SECTION REPORT

From the chair

By Brett A. Solomon, Esq.

I was humbled and honored to be elected the chair of the Pennsylvania Bar Association’s Real Property, Probate & Trust Law Section (RPPT) by members of our section’s council at our annual meeting in Pittsburgh. I’ve met a lot of great people during my time on council and look forward to serving as the chair of our section.

Thankfully, I have had some great leaders to learn from these past few years. I’ve watched as recent past chairs, Brett Woodburn and Jennifer Rawson, led our section with vision, wisdom and skill. In addition to being a skilled knowledgeable attorney, Brett W. has planned our section’s wine-pairing dinner at the annual retreat for years and does a great job making wine tastings fun and educational. As past-chair, Brett also planned this year’s retreat, which is shaping up to be one of the best we have ever planned (more on that later). For the last year, I have watched and learned from Jennifer how to handle yourself as a chair. Her wisdom and demeanor make her an ideal leader, and I hope to be able to do half as well as she did. And a preemptive thank you to section vice-chairs Mark Mateya (Probate/Trust Division) and Marshal Granor (Real Property Division), who are both active and vocal members of the section. Marshal’s leadership as editor of the newsletter has been invaluable.

Our section, the PBA’s largest in terms of membership, actively follows legislation that affects the members of our section, as well as the practice of law in general in Pennsylvania. We follow bills proposed by members of the House and Senate and opine on the ones that affect us most closely. The discussions are always well reasoned and cut right to the heart of why we feel strongly one way or another about what the proposed bill is seeking to accomplish. None of this could be achieved without the help of the many staff members of the PBA. On the legislative end, Fred Cabell Jr., director of legislative affairs, has been keeping our section up to speed on the latest out of Harrisburg for as long as I have been a member of the section. Fred is assisted by Samantha Laverty, legislative counsel, who has proven over the last year or so to be a valuable addition to the PBA. Finally, Pam Kance does a wonderful job year in and year out keeping us organized and helping our section prosper. Every organization needs someone like Pam to keep it successful.

Finally, let’s talk a bit about this year’s RPPT Annual Retreat. If you have not attended the retreat in the past, this is the year to attend, particularly if you are a member of the PBA Young Lawyers Division. This year’s retreat will take place Aug. 16-18 at Nemacolin Woodlands Resort in Farmington, Pa. (http://www.pabar.org/public/sections/RLP13/RPPTRetreatbrochure.pdf). The resort is about an hour from Pittsburgh, three hours from Harrisburg and four hours from Philadelphia. If you have never visited Nemacolin, I highly recommend you do so this August for the retreat. Nemacolin is one of the top resorts in Pennsylvania.

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boasting a world-class spa, two championship 18-hole golf courses, a casino and numerous other great outdoor activities on and off the property. RPPT guests who register for the retreat will be staying in the Chateau Lafayette (a hotel modeled after the famed Ritz Hotel in Paris) at an unheard of rate of $239/night. For members of the RPPT Section, registration is $250 (if paid by July 14) and $385 for non-RPPT members. The registration price includes up to 7 hours of substantive CLE credits and 2 ethics CLE credits, as well as two breakfasts, the annual wine-pairing dinner at Mulligan’s on the resort property and a whodunit murder-mystery dinner appropriate for the entire family.

The section has also planned two additional activities for the entire family on Thursday afternoon. The first is a one-hour guided tour of Frank Lloyd Wright’s Fallingwater house, which was once called “the best all-time work of American architecture.” The house was designed as the weekend home for the Kaufmann department store family and built over a waterfall in the Laurel Highlands. This very interesting house built in a beautiful setting is not to be missed. That is, unless you choose to compete in our second Thursday afternoon activity, the “Death v. Dirt” team challenge. Members of the “death” side of the section (Probate and Trust Division) will compete in a digital scavenger hunt your entire family can enjoy against the “dirt” members of the section (Real Property Division). Each team will decipher clues and take pictures to complete the scavenger hunt. The winning team will have bragging rights at all future RPPT meetings for the next year!

For members of the PBA Young Lawyers Division, the RPPT is offering a fantastic opportunity for young Pennsylvania lawyers to experience the RPPT Section’s annual meeting and the Nemacolin resort.

PBA YLD members who register for the retreat by July 14 will receive two nights of accommodations included in their registration price. That’s right, for $250, members of the PA YLD can stay for free and attend the retreat’s many real estate, probate and trust programs, simply for registering for the retreat by July 14! That price includes the meals, entertainment and the CLE credits mentioned above. Oh, to be young again!

