court. The Pennsylvania Bar Association’s Committee on the Unauthorized Practice of Law has determined such activities by accountants and paralegals constitute the unauthorized practice of law as set forth in 42 Pa. C.S.A. §2524. See the Committee’s Formal Opinion 97-102. The lawyer’s complicity with the unauthorized practice of law violates Rule 8.4(d) which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice.

While it may certainly seem trite to say, it is certainly true: There is no substitute for taking the time to do things properly. If a lawyer lacks the time or capability to properly represent a client, he or she should refer the client to a lawyer who does have the time and competence to undertake the assignment.

WHAT WOULD YOU LIKE TO SEE IN FUTURE ETHICS COLUMNS?

Send your questions and ideas to:

Paul C. Heintz, Esquire
Obermayer, Rebmann, Maxwell & Hippel LLP
1617 JFK Boulevard
One Penn Center
19th Floor
Philadelphia, PA 19103

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:

David A. Ruben
email: davidaruben@gmail.com
TAX UPDATE

By MARGERY J. SCHNEIDER, ESQUIRE
STERN AND EISENBERG, LLP

I. FEDERAL ESTATE TAX

Legislation

The Reid-McConnell Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (December 17, 2010)

The Reid-McConnell Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “Tax Relief Act”) restores the estate tax for 2010, 2011 and 2012, with a full step-up in basis. The top tax rate is 35 percent and there is an exclusion amount of $5 million for an individual and $10 million for a married couple. Estates of decedents dying in 2010 have the option of electing out of the estate tax and into the modified carryover basis regime put in place by EGTRRA. (The IRS will determine the time and manner of making the election.) For decedents dying in 2012 the exclusion amount will be indexed for post-2010 inflation.

In 2011 and 2012, the executor of the estate of a predeceasing spouse can elect, on a timely filed estate tax return, to transfer to the surviving spouse the estate tax exclusion amount unused by the “last … deceased spouse of [the] surviving spouse.” This new “deceased spousal unused exclusion amount” is available only for the estate of a spouse dying in 2011 or 2012.

The state death tax credit is revived for decedents dying in 2011 and 2012.

The due date for estate tax returns for estates of decedents dying after December 31, 2009 and before the date of enactment of the Act is nine months after the date of the enactment of the Act.

IRS Guidance

Private Letter Ruling 201046004 (August 17, 2010)

The IRS ruled that a court-approved good-faith property settlement agreement made by decedent’s heirs awarding property to decedent’s spouse would be treated as a distribution from the decedent to the spouse and that assets passing to the spouse would qualify for the federal estate tax marital deduction under IRC § 2056. Relying on Ahmanson Foundation v. United States, 674 F.2d 761 (9th Cir. 1981), the IRS continued on Page 20
Tax Update, continued

ruled that the compromise reflected in the settlement agreement provided an allocation of the estate’s assets “that is within a range of reasonable settlements” and could be considered a bona fide settlement of a legally enforceable claim. It therefore would be treated as passing from the decedent for marital deduction purposes.

Private Letter Ruling 201033023 (August 20, 2010)

The IRS did not grant time to an estate to make an alternate value election under I.R.C. § 2032 because the election was not filed within one year of the due date of the return. The CPA whom the taxpayer had hired to prepare the return had failed to consider the election.

II. FEDERAL GIFT TAX

Legislation

The Reid-McConnell Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (December 17, 2010)

Under the Tax Relief Act, for gifts made after December 31, 2010, the lifetime gift tax exclusion amount is $5 million for an individual and $10 million for a married couple. The maximum tax rate is 35%. The gift tax and estate tax exclusion amounts and rates are “reunified” as of that date.

In 2012 the exclusion amount will be indexed for inflation.

