Real Property, Probate and Trust Law

NEWSLETTER

Issue No. 53 | Spring 2002

SECTION REPORT:

From the Chair

Thank you!

It has been my distinct pleasure to chair the Real Property Division of the Real Property, Probate and Trust Law Section. Our Section, with its more than 3,000 members, is a resource for so many lawyers. Our focus on property and estate law issues affects every Pennsylvania lawyer to some degree. To the extent that it is possible, the divisions try to stay in touch to maintain "crossover" between divisions. During the past year, many of the Section activities have done just that.

Spring Retreat

The Section Spring Retreat was held this year at the Harrisburg Hilton on Friday, March 22, and Saturday, March 23. The Section offered timely and low-cost continuing education programs. On Saturday morning, we began a new and extraordinarily effective type of CLE program: roundtable discussions, moderated by fellow Section members, on tax assessments, title insurance, estate and trust administration and the Uniform Trust Code. These programs allowed the sharing of techniques and tips among learned practitioners, and put the attendees on the forefront of these specific practice areas. Because each division includes some of the most experienced lawyers in specific disciplines, we hope to do more roundtable-type programming so that we can better learn from each other.

Our committees also met at the spring retreat and discussed Orphans Court rules, elder law issues, the recent changes to the Municipalities Planning Code, recent case law in the land use area, proposed amendments to the Deficiency Judgment Act, efforts to better coordinate the Bulk Sales Laws, our project on legal opinions for Pennsylvania real estate transactions, the ongoing efforts to amend the Power of Attorney Act and suggestions for improvements to the proposed legislation that will permit settlement officers to satisfy certain mortgages.

Our Section, with its more than 3,000 members, is a resource for so many lawyers. Our focus on property and estate law issues affects every Pennsylvania lawyer to some degree.

Resolutions

As a result of the activities of our committees, the Section offered resolutions to the Pennsylvania Bar Association House of Delegates in support of amending the Deficiency Judgment Act and abolishing "Common Law Marriage" (per SB 1233 and HB 2271), and encouraging the legislature to codify statutes relating to real property. These are important issues that will help to make doing business in Pennsylvania a bit more simple, and a great deal more predictable. Efforts like these can make Pennsylvania a more attractive place to do business; and if more business is done in Pennsylvania, we will all benefit.

Participate!

It is an honor and privilege to work with the smart, involved lawyers who serve on the committees of the PBA, and who consider issues such as these. Thank you for allowing me to serve as chair of this Section. I invite you to mark your calendars for the **fall 2002 meeting on Friday, Sept. 20, in Harrisburg.** The Section's new chair, Neil Hendershot, will call the meeting to order at the Pennsylvania Bar Association headquarters. This meeting and all of the committee meetings are open to all Section members. Your participation is welcome.

Please join your fellow practitioners, with division chairs, Vince Mancini, Real Property; and Kirby Upright, Probate and Trust, and participate in Section activities. Volunteer to work on a committee — members are always welcome. Participate in listserv discussions — everyone learns a little as a result of listserv dialogues. Come to the next Section meeting in September — you will meet mentors and friends. I promise you that you will enjoy yourself. ❒

Andrea Geraghty served as chair of the Real Property Division, and practices with Geraghty & Associates P.C. in Pittsburgh.

Real Property, Probate and Trust Law Section Newsletter

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**Mark B. Hammond is with Allfirst Trust Company of Pennsylvania. He has MBA, JD and MA degrees and also serves on the Section's Legislative Committee.

DIVISION REPORT:

Real Property Law

By Vince Mancini

The various committees of Real Property Division conducted numerous meetings and activities at the Section Spring Retreat on Friday, March 22 and Saturday, March 23, in Harrisburg.

Finance Committee

The Finance Committee, chaired by Fred Clark, conducted two roundtable CLE programs on the subject of Bulk Sale Transfers in Pennsylvania, as well as discussions on usury laws and opinion letters for financing transactions. Following the CLE programs, the Finance Committee also conducted a regular meeting where they passed a resolution whereby the Real Property Division — and the Section — support proposed amendments to the Deficiency Judgment Act. The proposed act would eliminate the need for successive deficiency judgment proceedings in different counties. The division — and subsequently the entire Section — adopted resolutions to support the proposed statutory amendments. Fred Clark appeared on behalf of the Section at the May PBA House of Delegates meeting to speak on in favor of the proposed amendments.

Vendor Committee

The Vendor Committee, chaired by Chip Mackrides, conducted two CLE roundtable programs analyzing and discussing the most current Pennsylvania Association of Realtors' Residential Sale Agreement Forms.

The Eminent Domain Committee

The Eminent Domain Committee, chaired by Christopher Clemens, conducted a regular committee meeting. The committee discussed the subject of litigating an eminent domain case from the perspective of a condemnor. Chris and his committee are developing this subject for a potential CLE program at one of the future Section retreats.

Tax Committee

The Tax Committee, chaired by David Schwager, with Burt Goodman as vice-chair, discussed current "hot topics" in Tax Assessment Law, including the practice known as "Welcome Stranger." School districts and other taxing authorities across the commonwealth are engaging in a tactic of appealing tax assessments where properties are sold and the sale prices are in excess of countywide tax assessments. David and Bert are preparing a program for CLE credits addressing this and other subjects of tax assessment law. The CLE program will hopefully be presented at a future Section retreat.

Title Insurance Committee

The Title Insurance Committee, chaired by Allen B. Keiser, discussed the basic features and coverage of title insurance policies, as well as the numerous endorsements available to purchasers, lenders and other parties in a real estate transaction. The committee is developing this topic for a CLE program to be presented at a future Section retreat.

Landlord Tenant Committee

While the Landlord Tenant Committee did not meet at the retreat, a new chair has been appointed. Lee Stivale will report shortly on pending legislation affecting landlord/tenant rights regarding evictions. ❒

Vincent B. Mancini is the chair of the Real Property Division and also chairs the Zoning and Land Use Committee of the Real Estate and Probate Section of the Pennsylvania Bar Association. He practices in Media, Pa.

DIVISION REPORT:

Probate and Trust Law

By Neil Hendershot

Proud to Be RPPT-ers!

Our Section counts more than 3,000 members, enrolled for either our Real Property Law (RP) Division or our own Probate & Trust Law (P&T) Division. Together, we enjoy a sound treasury balance to support our mutual activities.

Our Section leaders are devoted and enthusiastic. Our committees are open for participation and have worthwhile projects to advance.

In Michael Shatto, Sandy Minner, and Patricia Graybill of the PBA, and Dick McCoy and Gail Markovitz of the PBI, we find dedicated and able staff support for both our Section activities, meetings and communications; and our CLE offerings, respectively.

Via our two thriving e-mail "listservs" — one for RP and another for P&T (both of which are available to every Section member just for subscribing online) — we now communicate quickly and effectively by broadcast e-mail messages delivered to each subscriber's computer desktop. Messages announce important case law developments, summarize statutory enactments and legislative proposals, identify and discuss possible regulatory or industry changes, and offer links to other resources. These listservs also create a forum for our fellow members to "brainstorm" their individual RP and P&T practice issues for feedback or help. Every Section member should sign up! Log onto the PBA Web site (www.pabar.org), and follow the instructions on the home page. There is no cost involved, since this is a benefit of RPPT Section membership! For more information, read the update on Page 11 of this *Newsletter* as to the operation of the Section's listservs.

Our *Newsletter* offers bi-annual (spring and fall) in-depth analyses of major developments in our RP & P&T practice areas, suggests improvements in statutes or procedures affecting our practices and reports on case law or statutory developments. It also updates our membership on Section activities and projects, and lists our leadership, with contact information.

Our annual Section Retreat, held in March of each year in Harrisburg, promotes committee work, offers CLE in innovative settings (such as roundtable discussions and vendor presentations), and enables us just to have fun being together. **The next retreat is scheduled for March 7 and 8, 2003, at the Crowne Plaza.**

Our fall Council/Committee Meeting held at PBA Headquarters focuses more on our committee work and the responses of our leadership to our members.

The Probate & Trust Law Division is proud to be a part of the organization that is our Section. We are proud to be RPPT-ers!

Automation and Office Practices Committee:

Dan Evans (dan@evans-legal.com), of Philadelphia, continues to chair the Automation & Office Practices Committee. If you are interested in the technological aspects of fiduciary law practice, please contact him. This committee was responsible for initiating the division's listserv, which now thrives. Most recently, this committee organized the vendor presentations at the Section retreat in March 2002, involving representatives of three software companies: Lee Zane, of Fast Tax Trust Services (formerly Zane & Associates, Inc.); Vince Lackner, of The Lackner Group; and Kathy Dever, of Faster Systems, LLC. After the presentations, each vendor prepared a summary regarding its estate administration software products, which appear elsewhere in this *Newsletter*. Now this committee expects to work on the assembly and promotion of special estate administration packages with special Section pricing from these, and perhaps other, vendors.

Ethics & Unauthorized Practice Committee:

Stephen Paschall (sppascha@rssm.com) chairs this committee. He will be assisted by Charlie Shields (beameres@epix.net), who sits on the PBA's Unauthorized Practice of Law Committee. In addition to tracking ethical advisory opinions proposed or issued by the PBA Ethics Committee, we hope that this committee can monitor the activities of the PBA Unauthorized Practice of Law Committee, per Section member Bill Hoffmeyer (info@hoffsemm.com). Particularly from the P&T viewpoint, much unauthorized practice of law relates to wills, trusts, POAs, and estate or personal planning. Our division must be a force to counteract the unreliable, unaccountable, and often manipulative advice or document preparation offered for payment by persons not licensed to practice.

Fiduciary Services Committee:

Carol Sikov Gross (cary1215@aol.com) chairs the Fiduciary Services Committee, which will review the pending Health Care Power of Attorney legislative proposal, now represented by SB 1265. This proposal drew upon the work of the Joint State Government Commsion's Advisory Committee on Decedents Estates Laws, and its Power of Attorney Subcommittee, conducted since 1995. That examination and report resulted in the introduction, during the 1999-2000 legislative session, of Senate Bill 172. This broad proposal then was reduced and refined through work of an Ad Hoc Advisory Legislative Task Force that met during 2001. The pending proposal before the Legislature is a compromise that appears to be workable and very much needed in the commonwealth. I believe that the PBA will request our Section to present comments during legislative hearings likely to be held later this year on this proposal. If you are interested in affecting legislation that will benefit millions of commonwealth citizens (particularly the elderly and infirm), and will define an important aspect of our future P&T law practice, then get in touch with Carol now.

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Neil Hendershot is a shareholder with the Harrisburg firm of Goldberg, Katzman & Shipman, P.C. He has edited this Newsletter *since 1983 and is chair of the Section.*

Division Report: Probate and Trust Law

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Legislative Committee:

Mark Hammond (mark.hammond@allfirst.com), of Harrisburg, in conjunction with Peter Porkorny (Peter.Pokorny@pabar.org), at the PBA headquarters, diligently prepares — for both our Section and also for his home bar association (Franklin County) — a fine update of legislative proposals, bills in process, and enactments. The most current update appears on Page 9 of this *Newsletter*. However, if you join our listservs, you will receive their update periodically, fresh and hot, delivered to your computer's desktop.

Orphans Court Practice Committee:

Jack Meck (jmeck@kglawpgh.com), of Pittsburgh, continues to chair the Orphans' Court Practice Committee, which formerly functioned as the Probate Procedures Committee. Jack will be assisted by David Morrison (phone 717-560-1500), of Lancaster. This committee will begin involving our P&T Division with the new and energetic group of Orphans' Court judges who meet at the State Court Trial Judges Conference, and also with the Supreme Court Orphans' Court Rules Committee and its counsel, Dean Phillips, of Philadelphia.

Sitting Orphans' Court judges in Allegheny, Dauphin, Lancaster, Montgomery, Philadelphia, and other Pennsylvania counties appreciate how important, distinctive, and specialized are the fiduciary matters raised before them. These cases derive mainly from an elderly population second in size nationally only to that in Florida, and more sedentary. Over the next 20 years, we must refine our statutes, court rules and procedures, and court structure to address this need. As a Section, we encourage judges to make a commitment for the court to be innovative, effective and specialized to handle such fiduciary matters; and we want to assist that movement in any way we can. This is the challenge of this committee.

Publications Committee:

As you can see from the contents of this extensive and timely issue of our Section's *Newsletter*, our contributors take their writing seriously. The Section's bi-annual newsletter alone justifies your membership in our RPPT Section.

Our *Newsletters* represent such a valuable body of work over time that our Section desires to make them available far beyond their individual publication dates. Thomas Dempsey Jr. (tjdesq@nauticom. net), of Pittsburgh, has volunteered to work on a project, already approved and funded last year by our Section, to scan and index, then make available electronically, all our Section's bi-annual *Newsletters* issued since 1983. He will work with Joel Fishman, a law librarian at the University of Pittsburgh Law School, who has indexed other materials for the PBA.

Appreciating the need to continue this important work in publications, we have introduced some new members into production of our *Newsletter*.

Mark Hammond, of Harrisburg, who has assisted in producing recent issues of the Section's *Newsletter*, is getting a promotion. As of this issue, he becomes the Section's "*Newsletter* editor." Still short of my 20 years in that position, and not wanting to retire yet or completely from this publication, I have been bumped to management, becoming the *Newsletter's* "executive editor."

Mark and I will find support from two assistant editors: Todd Fuller, of Pittsburgh, from our P&T Division, and Jon Jordan, of Kennett Square, from our RP Division.

We continue to receive regular substantive law "recent developments" from Vince Mancini (RP) and Stan Lehman (P&T).

We always seek articles, reports or updates about our divisions' projects or on RP and P&T law developments. We promote new legal authors and scholars!

• Have you — either for yourself, or for your firm — already prepared a well-written and timely article that we could print or reprint?

• Would you like to write a summary about law developments drawn from your research in a recent case?

• Could you translate your recent Pennsylvania Bar Institute presentation into a "practical pointers" article for our member's reference?

• Have you uncovered an outdated or contradictory ruling, or a faulty or uncertain procedure, which cries out for examination and change?

If so, then write an article for our *Newsletter*! It's impressive on your resume, and so rewarding in other (non-monetary) ways.

Reproductive Services Committee:

Carmina D'Aversa recently hired on with the Internal Revenue Service in Washington, D.C, so she resigned regretfully as chair of the Reproductive Services Committee. With her departure, we are "retiring her jersey" and suspending that committee for lack of a leader. However, if any P&T member is interested in leading or undertaking that work anew, please let us know.

Other Committees:

We will reorganize, reinvigorate and redirect some other P&T committees, including these: Business Succession Planning Committee (Steven Winters, chair); Charitable Planning Committee (Andrea Hyatt, chair); Estate Planning Committee (Thomas Hiscott, chair); Institutional Fiduciaries Committee (Daphne Goldman, chair); National Laws Committee (Arthur Solmssen Jr., chair) and Taxation Committee (Jill Fowler, chair).