I look forward to seeing all of the members of our section at Nemacolin in August and hope some new practitioners, young and old, check out our section and see what we are all about.

Brett A. Solomon is a shareholder in the Insolvency and Creditor’s Rights Group at Tucker Arensberg PC. He concentrates in the areas of creditors’ rights and insolvency, loan workout and restructuring and real estate matters. With a particular focus on secured creditors, Brett has gained extensive experience with the intricacies and nuances of federal bankruptcy law throughout the U.S. and state-court workouts and foreclosures in Pennsylvania and Maryland.

EDITORIAL:
Editor's prerogative
By Marshal Granor, Esq.

They call us Dirt and Death – Real Property on the one hand and Probate and Estates on the other. But who are we as lawyers, as a community, as a people and as a country?

Shortly after the 2016 presidential election, there was a spate of cemetery defamations across the country – mostly Jewish cemeteries. Gravestones were overturned or broken – some defaced with spray paint. I had an eerie feeling that things were not right with my world.

I needed to do something personal, so I signed-up online and spent an irregularly warm February afternoon at Mt. Carmel Cemetery in Philadelphia. About 100 people were there when I arrived. We were divided into groups either to catalogue the graves or to clean the grounds. Although incomprehensible to me, many of the graves were unindexed, although marked, and no updated records had been made in decades.

Grabbing leaf bags and a rake donated by Lowes, I walked to the filthy edge of the land. Years of accumulated leaves and debris, potato chip bags and more were piled high against the cyclone fence. I raked and stuffed the bags. I uncovered pieces of a tiny American flag, missing most of its field of blue, so I was unable to count the stars to know how old it was.

At one point, my rake scratched something hard under the mound. On hands and knees, I burrowed through the detritus to find a small, flat-to-the-earth gravestone. It had been forgotten for who knows how long. He had died in 1956, the year I was born.

At 4 p.m., the volunteers finished our work and slowly wandered out to the busy street together. So, who were we? A Sikh couple, some African-American teenaged boys, a Catholic neighbor who sobbed uncontrollably when he saw the damage, the LGBTQ club from a Philly public high school, and Jews from as far away as Connecticut and Virginia.

Why does defiling the graves of people long-dead hit us so hard? And what about the living families of the deceased? Can you believe there is legislation pending (HB 1019), which would require family members to be given reasonable access to gravesites of loved ones? Do we really need to legislate the right to visit a grave? Has the dirt around us become so valuable that owners of the land choose to deny a family the ability to grieve in the way they see fit? Why can’t we just follow the Golden Rule?

At the end of our monthly RPPT Council conference call in April, someone mentioned the death of the child of a section member. The child was just 25, and the thought of what that meant shook me. The obituary mentioned addiction. I had been a spectator to the “opioid epidemic” until it hit home in the last year or two.

Last year, on July 27, one of my employees received the most heartless phone call I’ve ever known.

“I’m looking for Mrs. X. We’ve got your son’s body here at ABC hospital. Can you come down to identify and claim the remains?”

Yes, really, from a doctor! You can’t legislate sensitivity or humanity, but I wish we could.

The son was 27 and a minor league pitcher. He was handsome, athletic ... and addicted to heroin. The family had brought him home, and after a stay at a residential detox program, he was clean and sober, living with his parents and waiting for the team to call him back.

That morning, the son drove into Philadelphia to score some heroin. But

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apparently he had detoxified so well that his typical dose killed him. The police found his dead body behind the wheel, having side-swiped several parked cars to a halt. The needle was still in his arm! I can’t get that mental image to fade.

Another employee’s 25-year old daughter has stolen most of the personality from his home for her fix. She has been in and out of jail, and he’s just about given up on her. It has taken all his strength and money, and there is nothing to show for it. When he receives a call from an unknown number, he freezes, thinking it will be the call that she’s dead.

While I tell people addiction has not hit my family, that’s only because I leave my nephew out ... his addiction is “only” alcohol. Last winter, we brought him to us, paid for his medical care, apartment and transportation, and gave him a family and new location to restart his life. It’s what he said he wanted ... until old friends from his former life started showing up. And neighbors complained about drunk and high people walking in and out. Eventually, we had to throw him out and cut ties.

I certainly don’t have the answers to the many concerns in our lives and the world around us these days. We can be horrified by the symbols and words of hate or the acts of destruction of burial grounds. We can shake our heads in disbelief that owners of cemetery plots might deny access to family members. But, more urgent than that, we have to stop and take the time to find a way to help our young people, before they prematurely become just more anonymous death and dirt.