Caselaw

Estate of Tatum v. U.S., (United States District Court, S.D. Mississippi, October 6, 2010)

The Court ruled that a residual beneficiary and his wife were liable for gift tax because the beneficiary’s disclaimer did not operate effectively to transfer property. It stated that, under the Mississippi law in force at the time of the testator’s death, a contingency in a will devising property to another if the residual beneficiary predeceases the testator was not effective when the beneficiary disclaims the property. The Court ruled that testator’s intent was manifested in his will and that the terms of the will could not be interpreted to mean that a disclaimer would have the same legal effect as the predeceased of an heir.

In 1987, Franklin M. Tatum, Jr. (“Franklin Jr.”) sent a letter to the executors of the will of his father, Franklin M. Tatum, Sr. (“Franklin Sr.”), disclaiming any interest in certain securities left to him as 60% residuary beneficiary of Franklin Sr.’s estate. Franklin Sr.’s will expressly provided that if Franklin Jr. predeceased him, the residue of his estate would go to his grandchildren. In 1988, the Probate Court of Forrest County, Mississippi issued an order affirming the disclaimer and stating that the disclaimed stock would pass to the grandchildren. Franklin Jr. died in 2003. His wife, Doris Tatum, died in 2001.

In 2008, the IRS, claiming that the disclaimer was invalid, issued Notices of Deficiency to the Estates of Franklin Tatum, Jr. and Doris Tatum for failure to pay a total of $1.5 M in gift taxes in 1997. The Estates paid the assessed amounts under protest and filed a Claim for Refund and Request for Abatement, which were disallowed in late 2008. The IRS argued that under two Mississippi Supreme Court decisions, a lapsed residuary bequest must pass by intestacy unless the

testator’s intent to the contrary is clearly stated in the will.

The Estate claimed that a disclaimer of property devised under a will is the equivalent of actual death and that Franklin Jr.’s disclaimer met the four requirements for qualified disclaimers under IRC Section 2581(a) and IRS Technical Advice Memorandum 8926001. It argued that Franklin Jr.’s disclaimer should operate to transfer the assets to the grandchildren.

However, noting that, as of Franklin Sr.’s date of death, Mississippi had not adopted the Uniform Disclaimer of Property Interest Act, the Court ruled that it must follow Mississippi common law applicable at that time. Under Comm’r v. Estate of Bosch, 387 U.S. 456, 463-464 (1967), it must attempt to decide on the effect of the disclaimer in the same way as the Mississippi Supreme Court would have decided. Under Mississippi common law before 1994, a the provision in Franklin Sr.’s will creating a contingent bequest could not be satisfied by Franklin Jr.’s disclaimer. Franklin Jr. disclaimed interest in the stocks he was entitled to under the will, but he did not disclaim his interest in whatever intestate interest he may have had in the property. The disclaimer failed to meet the definition of a qualified disclaimer, and the property was therefore transferred by intestacy to Franklin Jr. as the only surviving descendant. The Court ruled that the assets transferred to Franklin Sr.’s grandchildren by Franklin Jr. and his wife (via the principle of gift-splitting) were thus liable for gift tax.

IRS Forms

IRS Form 8939, Allocation continued on Page 21
of Increase in Basis for Property Acquired From a Decedent, is still in development. The IRS released a draft form on 12/16/2010 which is posted at [http://www.irs.gov/pub/irs-dft/f8939--dft.pdf](http://www.irs.gov/pub/irs-dft/f8939--dft.pdf). IRS Form 8939 is necessary to allocate the $1.3 million basis adjustment allowed for any heirs and the additional $3 million basis adjustment allowed for surviving spouses of decedents who die in 2010. It will be required for all estates with more than $1.3 million in non-cash assets valued as of the date of death. It will be due nine months after the date of enactment of the Reid-McConnell Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

III. GENERATION-SKIPPING TRANSFER TAX

Legislation

The Reid-McConnell Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (December 17, 2010)

Under the Tax Relief Act, the 2010 GST exclusion amount is $5 million and the rate is zero percent.

For transfers made in 2011 and 2012, the GST exclusion amount is $5 million and the rate is the equal to the highest estate and gift tax rate in effect that year (35 percent).