Invitation to Participate:

Please become involved with the division's work. You will find it meaningful and beneficial. ❐

Probate and Trust Law

By Stanley J. Lehman and Erin Milliken

Recent developments in the area of probate and trust law include several interesting decisions by Pennsylvania courts as well as significant changes to the Internal Revenue Code. Unless otherwise indicated below, section and chapter references are to the Pennsylvania Probate, Estates and Fiduciaries Code, Title 20 of the Pennsylvania Consolidated Statutes.

Gift

In *Eastman Estate,* 760 A.2d 16 (Pa. Super. 2000), the court determined that the decedent did not make an *inter vivos* gift of a bank account to his wife when he executed an account application that named his wife as a joint owner of the account. The signed application was not returned to the bank until after the decedent's death. The court concluded that merely signing an application for a new bank account is insufficient delivery to constitute a gift.

Gift — Power of Attorney

In *Peters Estate* (No. 2), 21 Fiduc.Rep.2d 31 (O.C. Div. Perry 2000), the court held that a power of attorney on a bank form to withdraw and perform bank-related activities does not authorize the agent to make gifts to himself.

Power of Attorney

In *Cambest Estate,* 756 A.2d 45 (Pa. Super. 2000), the court held that the executrix of a decedent's estate did not have power, pursuant to a power of attorney granted to her by the decedent, to remove funds from bank accounts that had been owned jointly by the decedent with her husband and place them in an account solely in the decedent's name. Accordingly, the court ordered the executrix to return the funds to the executor of the estate of the decedent's husband, who had survived the decedent.

Power of Attorney — Scope

In *Wolfgang Estate,* 20 Fiduc.Rep.2d 395 (O.C. Div. Lehigh 2000), the court held that transfers by a wife pursuant to a power of attorney from her husband into their joint names were valid. However, the court held that subsequent transfers by the wife of the previously transferred property to herself exceeded the scope of her power of attorney.

Charitable Bequest in Trust

In *Harry Stone Trust,* 21 Fiduc.Rep.2d 6 (O.C. Div. Montgomery 2000), the court awarded the share of a defunct hospital in a continuing trust, which was for the benefit of four named charities (including the hospital), to another hospital rather than *pro rata* among the remaining beneficiaries. Specifically, the court determined that the intention of the settlor would be more fully realized by substituting an existing hospital and maintaining the diversity of the charitable purposes set forth in the trust.

Charitable Gift — Compromise Over Objection of Attorney General

In *Clark Estate,* 20 Fiduc.Rep.2d 438 (O.C. Div. Bradford 2000), the court dismissed the objections of the attorney general as *parens patriae* where a will gave common stock to a church and the church, after consultation with counsel, agreed to accept less. Specifically, the court determined that the attorney general does not have absolute veto power over an agreement entered into by a charity. Hence, any such agreement is not void merely because the attorney general objects to it. Rather, the court noted that the function of the attorney general as *parens patriae* is not to impose its own will on charities, but to insure that charities are not taken advantage of in instances where the charities do not have the resources to protect their own interests.

Trust — Spendthrift Provision

In *Green v. Green,* 21 Fiduc.Rep.2d 1 (Civ. Div. Montgomery 2000), the court held that the income from a grantor trust, established by a husband and of which he is a beneficiary, is available to support his wife and children notwithstanding a spendthrift provision to the contrary. In this instance, the trust had been structured as a "grantor trust" for financial and tax planning purposes. The court noted that the husband and his family, "in making a concerted effort to restructure their financial affairs and focus upon significant tax advantages ... lost sight of the ramifications that the restructuring would have on the spendthrift provision of the trust." As a result, the trust provisions restraining the voluntary or involuntary transfer of the husband's interest in the trust were ineffective as to the husband's creditors.

Trust — Vested Interests

In *Zucker Estate,* 761 A.2d 148 (Pa. Super. 2000), the court held that the interests of remainder beneficiaries, who survive the testator but predecease the income beneficiary of a residuary trust, vest at the testator's death.

Will — Interpretation — *In Terrorem*

In *Emrick Estate,* 20 Fiduc.Rep.2d 390 (O.C. Div. Northampton 1999), the court held that the proceeding for will interpretation did not violate an *in terrorem* clause contained in the will. The court noted that, while a condition in a will which calls for a forfeiture if an individual challenges the will may be valid, in the instant case the petitioner merely requested that her rights under the will be enforced and did not controvert or call into question the validity of the will itself.

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Stanley J. Lehman is a partner with the Pittsburgh firm of Klett Lieber Rooney & Schorling and is chair of the Publication Committee. Erin Milliken is an associate with the same firm.

Recent Developments: Probate and Trust Law

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Will — Interpretation

In *Heacox v. Rice,* 20 Fiduc.Rep.2d 462 (O.C. Div. Franklin 2000), the court interpreted a reference in the decedent's will to "dishes" as including collectible dishes as well as common use dishes and objects normally associated with preparation and serving of food. The court also held that a reference to "personal effects" includes articles used by or carried on the decedent's person, but not furniture and furnishings.

Husband and Wife — Tenants by the Entirety — Creditors

In *Cogan Estate,* 20 Fiduc.Rep.2d 339 (O.C. Div. Bucks 2000), the court held that a transfer by the decedent and his wife of residential real estate owned as tenants by the entireties, to the husband in his sole name, was not a fraudulent conveyance as to the wife's creditors. Specifically, the court noted that alienation of entireties property by joint action eliminates the claims of a creditor of one of the joint owners, even if the claim has been reduced to judgment.

Husband and Wife — Medical Assistance — Conveyances

In *Dempsey v. Dept. of Public Welfare,* 756 A.2d 90 (Comwlth. Ct. 2000), the court affirmed the denial of medical assistance benefits to a nursing home resident by the Department of Public Welfare. Specifically, the County Assessment Office determined that the transfer of joint assets by the resident's husband into irrevocable annuities payable to the husband did not confer any tangible benefit upon the resident, and, accordingly, were for less than fair market value and for the impermissible purpose of qualifying for medical assistance benefits.

Incapacitated Person — Marriage

In *Acker, Incapacitated Person,* 20 Fiduc.Rep.2d 358 (O.C. Div. Blair 2000), following a determination that an individual is incapacitated, the court determined that his marriage was void. The court cited 23 Pa. C.S.A. § 3304(3)(b) as requiring the court to declare the marriage void as a collateral issue, even though no request had been made to the court to do so. The court determined that it must necessarily determine the validity of the marriage as part of its proper judicial function in determining the capacity of the individual.

In *In re E.B. Incompetent,* 20 Fiduc.Rep.2d 429 (O.C. Div. Montgomery 2000), the court, based upon its review of a prior adjudication of incompetency, changed its prior adjudication to "partially incapacitated," thereby authorizing the Clerk of Orphans' Court to issue a marriage license to the partially incapacitated individual.

Real Estate — Life Estate — Expenses

In *Spencer v. Petruschak,* 20 Fiduc.Rep.2d 372 (C.P. Div. Bradford 2000), the court held that a deed, subject to a life estate in an individual who is responsible for "all normal expenses," obligates the life tenant to pay real estate taxes and utilities but not to insure the premises. The court further held that the life tenant may convey, lease or alienate the life tenant's interest but must also allow the remainderman reasonable access to inspect the premises.

Cemetery — Condemnation

In *Condemnation of Muncy Cemetery Land,* 20 Fiduc.Rep.2d 419 (C.P. Div. Lycoming 1999), the court denied a borough's petition to condemn land owned by a cemetery that had not yet been divided into plots but which the cemetery planned to use for future burials. The court cited 53 Pa. C.S.A. § 47502 in protecting the cemetery from condemnation. The court noted that, while the statute fails to define what constitutes a "cemetery," case law provides that land owned by the cemetery and intended to be used for burial purposes constitutes a cemetery and is thereby protected.

Cemetery — Removal — Expansion of Church

In *In re Quickel Evangelical Church,* 20 Fiduc.Rep.2d 411 (O.C. Div. York 1999), the court denied the petition of a church to move grave markers and reinter bodies from an adjoining cemetery so that the church could expand its facilities. Specifically, the court determined that the proposed expansion of the church facilities did not advance the public good as is required by 9 P.S. § 41.

Intestacy — Forfeiture

In *Estate of Moyer,* 758 A.2d 206 (Pa. Super. 2000), the court held that a mother who has willfully failed to provide any duty of support for her child forfeits her right to inherit that child's estate under Section 2106.

Adoption — Involuntary Termination Support

In *Pike County Children & Youth v. Zuvic,* 20 Fiduc.Rep.2d 447 (Civ. Div. Pike 2000), the court held that, where parental rights are involuntarily terminated, the parent remains liable for the child's support until the child is adopted. However, under a similar fact pattern, the court held in *Kauffmann v. Truett,* 21 Fiduc.Rep.2d 109 (D.R. Div. Franklin 2000), that the parent is not liable for support.

Spousal Elective Share

In *Zebe Estate,* 20 Fiduc.Rep.2d 39 (O.C. Div. Montgomery 1999), the court held that the spousal elective share does not include a decedent's individual retirement account. However, the court held that the surviving spouse is entitled to an elective share of the decedent's "death benefit only" agreement with a corporation of which he was one-half owner.

Inheritance Tax

In *Pettenati Estate,* 769 A.2d 1229 (Comwlth. Ct. 2000), the court held that a savings account, titled in the names of a brother and a sister but which contains only the brother's funds, is not subject to inheritance tax in the sister's estate upon her death. Noting that the type of account was not designated, the court admitted parol evidence and determined that the brother intended the account to be payable to his sister on his death.

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Recent Developments: Probate and Trust Law
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Testamentary Capacity — Probate — Undue Influence

In *Angle Will,* 21 Fiduc.Rep.2d 83 (O.C. Div. Franklin 2000), the court upheld a will over claims of lack of capacity and undue influence. The decedent had executed his will while in the mild to moderate stages of Alzheimer's disease. Even accepting the fact that the decedent suffered from Alzheimer's disease at the time he executed his will, and that the disease weakened his mental faculties to some extent, the court declined to accept that the disease rendered him completely incapable of knowing his assets and the actual objects of his bounty.

Compensation — Attorney — Executor

In *Wohlpart Estate,* 21 Fiduc.Rep.2d 103 (O.C. Div. Montgomery 2000), the court addressed the difficult issue of the computation of attorneys fees for estates when the attorney is also serving as a fiduciary. In *Wohlpart*, the attorney charged a combined fee and commission of roughly 10 percent of the probate estate and two percent of the non-probate estate. Upon objection by the beneficiary of the residue of the decedent's estate, the court, citing *LaRocca Estate,* 431 Pa. 542, 246 A.2d 337 (1968), reduced the attorney's fee to $1,500 from $7,255.99, but permitted the attorney to charge an executor's commission of $6,583.07. In addition, the court, citing *Preston Estate,* 385 Pa. Super. 48, 560 A.2d 160 (1989), disallowed any compensation for the administration of the non-probate assets.

Compensation — Attorney — Executor

In *Feise Estate,* 21 Fiduc.Rep.2d 317 (O.C. Div. Montgomery 2001), the court relied on the guidelines set forth in *Johnson Estate*, 4 Fiduc.Rep.2d 6 (O.C. Div. Chester 1983), to determine the reasonableness of attorneys fees.

Personal Representative — Abandonment of Real Estate

In *Scypinski Estate,* 21 Fiduc.Rep.2d 115 (O.C. Div. Erie 2000), the court permitted the executrix of an estate to renounce her right to administer real estate and thereby abandon the real estate. The court held that, pursuant to Section 3312 and, as a result of disclaimers by the decedent's intestate heirs, title to the real estate would pass to the commonwealth in accordance with Section 2103.

Petition to Amend Death Certificate

In *In re Linard,* 21 Fiduc.Rep.2d 123 (O.C. Div. Lancaster 2000), the court denied a mandamus action seeking to compel the Lancaster County coroner to amend the decedent's death certificate from suicide to accidental death. The court noted that mandamus is an extraordinary remedy and the coroner's discretion will not be interfered with as it was not exercised in an arbitrary or fraudulent manner or based on a mistaken view of the law.

Slayer — Marital Debts

In *Baker Estate,* 21 Fiduc.Rep.2d 9 (O.C. Div. York 1999), the court held that, where a husband killed his wife and then himself, and where the marital debt of the husband and wife exceeded the assets in the husband's estate, the wife's estate was responsible for the balance of the marital debt. However, the court held that the wife's estate was not responsible for the cost of the husband's funeral and burial services.

Trust — Account

In *McCullough Trust,* 21 Fiduc.Rep.2d 135 (O.C. Div. Allegheny 2001), the court dismissed objections to the trustee's account where there was no loss of principal value. Alternatively, the trustee was not entitled to summary judgment on the grounds that the trustee's investments were statutorily authorized.

Will — Interpretation

In *Miller Estate,* 20 Fiduc.Rep.2d 235 (O.C. Div. Montgomery 2000), the court held that the decedent's will did not include a residuary clause and as a result, the residue of the decedent's estate passed by intestacy. The court further noted that a $10,000 bequest to a cousin who had predeceased the decedent, did not qualify as an "undisposed of" gift pursuant to Section 2514(10) (Pennsylvania's "anti-lapse" statute) and therefore passed by intestacy. The court noted that one of the principal limitations in applying the anti-lapse statute is that there must be a residuary gift in the will.

Election Against Will — Forfeiture

In *Reason Estate,* 21 Fiduc.Rep.2d 173 (O.C. Div. Chester 2001), the court held that the marital misconduct of a surviving spouse following separation worked as a forfeiture of her elective share rights in her deceased husband's estate.

Probate

In *Schrader Will,* 21 Fiduc.Rep.2d 197 (O.C. Div. Bradford 2001), the court upheld the Register of Wills' refusal to probate an alleged codicil which was offered for probate more than three months after the original probate of a will and an earlier codicil. The court noted the clear three-month limitation set forth in Section 3138. The court cited *In re Estate of Peles,* 739 A.2d 1071 (Pa. Super. 1999), in noting that §3138 is to be strictly construed.

Charitable Gift — *Cy Pres*

In *Brown Estate,* 21 Fiduc.Rep.2d 223 (O.C. Div. Philadelphia 2001), the court applied the doctrine of *cy pres* and held that a bequest to a nonprofit hospital be awarded to the nonprofit entity which formerly operated the hospital, as opposed to the for-profit business which subsequently purchased the hospital unbeknownst to the decedent.

Wills — Interpretation — Trustee Retention of Unproductive Assets

In *Sullivan Trust,* 21 Fiduc.Rep.2d 187 (O.C. Div. Berks 2001), the court held that the majority of the trustees of a trust established pursuant to the decedent's will were permitted to retain unproductive assets, over the objection of the minority trustee. The court noted that the decedent's will specifically authorized the retention of unproductive assets by the trustees.

(Continued on Page 8)

Recent Developments: Probate and Trust Law

(Continued from Page 7)

Wills — Precatory Words

In *Keefer Estate,* 21 Fiduc.Rep.2d 194 (O.C. Div. Columbia 2000), the court held that the language of a will authorizing the executor to "give what he sees fit to his brothers" was precatory, and did not obligate the executor to distribute any assets to his brothers.