Marshal Granor is the managing member of Granor & Granor PC in Horsham. He is vice chair of the Real Property Division of the RPPT Law Section and is executive editor of this newsletter. He is a member of the College of Community Association Lawyers and concentrates on condominium and homeowners association law.

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Real Property, Probate and Trust Law Section Writing Contest

The PBA Real Property, Probate and Trust Law Section is holding a writing contest for third-year Pennsylvania law school students. This is actually two contests in one: One for real estate (dirt) and one for probate and trust law (death). We want to encourage law students to consider these two areas of law for their future careers. There is a cash prize of $1,000 for the winning entry, $500 for second place and $250 third place in each of our dirt and death sides. The winning entries will also appear in an upcoming newsletter and on the section page of the PBA website. The winners will also be invited to attend the section’s annual retreat in the summer of 2018 to receive the award and to present a brief summary of their winning entries.

Here is the writing challenge: First, what does the student believe is a compelling topic facing attorneys in the area of real property law or probate and trust law. Second, how does he or she believe this topic can or should be addressed.

The competition is open to all third-year students currently enrolled in a Pennsylvania law school. Submissions must be the entrant’s original creation and may not have been published previously. A panel of qualified judges will select the winner based on content, quality of writing and relevancy. Entries must not exceed 5,000 words (plus any footnotes). Exceeding this length will eliminate an entry from consideration.

Entries must be submitted electronically to the section relations coordinator, Pamela K. Kance, pam.kance@pabar.org, by Nov. 1, 2017.

Interested in contributing to the next RPPT Section newsletter?

We welcome updates on committee activities or projects or on matters affecting our practice areas. We seek equality between our divisions and 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 email your article and a brief bio in Word format, as well as a high-resolution (300 dpi) author photo to the executive editor, Marshal Granor at Marshal@granor-price.com.

The deadline to submit articles for the next issue is Nov. 15, 2017.
ANNUAL RETREAT
August 16-18, 2017
Nemacolin Woodlands Resort
1001 Lafayette Dr, Farmington, PA 15437

Pennsylvania Bar Association
Real Property, Probate & Trust Law Section

The retreat offers:
• Up to 9 hours of substantive CLE credits, including 2 ethics credits
• Free time on Thursday afternoon to enjoy a “Death vs. Dirt” challenge, a trip to Fallingwater or a variety of resort activities and amenities.
• Wine-pairing dinner on Wednesday and a musical murder mystery dinner on Thursday.

CLE Programs/Meetings
Wednesday, Aug. 16
Avoiding Legal Malpractice in Estate Practice (CLE 301)
Code of Professional Responsibility (CLE 302)
Zoning and Land Use (CLE 303)
Crossroads of Estate & Litigation (CLE 304)

Thursday, Aug. 17
Annual Update on Probate Law (CLE 305)
Annual Update on Real Estate Law (CLE 306)
Mediating Estate Disputes (CLE 307)
Sheriff Sales/Tax Sales (CLE 308)
Dead Tenants Society (CLE 309)

FOR MORE DETAILS, SEE THE BROCHURE.

Nemacolin Woodlands Resort, one of North America’s five-star luxury premier resort destinations, is the location of the 2017 PBA Real Property, Probate & Trust Law Section Annual Retreat. Located in the picturesque Laurel Highlands of southwestern Pennsylvania, the impressive facility provides a welcomed summer respite for section members, colleagues and guests.

Register by July 14 to get $100 off the registration fee!

PBA YLD members: Register by July 14 to receive overnight accommodations as part of the registration fee!
If you are anywhere near my age, you likely answered that question “Ghost Busters!” Most of us recall the theme song and the images of three “professional ghost busters” saving Manhattan from ghostly and ghastly doom. After all, they were professionals ... they had the equipment, the training and the skill to do their job. And they had really slick marketing.

In the area of estate planning, that last element, really slick marketing, sometimes carries the day. Suze Orman’s show, for example, fills the air waves with legal advice on why everyone needs a trust. You can get her last will & testament kit on her website. You can also get her “dental savings plan” assistance on the same website. Really?!? She is no more a dentist than she is a lawyer! But she is giving out legal advice — right up to the “practicing law” line, hopefully without crossing it.