The due date for GSTT returns for generation-skipping transfers made after December 31, 2009 and before the date of enactment of the Act is nine months after the date of the enactment of the Act.

IV. IRS PRIORITY GUIDANCE PLAN

Department of the Treasury 2010-2011 Priority Guidance Plan (December 7, 2010)

The Priority Guidance Plan contains 310 projects that the Department of the Treasury has deemed priorities for July 2010 – June 2011. The following are the projects listed in the section entitled “Gifts and Estates and Trusts” concerning Federal estate and gift taxation:

1. Final regulations under IRC § 2032(a) concerning the imposition of restrictions on estate assets during the six-month alternate valuation period. (Proposed regulations published 4/25/08);

2. Final regulations under IRC § 2036 concerning GRATs. (Proposed regulations published 4/30/09);

3. Guidance on whether insurance policies held in a trust are includible in the grantor’s gross estate under IRC § 2042 when the grantor retains a power to substitute trust assets for assets of equal value, held in a nonfiduciary capacity;

4. Guidance on procedures for filing protective claims for refunds for amounts deductible under IRC § 2053;

5. Guidance on personal guarantees and the application of present value concepts in determining deductions for expenses and claims against the estate under IRC § 2053;

6. Final regulations under IRC § 2642(g) concerning extensions of time to make allocations of the GSTT exemption. (Proposed regulations published 4/17/08);

7. Regulations under IRC § 2704 concerning restrictions on liquidations of certain corporations and partnerships;

8. Guidance under IRC § 2801 concerning the taxation of U.S. citizens and residents receiving gifts or bequests from certain expatriates;

9. Final regulations under IRC § 7520 updating mortality-based actuarial tables used in valuing annuity interests. (Proposed regulations published 5/4/09);


V. PENNSYLVANIA

Additions and Modifications to the PEF Code

Pennsylvania Act No. 85 of 2010 (October 27, 2010), the former Senate Bill 53, includes several items concerning the treatment of estates of Pennsylvania decedents dying in 2010 that would otherwise have been subject to the Federal estate tax.

New Formula Clause Statutes

A new Chapter 28 has been added to Title 20 of the Pennsylvania Consolidated Statutes (otherwise continued on Page 22
known as the Pennsylvania Probate, Estates and Fiduciaries Code, or the PEF Code). Chapter 28 is effective as of October 27, 2010 and applies to estates of decedents who died after December 31, 2009. Chapter 28 provides guidance concerning the interpretation of the marital deduction, credit shelter and generation-skipping exemption formulas for decedents dying in 2010.

The new Chapter provides that a formula clause in a will, trust or any other dispositive instrument of a decedent dying in 2010 will be rebuttably interpreted pursuant to the federal estate tax and GSTT laws applicable to the estates of decedents who died on December 31, 2009.

Section 2801 contains definitions of the terms “formula clause” and “other dispositive instrument.”

Section 2802 contains the substantive provisions for the interpretation of formula clauses and sets forth the exception to the application of the presumption. The presumption will not apply to any dispositive instrument (a) that is executed or amended after December 31, 2009, or (b) that “manifests an intent that a contrary rule shall apply if the decedent dies on a date on which there is no applicable Federal estate tax or generation-skipping transfer tax in effect.”

Section 2803 gives standing to the personal representative, trustee or beneficiary of a decedent to bring a judicial proceeding for a case in which the proper interpretation of such a formula is in question. Such a proceeding must commence within twelve months of the decedent’s date of death. The court has the power to “modify a provision of a will, trust or other dispositive instrument in a manner that is not contrary to the decedent’s probable intention in order to achieve the decedent’s tax and other objectives.”

Changes to Tax Apportionment, PEF Code Section 3706

Subsection (a) of Section 3706 has been modified to state that parties liable for apportionment of the Federal estate tax must pay the amounts apportioned to them at the time the tax is due, regardless of whether an extension has been applied for or granted. Subsection (b) now states that the fiduciary may recover interest of 5% per annum from any party to whom tax is apportioned if the fiduciary must advance the tax payment on his/her behalf. Subsection (c) now states that the fiduciary may suspend distribution of property to any party who has not paid the Federal estate tax apportioned to him/her.