Inheritance Tax — Life Insurance Used to Pay Legacies

In *Schomaker Estate,* 21 Fiduc.Rep.2d 217 (O.C. Div. Allegheny 2001), the court directed the Pennsylvania Department of Revenue to refund, with interest, the amount of inheritance tax collected on life insurance proceeds used to pay legacies in the decedent's will. The court noted that 72 Pa.C.S.A. §9111(d) clearly mandates that the proceeds of life insurance be exempt from the inheritance tax. The court noted that this exemption applies even where proceeds are paid into the probate estate and subsequently distributed in the same manner as other assets.

Intestacy — Children Born Out of Wedlock

In *Bahl v. Lambert Farms,* Inc., 773 A.2d 1256 (Pa. Super. 2001), husband and wife raised the illegitimate child of their daughter as their own. During the couple's lifetime, the child was held out as their own in school records, a baptismal certificate and letters among family members. In addition, the surviving wife, following the death of her husband, listed the child as their own in the probate documents in the deceased spouse's estate. Accordingly, the court held that the concept of paternity by estoppel entitled the child's issue to bring an action to recover that child's interest.

Probate — Lack of Capacity

In *Eskra Will,* 21 Fiduc.Rep.2d 257 (Register of Wills, Allegheny 2001), the Register of Wills confirmed the probate of a 1993 will and denied the probate of a 1997 will upon finding that the testatrix lacked testamentary capacity in 1997. The register based his finding predominately on medical testimony that was contrary to the testimony of two attorneys who prepared and witnessed the 1997 will.

Contract to Will — Contract to Devise

In *Carlin Estate,* 21 Fiduc.Rep.2d 250 (O.C. Div. Washington 1998), the court held that the claim of a son, that his mother breached an alleged contract with his deceased father to devise real estate to their three sons upon the death of the last surviving parent, was premature as the mother was still alive.

Inheritance Tax — Sole Use Trust

In *Goldman Estate,* 21 Fiduc.Rep.2d 333 (O.C. Div. Lackawanna 2000), the court held that a trust established for the benefit of the decedent's widow, which gave her a general power to appoint or invade principal during her lifetime, qualified as a "sole use" trust that was not subject to inheritance tax in the husband's estate.

Probate — Appeal — Notice of Beneficial Interest

In *Schulman Will,* 21 Fiduc.Rep.2d 310 (O.C. Div. Lehigh 2001), the court denied a motion for the dismissal of an appeal by a son from probate filed more than one year after probate where the executrix failed to serve a Rule 5.6(a) notice of beneficial interest on the son of the decedent.

Economic Growth and Tax Relief Reconciliation Act of 2001

On June 7, 2001, President Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001 (the Act). The act makes significant and comprehensive changes to existing federal income and transfer tax laws, all of which will be repealed on Jan. 1, 2011, unless a new law is enacted prior to that date. The following is a summary of some of the more significant changes to the federal estate, gift and generation-skipping transfer (GST) taxes:

• Changes in 2001

1. Automatic allocation of GST tax exemption to certain post-2000 *inter vivos* transfers that are not direct skips, but as to which a generation-skipping transfer is likely.
2. Permitted division of certain pre-existing trusts, which are partially exempt from GST tax, into separate GST exempt and GST non-exempt trusts.

• Changes in 2002

1. Top estate, gift and GST tax rate reduced to 50 percent.
2. Applicable estate and gift tax exclusion amount increased to $1 million.
3. Reduction in I.R.C. §2011 state death tax credit begins.

• Changes in 2003

Top estate, gift and GST tax rate reduced to 49 percent.

• Changes in 2004

1. Top estate, gift and GST tax rate reduced to 48 percent.
2. Applicable estate and GST tax exclusion amount increased to $1.5 million.
3. Applicable gift tax exclusion amount remains at $1 million.
4. Repeal of I.R.C. §2057, Family-Owned Business Interests.

• Changes in 2005

1. Top estate, gift and GST tax rate reduced to 47 percent.
2. I.R.C. §2058 deduction for state death tax replaces I.R.C. §2011 state death tax credit.

• Changes in 2006

1. Top estate, gift and GST tax rate reduced to 46 percent.
2. Applicable estate and GST tax exclusion amount increased to $2 million.

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Recent Developments: Probate and Trust Law

(Continued from Page 8)

• Changes in 2007

Top estate, gift and GST tax rate reduced to 45 percent.

• Changes in 2009

Applicable estate and GST tax exclusion amount increased to $3.5 million.

• Changes in 2010

1. Total repeal of the estate and GST taxes.
2. Gift tax remains in effect at a maximum rate of 35 percent and an applicable exclusion amount of $1 million.
3. Enactment of new carryover basis rules:

    a. Basis of certain property transferred at death may be increased by $1.3 million.

    b. Basis of certain property transferred to surviving spouse (or for the benefit of a surviving spouse in a qualifying trust) may be increased by an additional $3 million.

• Changes in 2011

Sunset of repeal taking place in 2010 and pre-2002 law goes back into effect.

1. Applicable estate and gift tax exclusion amount returns to $1 million.
2. Maximum estate, gift and GST tax rate returns to 55 percent. ❒

UPDATE:

PBA Listserv Instructions

By Neil Hendershot and Traci Klinger

Listservs

We want to encourage greater use of our Real Property, Probate & Trust Law Section's listservs by our members. The following instructions should assist in your effective use of our Section's two listservs: one for the Probate & Trust Division, and another for the Real Property Division.

Changes

Note that the method for joining listservs has changed. You must subscribe separately to each listserv, since their memberships and operations are conducted separately by the PBA. Membership in PBA listservs is exclusive to PBA members who belong to the sponsoring committees and Sections.

You may want to save these directions for future reference.

To subscribe to a listserv, complete the form on the front page of the PBA Web site (www.pabar.org). Once subscribed to the listserv you will get the following confirmation message:

"File sent due to actions of administrator traci.klinger@pabar.org"

To unsubscribe to a list, send a message to realproperty-request@list.pabar.org with "unsubscribe" in the subject.

To change your e-mail address, you must unsubscribe the old e-mail address using the old e-mail address and subscribe the new e-mail address using your new e-mail address. Sending an e-mail to the list will not change your e-mail address on the listserv.

To post a message to the listserv, address your e-mail to realproperty@list.pabar.org and/or probatetrust@list.pabar.org.

To reply only to the sender of a posted message, hit "Reply," and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can use the message header to send copies manually to other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit "Reply to All," and type your response in the message body. This response will go to the sender and also to the entire listserv membership.

When you reply to the message, make sure that the listserv name is included either in the "to" or "cc" fields. If you see the listserv name with "bounce" included in the name, remove that address. The "bounce" address is a black hole. You may have to manually add the listserv address to one of the address fields in order for your reply to make it to the members of that list.

Attachments: Computer files can be attached to messages, which is accomplished through your e-mail program. Such files should be in common formats available to many users, such as plain text (.txt), Microsoft Word (.doc), Corel WordPerfect (.wpd), Adobe Acrobat (.pdf), photos (.jpg or .jpeg), or other common formats. Users who have the programs associated with those file formats should be capable of opening such files, but be reminded that some listserv members may not have the necessary programs for reading or viewing such file formats.

Customer Service: The PBA listservs are maintained by Traci Klinger, internet coordinator, 800-932-0311, ext. 2255.

Questions?

If you have any questions regarding a listserv, you may contact Traci via phone or by e-mail at traci.klinger@pabar.org. You can also send an inquiry to our section liaison, Michael Shatto, via e-mail at michael.shatto@pabar.org.

You can also send an inquiry to your section's officers. ❒

Neil Hendershot is a shareholder with the Harrisburg firm of Goldberg, Katzman & Shipman, P.C., and is the new chair of the Section. Traci Klinger is the internet coordinator at the PBA.

Recent Legislation

By Mark Hammond and Peter Pokorny

Through this column, the PBA Legislative Department seeks to inform Section members about adopted or pending legislation that affect our practice areas. The Section encourages members to express opinions regarding any pending legislation's importance or impact by contacting appropriate legislators, the PBA Legislative Department at 800-932-0311, ext. 2246, or the leaders of the Section. You may also contact Peter Pokorny via e-mail at peter.pokorny@pabar.org.

RECENT ENACTMENTS

Gov. Schweiker has signed the following acts:

Act No. 50 (SB 1014)

This act contains some clarifications to existing law regarding: situs of *inter vivos* trusts; rules of succession involving an intestacy following a valid prior estate; matters regarding equitable apportionment of federal estate and gift taxes, matters regarding the Uniform Transfers to Minors Act (age of majority 21 and delays of transfer of property after minor attains age 21); a clarification of section 5536 regarding distributions of income and property of an incapacitated person; clarification of section 6305 regarding the effect of disclaimers and rights of creditors of a disclaimant; and the addition of section 7104 providing for the power of trustees to resign, with or without court approval, and the liability that may be imposed by such resignation.

The Uniform Principal and Income Act is changed to conform to the 1997 ULA revision of the Uniform Principal and Income Act. This is important because it gives the trustee the discretion to change an existing trust to a personal "unitrust" much like what we have available to charitable trusts using the "total return" concept of investing.

Act No. 43 (HB 411)

This act amends the Municipalities Planning Code by providing for home-based businesses.

Act No. 39 of 2002 (HB 1935)

This act, known and cited as the Main Street Act, was signed on April 23. It addresses urban blight by providing for a commercial downtown revitalization program administered by the Department of Community and Economic Development. To see the act in its prior final bill form, see: www.legis.state.pa.us/WU01/LI/BI/BT/2001/0/HB1935P3725.HTM

Act No. 12 of 2002 (HB 1948)

This act amends the Second Class Township Code by further providing for real property. It is one of a series of pieces of legislation dealing with urban blight.

Act No. 2 of 2002 (HB 1219)

This act amends the Pennsylvania Municipalities Planning Code. Under this legislation, where a proposed amendment to the zoning ordinance involves a zoning map change, notice of the required public hearing shall be mailed by the municipality at least 10 days prior to the date of the hearing by first class mail to the owners of record at their addresses of record of all real property located within the area being rezoned and contiguous to the area being rezoned.

Act No. 110 of 2001 (SB 1215)

This act amends the Municipalities Code relating to parking authorities. The act makes changes in board member eligibility language in the Authorities Act and the Borough Business Improvement Districts.

Act No. 81 on Oct. 30, 2001 (HB 910)

This act amends Title 42 by further providing for the volunteer-in-public-service negligence standard relating to design professionals.

PENDING LEGISLATION (REAL PROPERTY)

Eminent Domain

SB 1118 - sponsored by Sen. Jim Gerlach, R-Berks, amends the Third Class City Code by further providing for the exercise of eminent domain and for restrictions as to certain property. It would restrict a city's right of eminent domain as against land situated in another municipality for the purposes of establishing public recreation places without the approval by resolution of the governing body of the municipality in which the land is situated. The bill passed the House unanimously on May 8, 2002. It has been referred to the Senate Urban Affairs Committee.

Home Inspectors

HB 2203 - sponsored by Rep. Peter Zug, R-Dauphin, amends Title 68 (Real and Personal Property) by further providing for requirement for home inspectors and for required contractual provision regarding home inspections. The bill passed the House on Dec. 11, 2001, and had second consideration in the Senate on March 19, 2002.

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Peter J. Pokorny, Esquire, is a legislative liaison with the Pennsylvania Bar Association. Mark B. Hammond is with Allfirst Trust Company of Pennsylvania. He is the editor of the Section's Newsletter *and serves on the Section's Legislative Committee.*

Update: Recent Legislation

(Continued from Page 10)

Interest and Usury

HB 2031 - sponsored by Rep. Stan Saylor, R-York, amends the Loan Interest and Protection Law, 41 P.S. §101, by further defining residential mortgage by raising the amount from $50,000 to $250,000. The bill was referred to the Commerce and Economic Developments Committee on Oct. 16, 2001.

Land Use

HB 167 - introduced by Rep. Lawrence Curry, D-Montgomery, amends the Municipalities Planning Code. It adds a provision that a municipality may reject an application if the land to be affected by the subdivision had been dedicated as permanent open space or remains subject to a deed restriction with the intent of prohibiting further subdivision, regardless of any zoning changes that may occur after such dedication or deed restriction has been made. The bill was reported out of the House Local Government Committee on January 23, 2001. This bill was placed on the table on May 8, 2002.

SB 1259 - sponsored by Sen. Greenleaf, amends Title 68 (Real and Personal Property) of the Pennsylvania Consolidated Statutes, by prohibiting adult-oriented establishments in certain locations. It was referred to the Local Government Committee on Jan. 10, 2002.

Municipalities Planning Code

HB 2159 - sponsored by Rep. Mike Hanna, D-Centre, amends the Pa. Municipalities Planning Code by further providing for increasing the bonding time period to secure structural integrity from 18 months to 36 months. It was referred to the House Local Government Committee on Nov. 19, 2001.

HB 2197 - sponsored by Rep. Ellen Bard, R-Montgomery, amends the Pa. Municipalities Planning Code by providing for separation requirements for adult uses. Adult uses should not be within 1,000 feet of a protected use. It was referred to the House Local Government Committee on Dec. 3, 2001.

HB 2341 - sponsored by Rep. Steil, amends the Municipalities Planning Code by further providing for procedures for landowner curative amendments, for hearings, and for governing body's functions. It was referred to the House Local Government Committee on Feb. 6, 2002.

Property Taxes

HB 2336 - sponsored by Rep. Ellen Bard, R-Montgomery, amends the Tax Reform Code by providing for taxation of transfers to members of the same family and for taxation of a qualified family interest.

This bill was of interest to the section when it was initially introduced last session. It was referred to the Finance Committee on Feb. 5, 2002.

Satisfaction of Mortgages

SB 14 - sponsored by Sen. Edwin Holl, R-Montgomery, provides for the satisfaction of consumer and other mortgages. This bill passed the Senate on April 3, 2001, and was referred to the House Commerce and Economic Development Committee on April 4, 2001.

This bill was a topic of discussion at the meeting of the Real Property, Probate and Trust Law Section on Sept. 21. The chair of the section has appointed an ad hoc committee to work on this legislation.

PENDING LEGISLATION (PROBATE)

Absentees

HB 2060 - Introduced on Oct. 23, 2001, by Rep. Kelly Lewis, R-Monroe, to amend Title 20 (Probate Estates and Fiduciaries Code) further providing for distribution of property of an absentee and for notice to the absentee. This was introduced subsequent to the terrorist incidents of Sept. 11 and provides that the court may find that an absentee was exposed to a specific peril of death, the period of notice shall be no more than once a week for two successive weeks. It passed the House on Dec. 3, 2001, and was referred to the Senate Judiciary Committee on Dec. 7, 2001.

Child Support

HB 1914 - Introduced on Sept. 18, 2001, by Rep. Joseph Petrarca, D-Westmoreland. It would continue the child support obligation beyond the death of a parent of a minor and unemancipated child. The court would be empowered to set aside an amount in reasonable proportion to the extent necessary for support from the amount available from the assets of an estate. Referred to Judiciary Committee on Sept. 18, 2001.