Changes to Trustee Powers, PEF Code Section 7780.6(a)

Paragraph (33), which provides that a trustee may exercise elections with respect to federal, state and local taxes, has been added to Section 7780.6(a) of the PEF Code. This amendment to the Pennsylvania Uniform Trust Act took effect on October 27, 2010 and applies retroactively to actions taken as of November 6, 2006.

Have the Conversation

By LOU HORVATH
EXECUTIVE DIRECTOR, INTERVENTION ASSOCIATES

Why didn’t I call you earlier?

At Intervention Associates, we so often hear this question when a client contacts us in response to an immediate need for a family member. More often than not, that family member is in a hospital or a rehabilitation center, ready for discharge the next day, and unable to care for himself. Suddenly, the family faces a very real dilemma.

Concern for the safety of an elderly parent (or parents) living independently is another all too common scenario. Mom or dad has grown forgetful and disorganized, isn’t navigating in the home well, and continues to drive, even though she or he really shouldn’t. Often, by the time we receive this kind of call, families are operating reactively. Emotions are running high and family members frequently disagree about what to do. They want realistic options and potential solutions fast.

As we face issues of aging and end of life with our clients, our loved ones (or even ourselves!) preparing for a change in health should be top on our list of priorities. Too often, it never makes the list at all. I’m convinced that the drama and enormous strain these emotionally charged care-related situations place on families can be improved vastly if professionals proactively engage in health care planning, just as we do in

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Have the Conversation, continued

estate and financial planning. It can be as simple as knowing in advance who to call and when.

What should I do?

When clients ask Intervention Associates this question, care management is usually the answer. Care management should be an integral part of any well-planned health care delivery system.

What is Care Management?

Though some people have heard the term, few seem sure of its meaning. Care management encompasses a variety of activities and steps required to properly plan for and deliver care to a person whose limitations prevent him from caring for himself. It often includes the coordination of client access to various community-based services.

The main components of care management include …

- Patient assessment/reassessment
- Development of an individualized care plan
- Arrangement and coordination of services (usually multiple)
- Continuous monitoring of services and client needs
- Patient advocacy

The care management function takes the burden of determining what’s best for mom or dad, for example, and the onerous task of finding and arranging appropriate services, off the family’s shoulders. In the case of Intervention Associates, it transfers that responsibility into the hands of a degreed, highly credentialed professional care manager. Understandably, families find this an immense relief.

Who is the Professional Care Manager?

The professional care manager is a health and human services specialist who formally assesses the needs of the individual and then creates, coordinates and monitors his care plan. The care plan might include transportation to doctors’ visits, home health aides to assist with activities of daily living, and any number of other nonmedical services. Most care managers are trained and experienced in fields such as social work, nursing, geriatrics, psychology, or other disciplines related to health care or mental health.

Some care managers work specifically with older adults to help them attain and maintain their maximum functional potential. These geriatric care managers serve as specialized resources for families of older adults and others with chronic illness, including people suffering from Alzheimer’s or Parkinson’s disease, or those exhibiting symptoms of dementia. It’s best to look for geriatric care managers who are members of the National Association of Professional Geriatric Care Managers (NAPGCM). As members, they commit to a prescribed code of ethics and standard of practice.

What we do at Intervention Associates

First, a little bit about who we are:

Intervention Associates is a nonprofit, Quaker-based care management and home care organization serving the greater five-county Philadelphia area.

A subsidiary of the Friends Life Care System (www.friendslifecare.org), Intervention Associates works closely with families, the community, physicians, attorneys, estate planners and financial advisors to arrange for and provide a range of services for people of all ages. They assess challenging circumstances, develop the right client solution, and implement a Plan of Care. As an active member of the National Association of Geriatric Care Managers, Intervention Associates also provides assistance in other areas of the country.

Care management services are the cornerstone upon which the organization was founded over 20 years ago. Soon after, we learned that high-quality home care services, a natural extension of care management, were also in demand. Accordingly, we accommodated our clients’ needs and expanded our offering to actually provide the care. Most recently, as part of our commitment to innovation, we added concierge services, such as bill paying, grocery shopping and social companionship.

Intervention Associates is probably best known for the ability and willingness to handle difficult, challenging and complex situations. The clients we serve include elderly adults, children and adults with special needs, people with multiple disabilities or chronic ailments, and patients with psychiatric issues and other mental health conditions.

Our offering includes the following:

continued on Page 24
Care Management Services

- A professional needs assessment followed by an effective care plan to help the individual maintain independence, function and quality of life (we believe home care does not mean homebound!)
- Identifying the most appropriate links to the community and private resources, including home-delivered meals, transportation and other services
- Complete care coordination, monitoring and oversight
- Patient advocacy, from inpatient admission through discharge
- Referrals to additional care providers, such as physicians, adult daycare programs, rehabilitation centers or nursing homes
- Assistance in selecting assisted living or other senior facilities, if needed, plus help with the actual move and monitoring the care and services received there
- Optional guardianship and estate services

Home Health Care Services

- Our own carefully screened and trained certified nursing assistants/home health aides to help with activities of daily living—such as eating, bathing, dressing, grooming, using the bathroom, and getting in and out of bed—available on an hourly, overnight or live-in basis
- Supplemental care within institutions like nursing homes or assisted living facilities
- Homemaking companions to help with meal preparation and light housekeeping

Home Care Concierge Services

- Bill paying and home office services
- Grocery shopping, transportation to doctors and other appointments
- Social companionship
- We can accommodate just about any request

THE PRIMARY CHALLENGES

Lack of Awareness

As I indicated earlier, many people do not realize care management services even exist, let alone understand the role of a professional care manager. In other words, families of individuals who need support (and sometimes even their professional advisors) don’t know what they don’t know, until they are thrust into a situation where they are trying to find and coordinate services on their own. Education is one of the greatest hurdles, but testimonials from our clients tell us that once they get the concept and experience the service, they wouldn’t trade it.

Cost Concerns

The economy has had a dramatic impact on service organizations and their clients. IVA strives always to develop a cost-effective, comprehensive care plan that meets a client’s needs and budget. At first, clients may question the expenditure; they may not initially realize that having a care manager is an investment that will pay significant personal dividends in quality of care and peace of mind.

Choosing a Trusted Resource

The health care system is an incredibly complicated maze to navigate, even for an experienced professional. Clients caught in a family predicament feel predictably overwhelmed. This is where a highly credentialed, experienced care manager proves invaluable. The care managers at Intervention Associates have extensive knowledge about the cost, quality and availability of health care and long-term-care services in the communities we serve. I can say with confidence that their skills and compassion are unsurpassed. They manage every detail with the goal of restoring our clients’ independence wherever possible.

Of course, any time you engage an outside firm, you stake your professional reputation on the outcome. You need a resource you can trust. For the reasons I’ve outlined in this article, I hope you’ll consider health-related care and Intervention Associates in the planning you do for your clients. I encourage you to call us before the need arises, and let us acquaint your organization and your clients with

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what we do. I hope you will come to think of us as an extension of your own services and part of your staff. We can step in to help you help them.

**About Friends Life Care:**

Friends Life Care provides in-home health care, related personal-care services and facility care to enrolled members. Individuals applying for membership must be in good general health, live in Pennsylvania or Delaware, and also be between the ages of 40 and 81. If you are accepted into membership, they provide and coordinate all of your care with a team of credentialed, carefully screened and selected professionals. If you need anything covered by the plan, the Care Coordinators are on call 24 hours a day, seven days a week, to identify the services you need and get them to you quickly.

Founded in 1985, Friends Life Care should be familiar to many families in the Delaware Valley. The membership community is currently comprised of almost 2000 people, and it is the largest organization of its kind in the country.