SB 182 - Introduced on Jan. 30, 2001, by Sen. Mike O'Pake, D-Berks, providing, that unless expressly provided in the decree, provisions for the support of a child are terminated by emancipation or attainment of majority of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment, to the extent appropriate in the circumstance. It was referred to the Judiciary Committee on Jan. 30, 2001.

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Update: Recent Legislation

(Continued from Page 11)

SB 1270 - Introduced on Jan. 29, 2002, by Sen. Mary Jo White, R-Venango, providing that the obligation for support remains unaffected by the death of the parents. Any interested party may file a claim against the estate of the parent to determine the liability of the parent to support a surviving child, regardless of whether a support order was in effect on the parent's date of death. It was referred to the Judiciary Committee on Jan. 29, 2002.

Distribution Independent of Granting of Letters

SB 592 - sponsored by Sen. Robert Jubelirer, R-Blair, provides that property in an amount of $11,000 or less held by the commonwealth may be distributed to the surviving spouse of the decedent, any child, the mother or father, any sister or brother, upon presentation of a certified copy of the death certificate and a receipted funeral bill, or an affidavit by a licensed funeral director stating that satisfactory arrangements have been made for payment of the funeral. It passed the Senate on Oct. 22, 2001, and was referred to the House Judiciary Committee on Oct. 24, 2001.

Health Care Powers of Attorney

SB 1265 - sponsored by Sen. Stewart Greenleaf, R-Montgomery. This is a re-introduction of legislation providing for health-care power of attorney and making changes to the advanced directives law. It is based on the recommendations of the Joint State Government Commission's Advisory Committee on Decedents' Estates Law. It has been revised from last session's bill. It does not incorporate the concept of a health-care representative and does not include provisions relating to do-not-resuscitate (DNR) orders. It was referred to Public Health and Welfare on Jan. 29, 2002.

Inheritance Taxes (series of bills)

HBs 22, 201, 236, 524, 757, 770, 771, 838, 1137, 1160, 1367, 1672, 1680, 1791, 1966 and SBs 131, 233, 345, 403, 411, 428, 469, 497, 1297

Twenty four pieces of legislation have been introduced relating to the inheritance tax. This legislation proposes to exempt persons with disabilities (HB 201), exempt lineal descendants (HB 524), exempt agriculture and forest reserve property (HB 757), phase out the tax (HBs 22, 771, 838, 1137, 1966 and SB 131), reduce the tax (HB 1680 and SB 233 and 428), exempt property up to a certain amount (HB 1160 and SB 403), provide for an exemption for premiums paid for long-term care insurance (HB 770), provide provisions for the spouse of a sibling (SB 411), eliminate tax on property in a joint account entirely funded by the survivor (HB 469), eliminate tax on property passing from parent, adoptive parent or stepparent to a child younger than 21 years of age to be at zero percent (SB 497), and eliminate the tax (SB 428).

Given the current economic climate, it appears unlikely that any inheritance tax legislation will pass during the current legislative term.

Insurance

HB 2053 - Sponsored by Rep. John Perzel, R-Philadelphia, amends the Insurance Department Act of 1921 to provide for the order of distribution of claims from an insurer's estate. This adds the cost of payments to employees or former employees under valid severance contracts existing at or prior to the filing of a successful petition for rehabilitation, up to $50,000 for each employee. This bill was re-referred to Rules on Feb. 12, 2002.

Out-of-Hospital Non-Resuscitation

HB 96 - sponsored by Rep. Patrick Fleagle, R-Franklin, provides for out-of-hospital non-resuscitation by emergency medical services. The emergency medical services may rely on a written "do not resuscitate" document or bracelet written in the model form established by this statute. The bill passed the House on April 3, 2001. The bill received second consideration in the Senate on May 8, 2002.

Viatical Settlements

SB 462 - sponsored by Sen. Hal Mowery, R-Cumberland, provides for the regulation of viatical settlements and the duties of the Insurance Department in regulating viatical settlements. The bill passed the Senate on April 24, 2002. It was referred to the House Insurance Committee ❒

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ARTICLE:

Gulf Power: Cable Broadband Defies Simple Categorization

By Clifford B. Levine and Kevin P. Allen

Introduction

Participants, customers, regulators and observers of the high speed internet access, or broadband, industry had keen interest in the United States Supreme Court case of *National Cable & Telecommunications Associates, Inc. v. Gulf Power Co.,* __ U.S. __, 122 S.Ct. 782 (2002) (Gulf Power). That case provided the court with an opportunity to resolve the perplexing question of how to categorize for regulatory purposes broadband services provided by traditional cable television companies. Prior to *Gulf Power,* different industry interest groups argued that broadband services delivered through a cable modem should be categorized under federal law as either a "telecommunications service," a "cable service," an "information service" or some combination of those possibilities. The proper categorization of cable-delivered broadband is more than an academic exercise. If cable-delivered broadband were deemed to be a telecommunications service, cable broadband companies would be subject to governmental regulations from which they are now exempt, most critically the requirement to provide broadband competitors "open access" to the cable lines themselves.

The Supreme Court, however, did not answer the question with any clarity in its *Gulf Power* decision. The court's decision, rendered in the context of the federal Pole Attachments Act, left the Federal Communications Commission (FCC) with the discretion to leave the categorization of cable broadband an open-ended question until such time as the FCC decides to render its definitive position on the issue.

Within weeks of the court's *Gulf Power* decision, the FCC announced its position, although it was less than definitive. The FCC decided that cable broadband is an "information service." The FCC, however, also indicated that cable broadband providers are not immune from FCC regulation. Consequently, the FCC requested further comments on how to structure an appropriate regulatory framework for cable broadband and for the industry in general.

The Ruling in *Gulf Power*

On Jan. 16, 2002, the United States Supreme Court issued its opinion in *Gulf Power,* Slip Op. No. 00-832. (Jan. 16, 2002), regarding the application of the Pole Attachments Act (Act), 47 U.S.C. § 224, as amended. In its opinion, the Supreme Court considered two consolidated appeals from the United States Court of Appeals for the Eleventh Circuit: *National Cable & Telecommunications Association, Inc. v. Gulf Power Co.,* No. 00-832; and *Federal Communications Commission v. Gulf Power Co.,* No. 00-843. Both appeals concerned the jurisdiction of the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and [to] adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1).

In the consolidated appeal, the Supreme Court considered two questions: "First, does the act reach attachments that provide both cable television and high-speed (broadband) Internet service? Second, does it reach attachments by wireless telecommunications providers?" Slip Op. at p. 2. The Supreme Court ruled in the affirmative as to both questions and, further, that high-speed Internet access through the commingled use of cable television lines and the attachments of wireless telecommunications providers were covered by the act.

Commingled Attachments: Cable Television and Internet Service

With regard to the first question, the Supreme Court considered whether the act addressed commingled cable television attachments that provide cable television and high-speed Internet service at the same time. The Eleventh Circuit had determined that such commingled services were not covered by the act's two specific rate formulas, and, therefore, were not covered by the act. Under the Eleventh Circuit's ruling, a cable television company would not have been able to expand the use of its lines to include high-speed Internet access without exposing itself to paying an additional monopoly rate to the electric utility to use its poles to provide such a service. Such monopoly rate would have been outside the regulation of the FCC under the Eleventh Circuit's interpretation of the act.

The Supreme Court, however, looked to the definition of pole attachment under the Act, 42 U.S.C. § 224(a)(4), which provides that "'pole attachment' means *any attachment by a cable television system* or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *(Emphasis added.)* The Supreme Court held that what was important under this definition was the identity of the "attaching entity — the entity the attachment is 'by.'" Slip Op. at p. 4. In essence, whether the cable company used the line merely for cable television or for a mix of television and high-speed Internet access was irrelevant. Only the fact that a cable company had attached the line was relevant.

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Clifford Levine is a partner in the Pittsburgh-based law firm of Thorp Reed & Armstrong, LLP. Kevin Allen is a senior associate in that firm. Both practice in the firm's Land Use and Regulatory Practice Group.

Article: *Gulf Power* — Cable Broadband Defies Simple Categorization
(Continued from Page 14)

Thus, based on the Supreme Court's interpretation of the act, cable television companies can use their lines attached to utility poles to provide cable television and high-speed Internet access within the protection of the act and its regulated rates.

In reaching that decision, however, the court declined its opportunity to address the question of the proper categorization of cable broadband services. According to the *Gulf Power* majority, the FCC, in the proceedings below, "decided that Internet services are not telecommunications services," and then, because a further determination was not necessary to resolve the issue raised by the Pole Attachments Act, declined to decide if such services qualify as cable or information services. The *Gulf Power* majority held that the FCC was within its rights to reach those conclusions. The majority also conceded that the FCC subsequently retreated from any decision regarding whether cable broadband services qualify as telecommunications services. Nevertheless, the court held that that retreat had no effect on the outcome of the case at hand. Thus, a decision on the proper categorization of cable broadband services was left for another day. In the meantime, cable broadband providers remain free from the regulatory burdens that apply to providers of telecommunications services, a freedom that is not available to cable broadband's primary competition, telephone companies that provide digital subscriber line (DSL) broadband service.

Wireless Communication Attachments

The second question considered by the Supreme Court was whether and to what extent the equipment of a wireless communications provider is susceptible to FCC regulation under the act. Slip Op. at p. 11. In the underlying appeal, the Eleventh Circuit had ruled that the act "does not provide the FCC with authority to regulate wireless carriers." Id. In briefing before the Supreme Court, however, the parties agreed that this holding was overstated and that "to the extent a wireless carrier seeks to attach a wireline facility to a utility pole ... the wireline attachment is subject" to the act. Id. The Supreme Court agreed with this statement and narrowed its consideration to the following issue: Whether some attachments by wireless telecommunications providers, such as those composed of distinctly wireless equipment, are excluded from the coverage of the act? Id.

To resolve this narrow question, the Supreme Court again referred to the language of 47 U.S.C. § 224(a)(4) regarding the definition of a pole attachment as "*any attachment* by a cable television system or *provider of telecommunications service* to a pole, duct, conduit, or right-of-way owner or controlled by a utility." Id. *(Emphasis added).* The Supreme Court determined that telecommunications service is then defined as "the offering of telecommunications to the public for a fee, 'regardless of the facilities used,'" 47 U.S.C. § 153(46). Slip. Op. at p. 11. As such, the Supreme Court concluded that the provider of wireless telecommunications service is a "'provider of telecommunications service,' so its attachment is a 'pole attachment'" Id. Thus, the attachments by wireless telecommunications companies were covered by the act.

The FCC's Subsequent Declaratory Ruling

On March 15, the FCC answered the question left open by *Gulf Power*. In a Declaratory Ruling and Notice of Proposed Rulemaking, the FCC, focusing on the nature of functions that the end user is offered, concluded that cable-delivered broadband is an information service, not a cable service or a telecommunications service. The FCC, however, took pains to emphasize that its categorization of cable broadband as an information service did not exempt cable broadband providers from FCC regulation. Simultaneously with its Declaratory Ruling, the FCC issued a Notice of Proposed Rulemaking seeking comment on the regulations to which cable broadband providers should be subjected, including the issue of whether incumbent cable providers must provide open access to independent internet service providers.

Conclusion

With specific regard to the Pole Attachments Act, the Supreme Court's *Gulf Power* decision resolved the questions before it in favor of regulation. Cable companies using pole-attached cable television lines for high-speed Internet access are covered by the act and entitled to its protections. Similarly, the pole attachments made by wireless telecommunications companies are also covered by the act and the rates charged for such attachments are regulated by the FCC. With regard to cable television companies, this preserves their right to adopt innovative new uses for their attached cable television lines within the protection of the act. As such, this may accelerate the development of broadband access to the Internet. With regard to the wireless telecommunications companies, the decision allows the wireless companies to continue to pay regulated rates for their use of utility poles within the protection of the act.

The court, however, chose not to decide the nettlesome, and more far-reaching, question of whether cable broadband is a telecommunications, cable or information service. The definitive answer to that question was left open for the FCC to decide. In its subsequent Declaratory Ruling, the FCC concluded that cable-delivered broadband is an information service, not a telecommunications or cable service. The FCC is now in the process of deciding how to regulate effectively and efficiently cable broadband providers and their competitors. ❒

UPDATE:

IRS Memorandum: Significant Service Center Advice Request re Certificate of Mailing

By Vince Lackner

CERTIFICATES OF MAILING (Important IRS Memorandum 1998-051)

We recently came across an IRS Memorandum with the subject line "Significant Service Center Advice Request re Certificate of Mailing." You may access the full text of this memorandum at the following link:
www.irs.gov/pub/irs-sca/1998-051.pdf

This is an extremely important document because it addresses what is admissible as proof of timely mailing via the U.S. Postal Service.

The bottom line is that the U.S. Post Office Form 3817 (Certificate of Mailing) is not sufficient proof that you mailed an estate tax return, extension request, and/or estate tax payment in a timely manner, if the official postmark displays a later date.

This problem can arise when the equipment used by the U.S. Post Office to stamp your Form 3817 Certificate of Mailing is different from the equipment that postmarks your envelope (even at the same Post Office counter), and the two pieces of equipment are set to different dates (especially late in the evening).

The only reliable proof (under IRC Section 7502) is registered mail or certified mail. The Second and Sixth Circuit Courts of Appeal both follow Section 7502 strictly. In the Eighth and Ninth Circuits, when an item is never received by the IRS, you can introduce extrinsic evidence of timely mailing, including a stamped Certificate of Mailing, under the common law "mailbox rule." Practitioners using the Form 3817 Certificate of Mailing, however, do so at their own risk. ❐

Vince Lackner is founder of the Lackner Group, a Pittsburgh-based software provider for estate and trust administration. This article was drawn from a posting on the Section's Probate and Trust listserv.

UPDATE:

New Procedure to Obtain an EIN

By Stephen J. Silverberg

The Internal Revenue Service has announced a revised procedure to ease getting an Employer Identification Number (EIN). This procedure has always been of concern in beginning estate administration.

The new, centralized process includes a single toll-free telephone number, consolidation of the EIN workforce into three campuses with different fax numbers, and a revised EIN application that allows third parties — primarily practitioners and reporting agents — to request a number either by telephone or by fax on behalf of their clients. The IRS has also redirected staff to issuing EINs and has eliminated the backlog of requests.

Call or FAX

Under the new system, there are two ways to get an EIN. First, taxpayers can call toll-free 1-866-816-2065, Monday through Friday from 7:30 a.m. to 5:30 p.m. EST. Taxpayers outside the U.S. should call the Philadelphia Campus (Service Center) at (215) 516-6999. Second, taxpayers can request a number by fax. The fax request lines are open 24 hours a day, seven days a week. To submit a request by fax, use Form SS-4, Application for Employer Identification Number. The December 2001 version of the form contains a space for third-party designation. The appropriate fax number is determined by the state of residence.

Different States

For Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia, requests should be faxed to the Brookhaven Campus at (631) 447-4991. For Illinois, Indiana, Kentucky, and Michigan, requests should be faxed to the Cincinnati Campus at (859) 669-5760. For Alabama, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming, a request should be faxed to the Philadelphia Campus at (215) 516-3990. ❐

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UPDATE:

Uniform Principal and Income Act

By Edward M. Watters, III

Senate Bill 1014, Printers Number 1431, passed the House on May 8. (The bill passed the Senate on Dec. 4, 2001). Gov. Schweiker signed this legislation on May 16 as Act 50 of 2002. Generally speaking the act will take effect 60 days after the governor's signature, although some provisions are retroactive.

This is the legislation that contains the new Pennsylvania Principal and Income Act, including the ability to convert the definition of income to four percent of a rolling three year average of total value (private unitrust).

It also contains other Pennsylvania Probate Estates and Fiduciaries Code provisions, including:

1. Using "principal place of administration" as the primary test for situs of an *inter vivos* trust.

2. Allowing non-present interest gifts under the Pa. Uniform Transfers to Minors Act to be held until age 25.

3. Creating a procedure for a trustee to resign without court approval, and for filing of related documents with the clerk in order to get "trustee short certificates."

4. Making it clear that the notice and acknowledgement provisions regarding powers of attorney do not apply to commercial transaction documents (e.g. a limited partnership). This change is retroactive to the date of the notice/acknowledgment requirement.

5. Creating an easier presumption of death test with regard to victims of September 11.

The full text is in the Electronic Billroom: www.legis.state.pa.us/WU01/LI/BI/ALL/2001/0/SB1014.HTM ❒

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ARTICLE:

New Laws Give Trustees Power to Implement More Flexible Investment and Distribution Strategies: The Pennsylvania Uniform Principal and Income Act

By Daphne Goldman and Anne Marie Levin

Trustees and beneficiaries of trusts should be aware of recent changes made to Pennsylvania's Probate Estates and Fiduciaries (PEF) Code. With the adoption of the new Pennsylvania Uniform Principal and Income Act, the changes affect investment strategies and distributions to beneficiaries.

A key concept of trust law is the distinction between trust income and trust principal. Traditionally, dividends, interest and rents have been considered income and are allocated to the income beneficiary; capital gains, on the other hand, are allocated to trust principal to support future income production and for ultimate distribution to the trust's remainder beneficiaries. Chapter 81 of the PEF Code, 20 Pa.C.S.A. §8101, et seq., governs whether a particular receipt or expenditure is allocable to income or to principal, unless different allocation is made by the terms of the trust instrument. Over time, changes in investment philosophies and new forms of corporate distributions have highlighted the need to revise traditional concepts of trust income and trust principal, especially for the trustees operating under the prudent investor standard required in Pennsylvania and many other states.

The prudent investor rule adopted in Pennsylvania in 1999, 20 Pa.C.S.A. §7201, et seq., allows trustees to invest for total positive return — production of ordinary income plus appreciation — while requiring trustees to treat the beneficiaries' respective interests impartially. This produces a conflict with traditional concepts of trust income and principal. Equity securities have produced the greatest overall return for investors, but in recent years, corporations have been paying smaller dividends while capital appreciation has increased significantly — a scenario thought to be quite a disadvantage to income beneficiaries. On the other hand, the need to produce trust income for distribution to the income beneficiary (who is likely to be the primary concern of the settlor of the trust) is a reason trustees may be over-invested in bonds, to the detriment of the remainder beneficiaries.

The Model Uniform Principal and Income Act, which has been adopted in many states, was amended to address this conflict by providing the trustees with a discretionary power to make an equitable adjustment between income and principal when the trustees would otherwise be unable to comply with the

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Article: New Laws Give Trustees Power to Implement More Flexible Investment and Distribution Strategies

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duty of impartiality, based on what is fair and reasonable to all beneficiaries. Under the power of adjustment, a receipt of capital gains, previously allocable to principal, may be allocated to income if necessary to treat all beneficiaries impartially. By the same token, a receipt of dividends, interest or rents may be allocated to principal.

The power of adjustment provision in the revised Model Uniform Principal and Income Act is included in the new Pennsylvania Uniform Principal and Income Act (hereinafter the UPIA). The UPIA was enacted as Act 50 of 2002 and signed into law by the governor on May 16, 2002. The Pennsylvania Legislature, unsatisfied that the adjustment power provides a bright line for trustees, has provided an alternative approach for providing a reasonable return to the income beneficiary — the unitrust concept — which generally defines the payout to the income beneficiary as four percent of trust corpus. Unless the will or the terms of the trust expressly provide otherwise, the provisions of the UPIA generally apply to every trust or decedent's estate existing on or after its effective date of July 15, 2002.

Trustees' Power to Adjust

The UPIA gives trustees the power to allocate trust assets either to principal or income in order to enable trustees to make distributions in a manner that is fair and reasonable to all the beneficiaries, except to the extent that the governing instrument directs otherwise.

Before adjusting principal and income, trustees are required to consider a number of factors, including the nature, purpose and expected duration of the trust, the settlor's intent as expressed in the trust instrument, the identity and circumstances of the beneficiaries, the nature of the trust assets, and the economic conditions and effects of inflation and deflation. The trustees must also consider the anticipated tax consequences of an adjustment, as well as the shifting of economic benefits and tax benefits between income beneficiaries and remainder beneficiaries.

The UPIA forbids trustees from making adjustments that would reduce income in a trust that requires that the entire income be paid at least annually to a surviving spouse, and includes other limitations to preserve tax benefits and to prevent adverse tax consequences. The power to adjust is also denied to a trustee who is a beneficiary of a trust or who would benefit from the adjustment directly or indirectly.

Trustees are permitted to release all or part of the power to adjust in order to avoid adverse tax consequences.

The Unitrust Approach

In addition to the power to adjust, the UPIA provides a "unitrust" option as an alternative approach to determining trust income. Unless prohibited by the trust instrument, this option permits a trustee who is not a beneficiary of the trust to convert a trust into a unitrust. The purpose of the unitrust option is to provide the trustees with more flexibility in carrying out the purposes of the trust and the settlor's intent. The trustees may make the election at any time by giving written notice to all living beneficiaries or by petitioning the court for approval. A beneficiary may also request the trustees to convert to a unitrust or petition the court to order a conversion.

When the power to convert is exercised, the trustees must distribute to the income beneficiary, at least annually, an amount equal to four percent of the net fair market value of the trust assets. For this purpose, trust assets are averaged over the three preceding years or over the period of the trust's existence, whichever is less.

Under the UPIA, the trustees are given broad discretionary powers in administering the trust as a unitrust. The trustees may determine how often to make distributions during the year, when and how often to value the trust's assets, and whether to include property occupied or possessed by a beneficiary in the calculation of the trust's assets. There is an order of priority for payment of unitrust distributions: they must be made first from income, as defined traditionally, and (to the extent the income is insufficient) next from net realized short-term capital gains, then from net realized long-term capital gains and, finally, distributions may be made from the principal of the trust. Provisions in the trust or will regarding distribution or withdrawal of principal are not affected by the conversion to a unitrust.

The trustees also will be permitted to petition the court if the trustees desire to pay more or less than four percent to the income beneficiaries, to average the valuations of the assets of the trust over a period other than three years, or to reconvert from a unitrust and exercise, instead, the power to adjust. A beneficiary of the trust has the right to petition the court for the same reasons, if the trustees refuse to do so. Court approval is also required to reconvert from a unitrust; upon such reconversion, the power of the trustees to adjust is revived.

Exercise of the power to convert a trust to a unitrust is prohibited in circumstances similar to those in which the power to adjust is prohibited. The purpose of these limitations is generally to preserve tax benefits, such as marital or charitable tax deductions or gift tax exclusions, or to prevent adverse tax consequences.

The trustees' exercise of the power to adjust or convert to a unitrust are subject to control by the court. If a court determines that the trustees abused their discretion, the court is empowered to restore the beneficiaries to their rightful position by requiring that certain distributions be made or by adjusting future distributions. The court may also require the trustees to pay the beneficiaries or the trust from their own funds to remedy the abuse. ❒

ARTICLE:

Land-Use Enforcement May be Inverse Condemnation

By Harris Ominsky

A recent legal opinion explored the murky-line between what is legitimate enforcement of a land use regulation and what is a *de facto* taking for which the owner must be compensated. In the case of *Shaner v. Perry Township,* 50 D.C. 4th 257 (2000), the township attempted to enforce land-use controls by filing equity actions against the property owners. Because the township's action caused the owners to lose existing and prospective tenants, Judge Albert A. Stallone of the Berks County, Pa., Common Pleas Court held that the township's actions rose to a *de facto* taking and entitled the owners to have a board of view determine the amount of just compensation owed to them.

Previously, the township had granted the owners a variance to build and operate a motor vehicle station on one lot. It also had issued the owners occupancy permits for the commercial use of a one-story building on a nearby lot. The approvals were not conditioned on paving the lots with either macadam or concrete, and the lot had been covered with gravel and stones for over eight years before the township attempted to enjoin their operation.

Township Action

The Shaners had leased out a gas station on one lot, and on the other had leased a one-story building to three tenants. Without even a warning, the township had started the injunction action to require the Shaners to stop tractor-trailers from parking on the lots with their engines running. It also sought a decree compelling them to pave the access driveways and parking areas. No action was taken against other owners despite the fact that at least three other nearby businesses had lots also covered with stone and gravel along the same route.

Although, the township discontinued one equity action, it shortly started a second one against not only the Shaners, but also their tenants. The complaint charged them with polluting the air with excessive noise, exhaust fumes and dirt from the parking lot.

As a result of that action, two of the tenants unilaterally terminated their leases and vacated the building. When prospective tenants inquired about occupancy permits, the zoning officer told them that he could not issue them while the equity action was pending.

After a non-jury trial, the court ruled in the favor of the owners on the request for injunctive relief and held that under the ordinance the owners were not required to pave the lots. The township had relied on the language on the zoning ordinance, which require parking areas to "have a hard homogenous all-weather surface." The court found that since that language is not defined anywhere in the ordinance, it is ambiguous; therefore, the existing surface did not violate the ordinance.

Owners' Counter-Attack

After the township's attack was thwarted, the owners started their counter-attack by filing a petition for the appointment of a board of view. They claimed that the township's actions in filing the equity action, and thereafter refusing to issue occupancy permits to prospective tenants, resulted in "inverse condemnation," commonly known as a "*de facto* taking" without just compensation, which had caused them to lose two tenants and several prospective tenants.

Judge Stallone agreed with the owners and said, "although a taking might be temporary as opposed to permanent in nature, just compensation is, nevertheless, required in the same manner as it is for a permanent taking." He held that although landowners alleging a *de facto* taking carry a heavy burden of proof, in this case the township's action simply "goes too far." Stallone cited Pennsylvania Supreme Court cases, which had established that a *de facto* taking occurs when the government "*substantially* deprives the owner of the use and enjoyment of his property."

He supported his decision with an analysis of the facts based on a three-prong standard needed to avoid a *de facto* taking. That test was set forth in *United Artists' Theater Circuit Inc. v. City of Philadelphia,* 635 A.2d 612, 618 (1993):

(1) The interest of the general public, rather than a particular class of persons, must require the governmental action complained of;

(2) The means employed to effectuate that purpose must be necessary; and

(3) The means employed must not be unduly oppressive upon the property holder considering the economic impact of the regulation, and the extent to which the government physically intruded on the property.

Essentially, Judge Stallone concluded that the township's action was not serving the interest of the general public. Rather, it benefited a particularly small number of complaining neighbors who lived in the immediate vicinity. Also, even assuming that the interest of the general public necessitated these actions, Stallone challenged the means used by the township when it refused to issue occupancy permits while the equity action was pending. He stated that the equity action was the "proper forum" for determining the issue. Moreover, suing the tenants forced them to incur attorney's fees and expenses, related to problems for which they had no responsibility. That was an "unduly oppressive" means to accomplish its objective.

Officials Beware!

This case should strike some fear into the hearts of township officials who attempt to enforce land-use regulations. It highlights the uncertain line between vigorous enforcement of residents' complaints and taking property without compensation. Townships, which frequently operate on very tight budgets, will rarely be certain about when they

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go over the line and create unanticipated liabilities, which may ultimately reflect in higher taxes. In the *Shaner* case, it is not clear how the owners' compensation will be calculated, however their petition requested reimbursement for economic losses suffered from lost rents, attorneys' fees "and other damages."

Perry Township's actions seemed to be particularly aggressive in this case, but it's not too difficult to see how other townships could fall into the same trap under similar circumstances. After all, neighbors raised legitimate complaints about tractor-trailers parked at night with their engines running and polluting the air. The township, which apparently tried to connect the dirt pollution to the unpaved parking lots, took prompt action in court to stop the problem. It is even easy to understand how the zoning officer could refuse new occupancy permits until the equity action was decided.

There are, of course, some aspects of the township's action which appear to be overreaching, such as suing the building tenants who apparently had no connection with paving of the parking lot or even the trucks; and starting the equity action without any notice to the owners or the tenants. Also, it took no action against neighbors that had unpaved lots.

One reading of the case is that the court based its decision on the peculiar facts before it and, therefore, the opinion may have little value as a precedent for future inverse condemnation cases. Despite that, owners will undoubtedly cite the *Shaner* case in future disputes about arbitrary or aggressive regulation.

The case could be read to stand for certain principles. First, a township legal action that restrains a use, even for a relatively short period of time, can constitute a taking that entitles the owner to fair compensation in the same way as formal eminent-domain proceedings. Second, a municipality must be cautious in responding to the complaints of special interest groups, such as neighbors, when the action of the township may not be perceived to benefit the interest of the general public. Third, filing an equity action and refusing to issue permits while that action is pending may be enough to trigger a *de facto* taking. This concept seems somewhat akin to the tort of misuse or abuse of process.

The *Shaner* case raises other difficult issues. The compensation to be paid for a temporary or *de facto* taking depends in part on the period of time that the owner's use has been curbed. Therefore, the delays built into the resolution of issues under our legal systems will directly affect the condemnation award. One should consider whether damages would have been incurred in the *Shaner* case, if somehow, magically, the case could have been decided within one day, or even one week, from service of the complaint. ❒

ARTICLE:

Pa. Department of Welfare Estate Recovery Program

By Mark B. Hammond

Under federal law, the Department of Public Welfare is required to recover the Medical Assistance costs from the estates of certain individuals who have died. If an individual 55 years of age or older received certain Medical Assistance benefits and dies, the department will reimburse the Medical Assistance program by recovering these costs from the assets of the person's estate.

Medical Assistance Estate Recovery happens *only* after the death of a person receiving nursing facility care, home and community based services, or related hospital and prescription drug services. When a recipient dies, the personal representative of the decedent's estate shall give notice to the Department of Public Welfare requesting a statement of claim. This notice shall be sent by certified mail, return receipt requested, or by fax, with the deceased person's name, last known address, social security number, date of death, and written documentation of the gross value of the decedent's estate to the Third Party Liability Section of the Estate Recovery Program, P.O. Box 8486, Harrisburg, PA 17105-6553, FAX 717-772-6553. Be sure to include the personal representative's name, address, and telephone letter so that the Medical Assistance Estate Recovery staff can respond.

Although these provisions have to do with individuals who are 55 years of age and older who have received Medical Assistance, we have found that many title insurance companies are requiring a copy of a "negative response" letter when real estate in a decedent's estate is sold.