The unique Friends Life Care plan provides the financial security of asset protection, ongoing health assessments and wellness education, and the coordination of the actual care in the home if and when it is needed. Friends Life Care is focused on ability vs. disability, and recognizes that promoting good health and independence is crucial to emotional and physical quality of life at any age.

* * * * * * * * *

It has been my pleasure to meet many of you during the past few years. You are part of a remarkable array of professionals helping people with a variety of needs. I will happily make myself available to meet with you and your organization to discuss related issues one-to-one or to review in more depth the ways Intervention Associates can serve as a resource for you and your clients.

**ED. NOTE:** Louis D. Horvath has been Executive Director of Intervention Associates since 2007. He serves as an adjunct faculty member at St. Joseph’s University in Philadelphia and at the University of St. Francis in Joliet, Illinois. Lou is a Fellow of the American College of Health Care Executives, a certified member of the National Association of Geriatric Care Managers and a certified member of the Association of Behavioral Health Care Executives.
The PEPC invites the Philadelphia Bar Association Probate and Trust Law Section to join our Council for membership and programming!

January Luncheon Program
January 18, 2011
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Speaker: Blanche Lark Christerson

February Luncheon Program
February 15, 2011
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: "Putting it All on Paper"
Speaker: Tom Rogerson

March Luncheon Program
March 15, 2011
11:45 a.m. - 1:45 p.m.
The Union League
140 S. Broad Street, Philadelphia, PA
Topic: "Kitchen Table Philanthropy: Exploring the Options in Family Philanthropy"
Speaker: Kathryn W. Miree

For more information on joining the Philadelphia Estate Planning Council or to register for any upcoming programs, please visit www.philaepc.org.
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2010 Committee Reports

Publications Committee

By DAVID A. RUBEN, CHAIR

During 2010, the Publications Committee has continued with its mission of producing three Newsletters per year.

We are fortunate to have had a number of members of the Section write for us on a wide variety of topics. This year we introduced a new regular column, Case Summaries from the Orphans’ Court Litigation Committee, and it is our hope that Section members find this addition to be informative.

We are always looking for timely and interesting articles, and welcome contributions from Section members as well as others engaged in related areas of work. We invite Section members to suggest ways in which the Publications Committee may better serve the needs of the Section.

Rules and Practice Committee

By BERNICE J. KOPLIN, CHAIR

In 2010 the Rules and Practice Committee completed its work on the filled in sample Petition for Adjudication for estate accounts for inclusion in the PEPH. An update of the trust forms for the PEPH impacted by the UTA is still contemplated. The Court provided its comments and suggestions on the Committee’s proposed revision of Rule 2039.1 (addressing the procedure for the approval of compromises involving minors, incapacitated person and survival actions) and the entire Committee is in the process of addressing them.

The Committee’s accomplishments are made possible by the extraordinary diligence and dedication of its members. My appreciation for them and their dedication and diligence is unbounded.

New members are welcome to join this Committee. The committee meets on the second Tuesday of the month at 4:00 p.m. at the offices of Schachtel, Gerstley, Levine & Koplin, 123 South Broad Street, Suite 2170. Although the Committee does not generally meet in December, July and August, the subcommittees have worked continuously throughout the year.

Legislative Committee

By KATHLEEN STEPHENSON, CHAIR

At the request of the Executive Committee, the Legislative Committee drafted a statute to address formula clause issues in wills and trust of decedents dying in 2010 that arose because of the absence of a federal estate tax and federal generation-skipping tax in 2010. Michael Stein took the lead in drafting the statute which was passed by the Pennsylvania Legislature and signed into law by the Governor on October 27, 2010, as Act 85 of 2010.

Education Committee

By AARON FOX, CHAIR

The Education Committee members meet eight times a year to discuss current topics relevant to the Section. Those topics become the basis for three programs (March, June, and October) that provide CLE credits for program attendees. The Committee is responsible for choosing topics that are relevant to the Probate Section membership, outlining the content of the programs, and then selecting and recruiting qualified panelists to make a two-hour presentation at the quarterly meetings. After the presentations are completed, the Committee reviews the evaluations that are generated from program attendees and utilizes those evaluations to improve upon future programs.