The Department of Public Welfare has published a brochure that contains a number of frequently asked questions that are helpful in aiding attorneys in counseling of executors and estate beneficiaries. The brochure is available on the Internet at http://www.dpw.state.pa.us/omap/provinf/maforms/omappub332.pdf ❒

Mark B. Hammond is with Allfirst Trust Company of Pennsylvania. He is the editor of the Section's Newsletter *and serves on the Section's Legislative Committee.*

ARTICLE:

Community Spouse Resource Allowance Interest Rate Reduced from Five Percent to Three Percent

By Gregory L. Kiersz

CSRA

Pennsylvania permits the community spouse to preserve the maximum Community Spouse Resource Allowance (CSRA) of $87,000. Pennsylvania is an income-first or resource-first state, depending on the election of the community spouse. Resource first is always a better option to preserve the community spouse's current and future income stream and long term retirement resources and quality of life.

MMMNA

If the Minimum Monthly Maintenance Needs Allowance (MMMNA) of the community spouse, currently $1,452, cannot be met by the community spouse's Social Security and pension income and the previously presumed five percent earnings available to the community spouse on the $87,000 Community Spouse Resource Allowance, the community spouse would be entitled to receive part of the institutionalized spouse's Social Security and pension income in order to reach the $1,452 Minimum Monthly Needs Allowance of the community spouse.

Hurly

A *Hurly* appeal, following the denial of Medicaid eligibility, sought to preserve cash resources in excess of $87,000, which if "annuitized" would have increased the spouse's income stream to $1,452. The additional *"Hurly"* annuitized resources will be deemed to be "annuitized" over the life of the community spouse, to generate the necessary MMNA of the community spouse to prevent impoverishment.

The resource assessment showed countable assets of $200,000. Wife spent down the countable assets to $132,000 (i.e., $87,000 + $45,000). Husband's (institutionalized spouse's) Social Security income is $900 + gross. Wife's (community spouse's) Social Security is $458 gross. Husband has dementia, but is physically healthy. The CSRA protected share was $87,000. Five percent of $87,000 yields a monthly earning of $362.50. Medical Assistance eligibility was to begin on Oct. 1, 2001. A *Hurly* appeal was taken to protect the wife's *additional* cash resources of $45,000. *Hurly* will protect the $45,000, supplementing the wife's Social Security and the five percent presumed earnings on the CSRA. The combined protected assets of the community spouse are $132,000. Wife's income stream would previously be calculated to the sum of: (a) $458 in Social Security, plus (b) five percent of $87,000, or $362.50 per month, plus a *Hurly* annuity (preserving the $45,000) which yields a calculated additional monthly income stream of $$631.50, for a grand total of $1,452 per month.

Letter Sent

Prior to the *Hurly* appeal, a letter was sent to the County Assistance Office (condensed/simplified) suggesting: "The presumption that the $87,000 can earn five percent is no longer a valid presumption. Certificate of Deposit rates on commercial bank deposits are significantly less than two percent. Current Certificate of Deposit earnings at our county's largest local national bank are 1.9 percent on one year $10,000 certificates. HCFA's (now CMS's) goal is to protect the quality of life of the community spouse and to prevent spousal impoverishment. Spousal impoverishment can only be prevented if current interest rates are utilized in the calculation of this presumed earnings on the CSRA. I cannot advise my client to consent to the presumed five percent interest rate that can be earned on the $87,000 protected share, and will recommend to my client that she appeal the matter to a fair hearing or beyond. The five percent presumed interest should be reduced to two percent. Prior to the *Hurly* calculation, the presumed interest rate on the $87,000 protected share instead of being five percent ($362.50 per month) should be based upon an interest rate of two percent."

Presumed Earnings

Our County Assistance Office contacted the Department of Public Welfare in Harrisburg. DPW countered with a three percent presumed earnings on the $87,000. The client accepted. This yielded the community spouse an additional $145 per month out of her husband's Social Security. She now gets an additional $145 per month from the Social Security which she would not have received if the presumed earnings rate was five percent on the $87,000 CSRA. We have received information that DPW has issued a policy clarification dropping the interest rate from five percent to three percent effective Feb. 2, 2002. ❐

Gregory L. Kiersz is a partner in the Waynesboro law firm of Patterson, Kiersz and Ganley. This article was drawn from a posting on the Section's Probate and Trust listserv.

ARTICLE:

Estate Planning and the Tax Act of 2001 — What to do in 2002

By John F. Meck

In the Tax Act of 2001, the primary change effective in 2002 was an increase in the "unified credit." You can now make some combination of lifetime gifts and bequests at death totaling $1 million without having to pay gift tax or federal estate tax. This is up from $675,000 last year. Before looking at some planning ideas available in 2002, let's examine the details.

Estate Tax Changes

From 2002 to 2009, the top federal estate tax rate is reduced, and the exemption from estate and generation-skipping tax is increased.

Year	Exemption	Top Tax Rate
2001	$675,000	55%
2002	$1,000,000	50%
2003	$1,000,000	49%
2004	$1,500,000	48%
2005	$1,500,000	47%
2006	$2,000,000	46%
2007	$2,000,000	45%
2008	$2,000,000	45%
2009	$3,500,000	45%

In 2010, the estate tax is repealed for one year only, and a form of capital gains tax is substituted in place of the estate tax. In 2011, assuming that the law is neither revised nor changed between now and then, the estate tax returns with a top tax rate equal to the top income tax rate, and each person will have a $1 million exemption!

Gift Tax Changes

• The annual exclusion for 2002 and subsequent years has increased to $11,000 from $10,000.

• In 2002, the gift tax exemption also increases to $1 million but stays there, while the estate tax exemption is scheduled to ultimately grow to $3.5 million (see table above). Thus an individual can only give away a cumulative $1 million during his or her life without paying gift tax.

• The gift tax and estate tax rates are reduced through the year 2009.

• The gift tax stays in place even during 2010 when the estate tax is repealed for one year.

The important thing to remember is that although the death exemption goes to $3.5 million, there will be gift tax if you make cumulative lifetime gifts of more than $1 million (over and above the available annual $11,000 exclusions).

Giving with the $11,000 Annual Exclusion

• If you have been making annual gifts to children, grandchildren or others, you can now give $11,000/year, an increase of $1,000. Splitting gifts with a spouse doubles this amount.

• If you have not made annual gifts in the past, you should consider starting now. Annual exclusion gifts are simple, have generally minimal transaction costs, do not count against your $1 million exemption, and all future income and appreciation are also removed from your estate.

• Remember, gifts in the form of payments made directly to schools (tuition only) and to medical providers (even health insurance) are unlimited and do not count against the $11,000 annual exclusion or your $1 million exemption.

Planning with the $1 Million Exemption

Married couples who have already implemented an estate plan probably have as part of the plan a marital gift to the surviving spouse (outright or in trust), and a credit shelter trust to hold $1 million of exempt assets, previously $675,000. This is known as an A/B plan. You may want to revisit this plan if the beneficiaries of the two gifts are substantially different, especially in a second marriage situation.

For example, you may have set up an A/B plan with, of course, the surviving spouse as the beneficiary of the marital gift, but naming other individuals, such as your children or charity, as beneficiaries of the $675,00 credit shelter gift. With the substantial jump of your exemption to $1 million in 2002 you will have more dollars going to the beneficiaries of the credit shelter gift, leaving less available for the surviving spouse. This may or may not be what you had in mind. This will be exacerbated as the exemption increases toward $3.5 million in 2009.

You may want to consider addressing this by redrafting your documents to provide for a cap on the credit shelter gift.

You should consider making a lifetime gift of the additional $325,000 exemption available in 2002. For married couples this would be $650,000. The sooner you make any gift, the sooner the appreciation and income on the assets given away will also be removed from your estate. This "gift" of future appreciation and income is without tax and is not counted against your exemption or annual exclusions. In addition, even if you have only been an annual exclusion giver in the past, this might be a good time to consider larger lifetime gifts.

Caveat: if you have previously paid gift tax, because your total lifetime gifts (above the available annual exclusions) exceeded $675,000, then if you give away the full amount of the $325,000 increase in your exemption you will have to pay additional gift tax. The worst case is that you may only be able to make a $250,000 gift in 2002 or 2003 without paying additional gift taxes.

The gift tax exemption is frozen at $1 million and does not grow along with the estate tax exemption, which increases in increments to $3.5 million in 2009. You may want to consider a leveraged use of your exemption, for it seems unlikely we will see any long lasting repeal of the estate tax; currently scheduled for 2010, but only for that one year. Through leveraging you can stretch the use of your exemption without paying tax. Even if the estate tax is repealed, the law still maintains the gift tax, again arguing for leverage.

Two leveraging techniques are a qualified personal residence trust (QPRT) for your house, vacation home or both, and a GRAT (grantor retained annuity trust) for stock, real estate or other assets. If the house in a QPRT or assets in the GRAT appreciate more than the market interest rate, you accomplish a tax free gift of this excess appreciation. ❒

John ("Jack") Meck practices with Kabala & Geeseman in Pittsburgh and chairs the Probate & Trust Division Orphans' Court Practice Committee.

ARTICLE:

The Non-Recognition of Gain or Loss on Exchanges Solely in Kind and Reverse Like-Kind Exchanges in Real Estate

By Carolyn L. Dorazio, MBA, CCM

Deferred Gain

Section 1031 of the Internal Revenue Code allows taxpayers to defer the recognition of gain when the property is used by the taxpayer in a trade or business or held by the taxpayer for investment and then exchanged for like-kind property. The simultaneous exchange of the properties is not required.[1]

The IRS Section 1031 "tax-free" exchange is also called the like-kind exchange. The provisions of IRS Section 1031 exclude the exchange of the legal residence for another legal residence. Provisions for this kind of exchange are found in IRS Section 1034. Investment real estate is covered under Section 1031. In a tax-free exchange, the IRS provisions permit parties to move their basis from the property owned to the property they will acquire, with several adjustments to be taken into account. Tax-free exchanges are not available to the development subdivider or the apartment owner. An interest in a partnership cannot be exchanged.

Property Use

"Like-kind" does not refer to the nature, character or type of property. Instead, it addresses the intended use of the property. Provided the property is initially acquired and held for either business or investment purposes, it can qualify as a suitable replacement property under IRC Section 1031. Any number of combinations may be considered. These include an apartment building for a single family rental dwelling, bare land for a condominium or a shopping center for an apartment building. If, however, in addition to like property, you give up unlike property, you must recognize gain or loss on the unlike property you give up. The gain or loss is equal to the difference between the fair market value of the unlike property and the adjusted basis of the unlike property.

QEAA

The like-kind exchange rules generally do not apply to an exchange in which you acquire replacement property (new property) before you transfer relinquished property (a deferred exchange). However, if you use a Qualified Exchange Accommodation Arrange-ment (QEAA), the transfer, even in these circumstances, may qualify as a like-kind exchange. This applies whether the interest is that of a general or limited partner. However, under certain circumstances the exchange may be treated as a tax-free contribution of property to a partnership.

Because taxpayers typically are unwilling to rely only on a promise by a transferee to transfer the like-kind replacement property, the use of a guarantee or security agreement is very common with deferred exchanges. Additionally, because persons who want to purchase the relinquished property may be unwilling or unable to acquire replacement property, taxpayers often retain an intermediary to facilitate the exchange.

Replacement Properties

The taxpayer may identify more than one replacement property. The replacement property must be located in the United States. The maximum number of properties to be identified is three, regardless of market value; or any number as long as their aggregate market value at the end of the identification period does not exceed 200 percent of fair market value of the properties being relinquished (the 200-percent rule).

If the taxpayer has identified more properties than permitted under the three-property or 200-percent rule, proper identification is made if the property is received by the transferor prior to the expiration of the identification period and the replacement property is received prior to the end of the exchange period, but only if the taxpayer receives before the end of the exchange period the identified replacement property representing 95 percent of all identified replacement properties (the 95-percent rule).

Use of an SPE or LLC

A single-member LLC is disregarded for tax-purposes, therefore a taxpayer can acquire replacement property as a single-member LLC and the IRS will not consider it a different entity than the seller of the relinquished property. Any income taxes associated with the LLC are passed through to the designated single member. *See Private Letter Rulings 9807013 and 9751012.* An individual, corporation, partnership, trust or other entity can be a single-member of a single-member LLC. The only exception to this rule relates to husbands and wives who own property jointly either as joint tenants or tenants by the entireties. Delaware provides ample statutory protection for the owners of the entity. Also, Delaware does not impose state income tax on the entity. Any LLC however, must be registered to do business in the state in which the property is located.

Reverse Exchanges

To qualify for a tax-free like-kind exchange under the traditional structure, the owner's property typically had to be sold before the replacement property could be acquired. However, the IRS recently published a Revenue Procedure 2000-37, which provides a "safe harbor" technique under which the property owner could acquire the replacement property prior to disposing of the replaced property and still obtain tax-free treatment. The transferor assigns the right to the proceeds, not a right to the obligations.

Carolyn L. Dorazio is an associate in the Pittsburgh firm of Obermayer, Rebman, Maxwell & Hippman, LLP.

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Article: The Non-Recognition of Gain or Loss on Exchanges Solely in Kind and Reverse Like-Kind Exchanges in Real Estate

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For the safe harbor to apply, it is crucial that all parties with an interest have notice of the tax-free exchange. Now players may engage in these so-called "reverse like-kind" exchanges with very little tax risk. The IRS will not challenge the qualification of the property as either replacement property or relinquished property if the property is held in a Qualified Exchange Accommodation Arrangement (QEAA). Under the Revenue Procedure, the parking arrangement will be treated as a like-kind exchange where the exchanging party and an exchange accommodation titleholder (EAT) enter into a qualified exchange accommodation arrangement (QEAA). If the property is held in a QEAA, the IRS will accept the qualification of property as either replacement property or relinquished property, and the treatment of an EAT as the beneficial owner of the property for federal income tax purposes. The rules apply to QEAAs entered into with an EAT who acquires qualified indicia of ownership of property after Sept. 14, 2000.

Owner and Agreement

The transaction must be structured so that the accommodation party has enough of the benefits and burdens of ownership relating to the property to be treated as the owner. If the accommodation party or EAT is not treated as the owner, the transfer is disqualified from like-kind treatment and the gain is taxable.

Under the QEAA, the transferor and the EAT must enter into a written agreement no later than five business days after the qualified indicia of ownership are transferred to the EAT. The agreement must contain the following elements:

• The EAT is holding the property for your benefit in order to facilitate an exchange under the like-kind exchange rules and Revenue Procedure 2000-37.

• The transferor and the EAT agree to report the acquisition, holding, and disposition of the property on your federal income tax returns in a manner consistent with the agreement.

• The EAT will be treated as the beneficial owner of the property for all federal income tax purposes.

The property may be treated as being held by a QEAA even if the accounting or state and local tax treatments are different from the guidelines stated above. When the ownership of the property is transferred to the EAT, it must be the transferor's intent that the property held by the EAT represents either replacement property or relinquished property in an exchange, intending to qualify for the nonrecognition of gain.

Reverse's Advantages

The "reverse like-kind exchange" offers advantages over the current like-kind exchange rules when the taxpayer owns multiple properties, wants to sell one or more of the properties, and knows the price of the replacement property. Section 1031 does not require that the disposition and acquisition of property occur simultaneously. Exchanges that occur within a 180-day period, known as Starker exchanges (because of the U.S. Supreme Court case that engendered them), are now expressly authorized. On Oct. 2, 2000, the IRS published Rev. Proc. 2000-37, 2000-40I.R.B. 308 to answer specifically how to perform these Starker "reverse like-kind exchanges."

Safe Harbor's Rules

To satisfy the safe harbor rules, the following must be adhered to:

1. The accommodation party must hold *legal title* to the property and possess other incidents of ownership, which shall be treated as beneficial ownership. Such qualified indicia of ownership must be held by the accommodation party at all times from the date of acquisition by the accommodation titleholder until the property is transferred as described in section 4.02(5) of this revenue procedure. For this purpose, "qualified indicia of ownership" means legal title to the property or other indicia of ownership of the property that are treated as beneficial ownership of the property under applicable principles of commercial law or interests in an entity that is disregarded as an entity separate from its owner for federal income tax purposes (e.g. a single-member limited liability company) and that holds either legal title to the property or other indicia of ownership.

The Revenue Procedure does not address all the possible tax issues associated with a reverse like-kind exchange. One such example is whether the EAT is precluded from claiming depreciation deductions with respect to the relinquished or replacement property.

2. The taxpayer must have a *bona fide intent* that the property held by the exchange accommodation titleholder represents replacement or relinquished property in an exchange intended to qualify under Section 1031.

3. Within five days after the transfer of the indicia of ownership of the property to the exchange accommodation titleholder, the parties must enter into a *written agreement* providing the titleholder is holding the property to effectuate a like-kind exchange.

4. No later than 45 days after the transfer of the property being replaced, the *relinquished property must be identified.*

5. No later than 180 days after the transfer of the property to the EAT, the *property must be transferred* to the taxpayer as replacement property or to someone else who is not the taxpayer as relinquished property.

Section 1031 and Vacation Homes

Code Section 1031 provides that no gain or loss is recognized on the exchange of property held for investment for like-kind property that is held for productive use in a trade or business or for investment. The applicability of 1031 is unclear in the case of an exchange of a vacation home which has been used both for personal and for rental purposes during the taxable year or prior years where the amount of personal use exceeds the threshold as outlined in Code Section 280A(d). There is no statutory authority on point.

Personal Property Exchanges

The rules defining like-kind property in real estate exchanges are more liberal than the rules for personal property, but the principals and advantages are the same for both. Depreciable tangible personal property can be either "like kind" or "like class" to qualify for nonrecognition treatment. Like-class properties are depreciable tangible personal properties within the same general asset class or product class. The Treasury Regulations classify personal property by general

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asset class (*See Revenue Procedure 87-56, 1987-2 C.B. 674.*) and product class (*See Division D of the Standard Industrial Classification Codes.)* to determine if the personal property transferred and received are considered like-kind property. *(See Treasury Regulation Section 1.1031[a]-2[b].)*

Property Types

Some examples of different classes of personal property include:

1. Office furniture, fixtures and equipment,
2. Information systems (computers and peripheral equipment),
3. Automobiles and taxis *(See Treasury Regulation section 1.1031[a]-2[b]),*
4. Trucks, vessels and industrial steam and electric generation or distribution systems.

Exchanges of two properties contained in two different asset classes mentioned above would not qualify for the like-kind exchange under Section 1031. Product classes include property listed in a four-digit product class in Division D of the Standard Industrial Classification (SIC) codes of the *Executive Office of the President, Office of Management and Budget, Industrial Classification Manual.* Copies may be obtained from the National Technical Information Service by calling 1-800-553-6847. If the two pieces of personal property are not contained within any general asset class but within the same product class, the properties are of a like-kind class. Whether intangible personal property, such as a patent or copyright, is of a like kind to other intangible personal property generally depends on the nature or character of the rights involved.

Single Transaction

Another instance in which personal property has special significance is in an exchange that is not simultaneous. Under the three-property rule (pursuant to which the taxpayer can identify up to three properties within the 180-day period), if the real property exchange involves a small percentage of personal property, Treasury Regulation Section 1.1031(k)-1(c)(5) permits the taxpayer to treat the real property and the personal property as a single transaction for purposes of the three-property rule, so long as

(a) such personal property is typically transferred with a larger item of property in standard commercial transaction, and

(b) the aggregate fair market value of all incidental property does not exceed 15 percent of the aggregate fair market value of the real property.

Long-Term Leases

The regulations provide that a lease with 30 years or more remaining is of like-kind with respect to a fee interest in real estate.[2] Typically, a long-term lease is viewed by the IRS as equivalent to full ownership for purposes of Section 1031. With respect to personal property such as large machinery or transportation vehicles, no clear authority exists as to when a leasehold could be considered a like-kind exchange with a fee simple interest. It may be possible that a long-term lease of personal property should be of like kind with respect to a fee interest in such property. The subsequent analysis then becomes what constitutes a long-term lease with respect to varying types of personal property. A 30-year lease may be long for real estate but not for a tractor-trailer truck. Until this issue is discussed in detail in the regulations or other tax authority, the tax-free treatment of an exchange of a leasehold in personal property for a fee interest in the same kind of property remains uncertain.

Exchanges Between Related Persons

For an exchange of property between related persons to be afforded the same favorable non-recognition of like-kind property treatment, a special holding period must be met. If an exchange of property that would otherwise be eligible for the nonrecognition of gain or loss is made between parties that are related, both the property that was relinquished and the property that was received must be held by the respective party for a period of two years after the date of the last transfer of a particular exchange. If this two-year timeframe is not abided by, any gain or loss recognized must be taken into account as of the date of the disqualifying disposition of the property. [3]

Holding Period

The IRS requires that the parties to a related party exchange file Form 8824, "Like Kind Exchanges," for the two years following the year in which the exchange occurs, as well as for the year of the exchange. If gain is realized as a result of a later disposition, the original return is not amended. Rather, the gain is recognized on the return for the year in which the disqualifying disposition occurred. [4] The running of the two-year holding period is suspended for any period of time in which the risk of loss of the holder of the property is substantially diminished by:

- The holding of a put on the property,
- The holding of an option of another person to acquire the property, or
- A short sale or any other transaction.

Certain types of dispositions are not subject to the holding period and will not prevent the application of non-recognition treatment even if they occur within the two-year period. They are:

1. Any disposition that occurs after the death of either property owner; or
2. Any disposition that results from a compulsory or involuntary conversion, as long as the exchange had been made before the conversion became apparent; and
3. Any disposition to which it can be established to the satisfaction of the secretary where neither the exchange nor the disposition had as one of its principal purposes the avoidance of federal income tax.[5]

"Related Person Rules"

For purposes of determining exchanges of property subject to the holding period, related persons are:

1. Brothers and sisters, spouses, ancestors, and lineal descendants;
2. An individual and a corporation where more than 50 percent of the value of the outstanding stock is owned, directly or indirectly, by or for such individual;
3. Two corporations that are members of the same controlled group;
4. A grantor and a fiduciary or any trust;
5. A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts;
6. A fiduciary of a trust and a beneficiary of such trust;
7. A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts;

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8. A fiduciary of a trust and a corporation where more than 50 percent of the value of the outstanding stock is owned, directly or indirectly, by or for the trust or by or for a person who is the grantor of the trust;

9. A person and an organization to which Code Section 501 (tax-exempt organizations) applies and which is controlled directly or indirectly by such persons or (if such person is an individual) by members of the family of such individual;

10. A corporation and a partnership if the same persons own

(a) more than 50 percent in value of the outstanding stock of the corporation, and (b) more than 50 percent of the capital interest, or the profits interest, in the partnership;

11. An S corporation and another S corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation;

12. An S corporation and a C corporation, if the same persons own more then 50 percent in value of the outstanding stock of each corporation;

13. A partnership and a person or conversely, two partnerships in which more than 50 percent is owned directly or indirectly by the same persons.

Transfer of Fractional Interests

With respect to real estate, the IRS has indicated that a taxpayer may exchange tax-free an undivided fractional interest such as a tenancy in common for a fee interest.[6] However, no authority exists with respect to personal property. The ownership of fractional interests in real property is generally defined by state statute, while the ownership of fractional interests in personal property is generally governed by contract.

Other Personal Property and Goodwill

Other property involved in a like-kind exchange may include: intangible personal property, non-depreciable personal property, or personal property held for investment. But these types are not placed in specific like-kind classes. The regulations provide that goodwill or going-concern value of a business activity is not like-kind to goodwill of another business enterprise, regardless of the fact that the business may be similar. The rules for like-kind exchanges do not apply to exchanges of stock in trade or other property held primarily for sale, such as inventories, raw materials, and real estate held by dealer. Nor does it apply to stocks, bonds, notes, or other securities or evidences of indebtedness, such as accounts receivable. Goodwill cannot be exchanged for goodwill in other businesses in situations in which the sale of the business is combined with the sale of real estate. A leasehold interest of 30+ years would be considered a lifetime interest and could be exchanged.

Partnership Interests

Exchanges of partnership interests do not qualify as nontaxable exchanges of like-kind property. This applies regardless of whether they are general or limited partnership interests or are interests in the same partnership or different partnerships. However, under certain circumstances the exchange may be treated as a tax-free contribution of property to a partnership. *See Contribution of Property in Publication 541.* An interest in a partnership has a valid choice under Section 761(a) of the Internal Revenue Code to be excluded from all the rules of subchapter K of the code and to be treated as an interest in each of the partnership assets and not as a partnership interest. ❒

[1]IRC §1031
[2]Treas. Reg. §1.1031(a)-1(c)(2)
[3]IRC 1031(f)(1)
[4] IRC §1031(f)
[5]IRC §1031(f)
[6]Rev.Rul. 73-476, 1973-2 C.B. 300; PLR 9525042, March 22, 1995

ARTICLE:

No Annual Exclusion for Gifted LLC Interests

By Christy Barton

In *Hackl v. Commissioner,* 118 T.C. No. 14, decided March 27, 2002, a case reviewed by the full court, the tax court ruled that the gift of LLC membership units by a husband and wife to their children and grandchildren failed to qualify for the annual gift tax exclusion because the donees did not have the immediate use, possession, or enjoyment of the LLC units.

The LLC's operating agreement prevented the donees from obtaining any immediate substantial economic benefit from the LLC units because the donees could not (1) unilaterally withdraw their capital account, (2) sell their units without the approval of the LLC's manager, or (3) effectuate a dissolution of the LLC by themselves. In addition, the donees did not have the immediate use, possession, or enjoyment of the income from the LLC units because the LLC was not expected to produce immediate income, and any income generated would only be distributed at the manager's discretion. Consequently, the couple was not entitled to the gift tax annual exclusion for the transfers of LLC units to their children and grandchildren.

Obviously, this decision will have equal impact in the Family Limited Partnerships planning arena because the limited partner interests our clients routinely gift to their family members are subject to restrictions which are at least as stringent as those which the tax court found sufficient to uphold the IRS' denial of the annual exclusion. ❒

Christy Barton is a member of the Barton Law Firm, LLC, of Columbia Mo. This article had been posted on the Section's Real Property listserv, as derived from the ABA's RPPT listserv.

ARTICLE:

Brokers Lose Commissions When They Fail to Have Proper Listing Agreement

By Harris Ominsky

"A verbal contract isn't worth the paper it's written on." — *Samuel Goldwyn*

Two recent cases bar brokers' sales commissions for failure to enter into a proper commission agreement. In a case decided by Judge Albert W. Sheppard of the Philadelphia Common Pleas Court, a broker was denied a commission because he did not have a written listing agreement. *Roddy, Incorporated v. Thackray Crane Rental, Inc.,* May term 2001, No. 1566 (Philadelphia Common Pleas Crt., Sept. 10, 2001).

Oral Agreement

Roddy, a real estate broker licensed to do business in Pennsylvania, had arranged with the defendant to receive a six percent commission if he introduced the defendant to a property which the defendant would purchase. Unfortunately for Roddy, he never reduced that agreement to writing.

Roddy, in reliance on the oral agreement, had brought to the defendant's attention a piece of commercial property which the defendant purchased about eight months later. At the time of the purchase, the defendant had secretly, and without notifying Roddy, entered into the agreement through another agent, purportedly in an attempt to deprive Roddy of the agreed fee.

In defending against the commission claim, the defendant invoked the newly-amended Pennsylvania Real Estate Licensing and Registration Act (RELRA) codified at 63 PS §§ 455.101 *et seq.* which prevents recovery of a brokerage commission when there is no written agreement between the broker and the client.

Roddy cited several cases in which brokers were permitted to collect commissions based on oral exclusive listing agreements which had held that the purpose of RELRA was merely to police real estate brokerage operations and provide guidelines to be enforced by the real estate commission after an administrative hearing. These cases held that the purpose of the act was not to change the substantive law of contracts or agency.

However, Judge Sheppard held that those cases predated the 1998 amendment of RELRA, which made it clear that unless there is a written agreement, the broker is not entitled to recover a fee or commission. Sheppard stated in a footnote that even under the earlier law, the broker might have had a problem in recovering because, among other things, he would have to prove that he was the "efficient cause" of the "production" of a sale and that could be affected by the fact that the seller and the buyer had a break in their negotiations after Roddy introduced them, and didn't reach an agreement until a later date.

Even when a broker has entered into a written commission agreement, he may not be able to collect his commission if he has failed to meet all of RELRA's requirements for such a written agreement. In a recent Berks County case, a broker lost his sales commission on four real estate parcels because he failed to put a termination date in the listing contract with the seller. In *Knoblauch, Inc. v. Singer,* PICS Case No. 010359, (C.P. Berks, Jan. 29, 2001), the dispute arose over a five percent real estate broker's commission set forth in a listing agreement which did not contain any termination date.

It is not clear from the decision exactly how much the broker did to land the purchaser or how soon the sale occurred after the listing agreement was signed. However, it is clear that the broker had identified the successful purchaser as a prospect in that agreement.

"Listing Contract"

In barring the broker's commission, the court adhered to a strict construction of RELRA. The failure to insert a termination date was a violation of a provision of the act requiring the broker "to specify a definite termination date that is not subject to prior notice in any listing contract." Among other things, a broker is prohibited from failing "to specify a definite termination date that is not subject to prior notice in any listing contract." Despite that rule, the broker neglected to insert a termination date in the agreement.

After some analysis, the court concluded that the five percent commission agreement was in fact a "listing contract under the act and that failure to provide termination date was a violation of the act." The act does not define "listing agreement," and the broker argued that the applicable letter which set the commission was not a listing agreement because it was merely a finder's letter.

While the court did not cite any precedent on this issue, it held that:

> ... to form a "listing contract," all that was required was that the real estate broker and the owner of the property form an agreement in which the owner places the property with the broker who, in turn and in prospect for a commission, agrees to attempt to find a buyer ...