In 2010, the Committee organized timely programs on the legislative changes occurring in the estate tax and potential planning opportunities, as well as a program on advising clients on closely-held businesses and a program in October on grantor trusts. Our deep thanks go out to all of the terrific speakers and planners who participated in programs this year.

The Committee welcomes suggestions for program topics, and any interested Section members may volunteer to become a member of the Committee by contacting Aaron Fox at (302) 778-5416.

Meanwhile, the committee under the leadership of William C. Bullitt continues to look at UPMIFA and how, when and if it will be enacted in Pennsylvania.
**Tax Committee**

DONALD DICARLO, CHAIR  
MARGUERITE WEESE, SECRETARY  
MARGERY SCHNEIDER, TAX UPDATE AUTHOR

**Events:**

2/2/10: This was the committee’s 2010 organizational planning session. Don DiCarlo continued as the Chair for the 2010 year. Marguerite Weese continued as the secretary. Margery Schneider agreed to provide written tax updates for quarterly section meetings and newsletter. Everyone in attendance agreed that they liked the meeting setup with having a speaker come and present on a topic each month. The committee particularly noted how well received the IRS speaker and Department of Revenue speaker were and agreed they should be invited back for annual sessions. Discussion also ensued regarding 2010 transfer tax laws. Update was provided by attendees regarding key take aways from recent Heckerling Conference.

4/6/10: Roberta Barsotti of Archer & Greiner spoke on Fiduciary Income Tax Planning. Important topics included: the possibility of upcoming legislation putting limits on GRATs, the extension of the unitary bundled fee rule that allows bundled fees to deductible, Notice 2010-19 which looks at the issue of whether a transfer to a wholly grantor trust constitutes a gift, the current dates on the first time home buyers credit, sunsetting provisions on 12/31/10, the extension in 2013 of the medicare tax to investment income (including income inside a trust or estate).

5/4/10: Glenn Henkel of Kulzer & Dipadova provided an update on New Jersey Inheritance and Estate Tax Issues.

10/5/10: PA Department of Revenue officials came to discuss what is going on in the Department’s Inheritance Division. Highlights include the incredible monetary turnout of the Amnesty Program, the news that the Philadelphia register of Wills going online for filing of creation of estate record, POA, and payments, the difference between wrongful death suit and survivor lawsuits, and who to call if you have questions in the Department.

12/7/10: Officials from IRS to present.

**Litigation and Dispute Resolution Committee**

By TIMOTHY J. HOLMAN, CHAIR

The Orphans’ Court Litigation and Dispute Resolution Committee continued to discuss recent developments in the law and procedure governing Orphans’ Court litigation, practice before the Orphans’ Court, and alternative dispute resolution techniques. Among the interesting topics we discussed were: (1) enforcing judgments obtained in the Orphans’ Court; (2) the use of a handwriting expert to examine signatures on estate planning documents; (3) the applicability of the “Dead Man’s Rule” to Orphans’ Court disputes; (4) sealing and/or attempting to unseal the records of Orphans’ Court matters involving sensitive information; and (5) the importance of the discovery of electronic information and the use of “litigation hold” letters to ensure that our clients comply with their obligations to preserve electronic evidence and to attempt to prevent our adversaries from destroying electronic evidence. We also contributed articles to the Probate Section’s Quarterly Newsletter on recent Orphans’ Court cases of interest to the Section.

I am thankful for the input and participation of the dedicated members of the Committee, whom I thank for their time and their work on behalf the Section.