In light of this definition, brokers will have to make sure that even informal letters sent to confirm commission arrangements meet all of the formal requirements of RELRA. The broker argued that even if the writing constitutes a "listing agreement," he was not responsible for omitting the termination date because the seller was supposed to write one in. The court rejected that argument and concluded that it was the broker's duty, and not the seller's, to do so.

Equitable Remedies

Even though the broker had identified the buyer, the court held that *quantum meruit* or unjust enrichment were not appropriate remedies because the agreement was illegal under the act. These are equitable remedies, and the court found that the plaintiff had "unclean hands which would preclude

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Article: Brokers Lose Commissions When They Fail to Have Proper Listing Agreement

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that kind of remedy." It stated that the broker's hands were "smudged with the ink that should have been used to put a definite termination date in his listing agreement." The court also pointed out that under RELRA, the prohibited act potentially subjects him to the possible suspension or revocation of his professional license or registration certificate and even the imposition of fines.

Scope of Opinion

An inquiry of the parties revealed what should be a key fact that colors the opinion, but was not even mentioned by the court. The buyer did not come forward and sign the purchase agreement until more than a year after he received the listing agreement! Therefore, on the face of the opinion, the decision seems broader than necessary. Essentially, it seems to say that without a termination date, a listing contract is not enforceable, regardless of how soon the broker produced the buyer.

In the *Knoblauch* case, if a termination date had been inserted, as required by the act, it is likely that the broker's right to a commission would have expired under the listing agreement. On the other hand, if the buyer had come forward and signed the purchase agreement within a month of the listing agreement, would it be equitable to deprive the broker of a commission when it was likely that the sale was well within any termination date that the broker would have inked in?

Often brokers provide for a post-termination commission if a listed prospect closes on a purchase after the agency terminates. The court did not discuss whether that type of arrangement also requires a termination date. However, it is possible that the courts will also interpret the act as requiring termination dates for post-termination closings. The broker has appealed the decision to the Superior Court of Pennsylvania, and the Pennsylvania Association of Realtors (PAR) has filed an *amicus* brief on behalf of the broker.

Whatever the outcome, the message sent to brokers by the *Roddy* and *Knoblauch* cases is clear. Make sure you have a written commission agreement with a termination date, and don't rely on your client to fill in any blank spaces. As Samuel Goldwyn once said, your verbal contract won't be worth the paper it's written on. And that paradox may now be augmented to say a written contract that doesn't terminate — may never even begin. ❒

Harris Ominsky practices with Blank Rome Cominsky & McCauley, LLP, in Philadelphia. He is the author of a new book, Real Estate Practice: Breaking New Ground, *published by Pennsylvania Bar Institute. This article first appeared in* The Legal Intelligencer, *and is being used with permission of the author.*

Real Property, Probate and Trust Law Section Committee Assignment Request

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Section members, please return this form to Real Property, Probate and Trust Law Section Committee Assignments, Pennsylvania Bar Association, PO Box 186, Harrisburg, PA or FAX to 238-7182.

PHOTO REVIEW:

Spring Retreat — March 22-23, 2002 — Harrisburg

Members of the Section's Real Property Law Division and its Probate and Trust Law Division ...

... met in committees, in CLE sessions, and in leadership sessions ...

... to learn, exchange, identify, promote, and ponder our law practice's principles.

PHOTO REVIEW:

Committee/Section Day — May 2, 2002 — Hershey

After a wonderful year of hard work and leadership ...

... outgoing chair of the Section, Andrea Geraghty, is presented with ...

... gifts and awards from Neil Hendershot, chair-elect, and Reg Belden, PBA president.

PHOTO REVIEW:

Committee/Section Day — May 2, 2002 — Hershey

Andrea Geraghty, Outgoing Section Chair

Neil Hendershot, Next Section Chair

Kirby Upright, New Probate & Trust Division Chair

Fred Clark (left) and Ken Shirk (right)

(left to right) Sandra Upor, PBA Board of Governors; Neil Hendershot; Phil Korb

Chip Mackrides (left) and Sandra Upor (right)

PRODUCT FEATURE:

The Lackner Group Estate Administration Software

Estate administration software from the Lackner Group was presented by the Probate and Trust Law Division at the RPPT retreat in March in Harrisburg by Vince Lackner. As a service to Section members, The Lackner Group was invited to submit a description of their company and its products and services for the Newsletter *The following copy was provided by The Lackner Group, and edited by Neil Hendershot.*

The Lackner Group

The Lackner Group was founded in 1985 by attorney Vincent F. Lackner Jr., to develop software that simplifies substantive legal procedures relative to the field of estate and trust administration. Highly respected as a practicing lawyer in the Pittsburgh legal community prior to 1985, Mr. Lackner developed the 6-in-1 Estate Administration System in response to a wish list drawn up by the Computer Probate Systems Committee of the American Bar Association. Since the incorporation of The Lackner Group in 1985, Mr. Lackner has demonstrated his software to thousands of lawyers at the national, state and local levels.

The Lackner Group currently sells and services 1,885 clients in 11 states. These clients use either the 6-in-1 Estate Administration System or standalone software (Quiks) for state or federal tax returns. Throughout Pennsylvania we are proud to service 1,369 clients.

The Lackner Group has specific products for Pennsylvania. They include, but are not limited to, our 6-in-1 Estate Administration System and the PA InheriTax for Windows and Macintosh. To the best of our knowledge, the Macintosh version of the PA InheriTax product is the only product available in Macintosh format for production of the Pennsylvania Inheritance Tax return (Form PA-1500).

The 6-in-1 Estate Administration System

The 6-in-1 Estate Administration System was released in 1986 as the first-ever "one-write" solution that met the challenge of keeping track of a vast variety of information related to estates and trusts. It was designed to put that information onto the appropriate documents for filing with the IRS, state Departments of Revenue, and local probate courts, and to eliminate redundant data entry entirely.

The 6-in-1 System reflects the expertise of experienced attorneys, legal assistants, accountants, tax managers and trust officers at thousands of law firms, accounting firms and banks.

It incorporates the relevant rules contained in the Internal Revenue Code, Treasury regulations, various state tax statutes and regulations, and fiduciary accounting principles that have evolved over the past 25 years.

The 6-in-1 Estate Administration System will produce — with one single entry of each receipt and disbursement — the six core documents for the administration of an estate or trust:

- Inventory
- Accounting (Estate & Trust)
- U.S. Estate Tax Return (Form 706)
- State Death Tax Return (Form PA-1500)
- U.S. Fiduciary Income Tax Return (Form 1041)
- State Fiduciary Income Tax Return (Form PA-41)

Output

The 6-in-1 System provides the ability to prepare multiple documents with only one entry of each transaction. It offers the same flexibility to allow you to send transactions to exactly the section of each document you prefer, to customize descriptions easily, and to set up multiple estate bank accounts in which you can enter disbursements and deposits. Once the information is entered into the system, any of the above documents can be produced in a minute or two for most estates. Imagine the convenience and time savings of entering a transaction one time and having it reflected on all six documents.

Predefined reports are included, and you can create others to meet your needs. Among them are assets on hand, showing at a glance what assets remain to be distributed; basis summaries; transactions, listing all your entries or only certain types; and bank reconciliation reports sorted by bank and by date. You can produce accounting reports that show specific entries that have been entered incorrectly, causing your accounting to be out of balance. Once these entries are determined, simply correct the entry and the accounting will balance to the penny!

If the goal of your practice is to expand the estate and trust business, a one-entry system is the best option available. Of equal importance is a product specifically designed by a practicing attorney and one who specializes in Pennsylvania issues.

The PA InheriTax for Windows/Macintosh (Inheritance Tax Form PA-1500)

Since releasing the PA InheriTax for Windows/Macintosh software in May of 1999, we are proud to have almost 900 law firms, banks and accounting firms using this program. The PA InheriTax product will produce your PA Inheritance Tax Return (Form PA-1500), PA-Inventory and HUD-1 Settlement Form.

The PA InheriTax program is easy to use. Enter the assets, deductions and amounts allocable to each tax class and the program does the rest. It also calculates the exact tax for all classes, computes the discount for early payment and interest on late payments, and handles section 9113 sole use trusts. Within minutes you have a PA-1500 and a PA Inventory that are ready to be filed.

The PA InheriTax product user list includes 200 firms.

A single-use product, like PA InheriTax, is the best starting point in the automation of your practice. Once you become an expert with such a product, you can always upgrade to a more complex product, such as 6-in-1, at a later date if necessary.

(Continued on Page 33)

Product Feature:
The Lackner Group Estate Administration Software
(Continued from Page 32)

The PA InheriTax product, as well as the 6-in-1 system, comes with an unconditional 60-day money-back guarantee. If you are still doing estates manually, you have nothing to lose by trying estate-specific software. We are very confident you will join the ever-increasing number of satisfied users.

You can preview and download the PA InheriTax for Windows/Macintosh program by visiting The Lackner Group's Web page at www.lacknergroup.com. ❒

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PRODUCT FEATURE:

Fast-Tax Trust Services Zane Software

Fast-Tax Trust Services Zane Software was presented by the Probate and Trust Law Division at the RPPT Section retreat in March in Harrisburg by Lee Zane. As a service to Section members, Mr. Zane was invited to submit a description of his company and its products and services for the Newsletter. *The following copy was provided by Fast-Tax Trust Services Zane Software, and edited by Neil Hendershot.*

Products

Trust and estate executives worldwide rely on Fast-Tax Trust Services to help them get more done in less time and lower overall costs. No matter the size of your organization, the complexity of your needs, or the unique ways in which you work, Fast-Tax can bring together a combination of products and services that are right for you. From software solutions to complete tax preparation and court accounting services, Fast-Tax can address your needs. More trust and estate income tax returns are prepared using TrustEase® than any other single solution. Zane Software offers the only Windows™-based, integrated court accounting, trust and estate product on the market. Fast-Tax has an even more powerful platform upon which to expand its products and services as a part of the Thomson Corporation, a leading provider of integrated information solutions to business and professional markets worldwide

Zane Software, from Fast-Tax Trust Services, provides fiduciary accounting and tax software system for trust and estate professionals nationwide. Zane Software is a suite of products that work independently or together as a fully integrated system. Information is shared with the Zane FAS, Zane 706 and the Zane 1041. Transactions entered or modified in any one of several products are reflected throughout the various documents accurately and efficiently.

Zane Fiduciary Accounting System (FAS)

Comprehensive, yet easy to use, FAS integrates probate court accounting, inventory, a fiduciary calendar, 706, 1041, management reports, online securities valuation, periodic trustee/executor statements, cash and securities reconciliation, and more. For accounting purposes, the system uses average cost while using FIFO and specific lot identification for income taxes.

Zane 706 Estate Tax

The 706 software produces a complete federal death tax return, including calculations of the inter-related marital and charitable deductions, generation skipping transfer tax, prior transfer tax credit, foreign death tax credit and optimum marital deduction.

Zane 1041 Fiduciary Income Tax

The FIT software produces a complete fiduciary income tax return including passive activity losses, forms 4797, 4952, 8582, 6198 and calculation of the two percent floor limitations, grantor trusts, estimated tax coupons, etc. Income, expenses, sales, distributions and beneficiaries are picked up from the accounting as well as carry over information from your prior year's return. Includes full tutorial and IRS instructions in a searchable/printable format.

Zane 709 Gift Tax

The 709 software produces a complete gift tax return, and handles importing of prior return information (donor, donee, prior gifts, etc.), as well as splits gifts from the spouse's return.

Zane Fiduciary Calendar and Tickler

This docketing software provides a detailed calendar/checklist composed of several specific ticklers, and a general calendar designed for the management of trust and estate deadlines. Now there is no need to input each deadline. The system automatically calculates when the 1040, 1041, 706, 709, state inventory and other items are due. It shows the estimated payment dates for both federal and state taxes, the cutoff date for creditor claims, bequest deadlines and more. It even allows for the inclusion of any miscellaneous dates you want to be reminded of for particular clients. ❒

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PRODUCT FEATURE:

FASTER Systems, LLC

FASTER Systems LLC was presented by the Probate and Trust Law Division at the RPPT Section retreat in March in Harrisburg by Kathleen Dever. As a service to Section members, Ms. Dever was invited to submit a description of her company and its products and services for the Newsletter. *The following copy was provided by FASTER Systems LLC, and edited by Neil Hendershot.*

FASTER (Fiduciary Accounting System for Trusts and Estates Reporting) is Windows-based software for your court accounting and death tax filing needs.

Originally developed in 1989 in collaboration with a major Philadelphia bank, FASTER was the first software company to release a complete Windows version in 1998. The software is developed in a 4GL language utilizing a relational database system. It operates in a client/server LAN, WAN or single-user environment. Focusing on ease of data entry and the full integration between accounting and taxes, FASTER allows users to complete their work quickly and accurately.

Integration

The integration between the FASTER accounting and death tax software allows users to simultaneously generate probate tax and inventory/accounting transactions in one screen, while still having the ability to edit the individual entry for each form/schedule from that same screen. Non-probate transactions that are specific to a tax return can be entered without affecting the accounting. Tax forms are generated on plain paper and can be displayed on screen before printing.

Estate-Val or Appraise Valuation Software

Using the Estate-Val or Appraise valuation software, date of death or alternate valuations (including IRD) can be imported into FASTER, eliminating manual data entry. If you prefer to use your own asset descriptions, FASTER uses the asset descriptions from your personal global asset file. Assets not in the global file can be added and edited during the import process. Once the new asset has been added to your global file, the import automatically uses that asset description.

Features

In the accounting, data entry is enhanced by various features such as "Copy" and "Copy and Increment Date" buttons. The "Copy" button allows the user to make multiple copies of the same transaction with the flexibility of editing each new transaction, as needed. The "Copy and Increment' button allows the user to duplicate recurring transactions where only the date changes. Increments can be done by month, quarter, semi-annual or year. Income receipts, such as Social Security benefits or dividends can be entered in a matter of seconds rather than minutes. These features are also available in disbursements and distributions.

Timesavers

Additional timesavers include our Combined Transactions for entering capital gains distributions and reinvestment, dividend reinvestments and principal/income transfers. Common data is entered only once and then the individual transactions are created by FASTER.

When settling your accounting, various inquiry screens allow you to review all transactions related to a specific asset or cash account. If an error is found, transactions can be edited or deleted directly from the Inquiry screen. Reports can also be generated on paper for larger account settlements.

Enhanced printing features allow the user to print all schedules, individual schedules or individual pages within a schedule with correct page numbering. Font sizes and margins are user defined. Accounts can be displayed on screen in WYSIWYG format for review prior to sending to the printer, saving paper and costs.

Account Preparation Services

If you prefer to do just the tax work, FASTER Accounting Services also provides actual account preparation services from your records. The FASTER Accounting Services Group (using FASTER) can prepare your accountings or schedules of distribution quickly, expertly and at a low cost. ❒

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Interested in contributing to the next RPP&T Newsletter?

We welcome updates on committee activities or projects, or on matters affecting our practice areas. We seek equality between our divisions; and we need commitments for material from each division. We ask our officers, council members and committee chairs to submit or recruit material, or to recommend material to reprint with permission.

Please produce submissions in MS Word format and send the file as an attachment via e-mail to the editors.

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