New members are always welcome. We meet on the second Tuesday of each month at 8:30 p.m. at the office of Heckscher, Teillon, Terrill & Sager, P.C. at 1500 Market Street, Center Square East, East Tower, 12th Floor (the “HQ” space). All members of the Probate & Trust Section are welcome at our meetings, and are also welcome to contact the Chair at any time to discuss joining the Committee or to raise any issues which may be of interest to the Committee. Mr. Holman can be reached by phone at 610-940-4196, or by email at tholman@htts.com.
Guardianship Handbook Committee

KEELIN BARRY AND RISE P. NEWMAN, CO-CHAIRS

The Guardianship Handbook Committee, a subcommittee of the Elder Law Committee completed a 100+ page handbook for the use of attorneys serving as guardian in Philadelphia County. The handbook is posted on the home page of the Philadelphia Bar Associate Probate and Trust Section homepage and the Elder Law Section homepage.

The handbook was the vision of Orphans’ Court practitioners who saw the need to provide guidance for those attorneys unfamiliar with the day to day procedures and potentially daunting task associated with serving as an individual’s guardian. The Guardianship Handbook is meant to provide some answers and to shed some light on the many questions that arise.

It is the hopes of the of Probate and Trust Section that this resource will contribute to expanding the pool of competent lawyers willing to serve as guardians for the court as well as to provide support to the generous members of the Philadelphia Bar who already take on these challenging situations for little or no money.

Because the Guardianship Handbook Committee wants feedback and input from other practitioners, this Handbook is presented as a draft. Corrections, suggestions for change, and additions are welcome. After approximately one year, the committee members will incorporate comments and suggestions to create a “final” Handbook. The suggestions and comments should be sent to: guardianshiphandbookcomments@gmail.com.

The Co-Chairs of the Guardianship Handbook Committee wish to thank the dedicated members of the Probate and Trust Section of the Philadelphia Bar Association Elder Law Committee’s Guardianship Handbook Committee who have put in countless hours creating this valuable resource and who will continue to work toward refining the draft into a final version. The Co-Chairs also wish to thank the Orphans’ Court judges who tirelessly work through guardianship cases in order to improve the life of those affected by their decisions.

New members are always welcome. To join, contact: amanda@risenewmanlaw.com.

Elder Law Committee

KEELIN S. BARRY, CHAIR

WHAT IS ELDER LAW?

Elder Law is among those few areas of law defined by the population served instead of the subject matter content. Elder Law practitioners develop expertise and contacts to help older clients and their families with legal planning and problems related to aging. Medicaid planning for those needing nursing home care, advance healthcare directives, estate planning and administration, guardianships, and public benefits are among the staples of this area of practice. However, the Elder Law practitioner also must be able to steer clients through problems relating to deeds, financial scams, and grandparent visitation and custody rights. It is truly an ever-changing area of practice.

Committee-sponsored Educational Programs

During 2010, with thanks to Program Planning Chair Mark Beaver of the legacy Group, the Elder Law Committee has offered CLE programs to educate the legal community about the following cutting-edge issues:

January 28, 2010: “Introduction to Long-Term Care Insurance”
With presenters James Boyd, Karr Barth Associates, Inc. and Gary M. Klazmer, Esq., Klazmer Financial Group

March 25, 2010: “Understanding Alzheimer’s”
With presenter Theresa Haenn of the Alzheimer’s Association

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Elder Law Committee Report, continued

April 29, 2010: “Practical Calculations for Using Annuities and Notes in Medicaid Planning”
With presenter Matthew J. Parker, JD, CELA, Marshall, Parker, & Associates.

Philadelphia Guardianship Handbook

The main focus of the committee’s attention during 2010 has been development of the Philadelphia Guardianship Handbook. Please see the separate report highlighting this important project.

Speakers Available for Your Group

If your group is interested in Elder Law topics, we can send an experienced speaker to address your group. Contact us at the Philadelphia Bar Association.

What will the Elder Law Committee do in 2011?

During 2011, the Elder Law Committee will continue to offer educational programs for attorneys and others on cutting-edge elder law topics. Programs are announced in the Philadelphia Bar Reporter Online. Please join us.
## Court of Common Pleas of Philadelphia County
### Orphans’ Court Division 2011 Calendar

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