I am not angry at Suze Orman ... disappointed in her, perhaps, for selling things she does not fully understand, but not angry. I am using Ms. Orman as an example of the many legal options that have sprung up in recent years. The “legal zooms” of today are giving people what they want in the legal arena in the same way that McDonald’s gives them what they want in the nutrition arena. Very little. They want quick and cheap, and they get both. But the similarities do not end there ...

Eating a diet of three “McMeals” a day will have an effect on you. High blood pressure, weight gain, potential heart issues, fatigue and so on. The effects of that diet can last a lifetime.

The quick and cheap last will & testament kits are similar. They give you a series of questions to answer and, as long as your life fits neatly within those lines, you are okay. Or are you? Has your last will & testament kit taken into consideration the differences of children (can anyone say “black sheep”?), the different ways that distributions can be made (divide it evenly only begins to answer that question), or the myriad of nuances that we have seen in dealing with our estate planning clients. Are any two estate planning clients precisely the same?

In our office we have a name for the will kits. We call them “The Attorneys Full Employment Act.” We call them this because the testator, in order to save money, decided not to pay an attorney an hourly rate to draft his will. He got a last will & testament kit for less than a hundred dollars. (He then didn’t understand why the register of wills refused to register his will. But I digress.) One day, when he passes away, the testator’s four children will try to decipher what, precisely, their father meant in the well-intentioned, but poorly-drafted, language in his last will & testament.

If all four children agree completely on how to divide the estate, then the $100 will may have done its job. If, however, there is ambiguity in the will, then one of the children may hire his own attorney to be sure that “his inheritance” isn’t squandered or stolen. And it only takes one beneficiary to start the attorney carousel going. If child number one hires an attorney, then child number two is going to hire an attorney, and so on. Before long, we have an attorney representing the estate and four others who are each representing a beneficiary (and hoping to get a piece of the pie). It is The Attorneys Full Employment Act, Act One.

We can do something that no will kit can ever do. We can listen. We can apply our expertise and experience. We can lend a hand to a testator or testatrix who has just lost a spouse and is afraid. We can create a simple estate plan that addresses all of the testator’s needs in the midst of what looks like a jumbled mess of a family. We can create a complex set of trust and testamentary documents to fulfill a grandparent’s wishes for his grandchildren. We have the chance to make a real difference in the lives of our clients. Don’t be afraid of the will kits out there ... they are nothing more than opportunities for us to shine (as well as being The Attorneys Full Employment Act).

Mark A. Mateya practices law in his own practice, Mateya Law Firm, PC. His practice focuses on estate planning, estate administration and accompanying elder law issues. Attorney Mateya has testified as an expert witness in estate and trust litigation. He is a frequent lecturer for the Pennsylvania Bar Institute and is the vice chair of the Probate & Trust Law Division of the RPPT Law Section.
Until the Tax Reform Act of 1986, grantor trust status was something to be avoided. But thanks to rulings by the Internal Revenue Service, intentionally creating a grantor trust is now an accepted estate and gift tax planning strategy. This article will explain the principles of grantor trusts, why grantor trusts are desirable, and the way that some Pennsylvania court decisions could undermine the effectiveness of grantor trusts in Pennsylvania unless the trusts are drafted to negate those decisions.

What is a grantor trust?

Section 671 of the Internal Revenue Code (IRC) states that, when IRC sections 672 through 679 specify that the grantor or beneficiary of a trust shall be treated as the “owner” of any portion of a trust, that grantor or beneficiary must include the income, deductions and credits of the trust on that person’s individual income tax return. The trust is then known as a “grantor trust.” (Although the Pennsylvania Uniform Trust Act, 20 Pa.C.S. Ch. 77, refers to the “settlor” of a trust, the Internal Revenue Code refers to the “grantor.” Thus, this article will use “grantor.”)

The provisions of IRC sections 672 through 679 are too complicated to be described in detail, but they represent the judgment of Congress that a grantor who has retained a certain level of control over the income or principal of a trust should be treated as the owner of that trust for income tax purposes. The simplest example is a revocable trust. If the grantor of a trust can revoke the trust, then the trust should be ignored for income tax purposes. Similarly, a beneficiary who can withdraw the income and principal of a trust should be treated as the owner of that trust.

Irrevocable grantor trusts

That a revocable trust is a grantor trust does not create any opportunities for estate or gift tax planning, because the creation of a revocable trust is not a completed gift, and the trust is still part of the gross estate of the grantor for federal estate tax purposes (and also subject to Pennsylvania inheritance tax). However, there are other powers the grantor can retain to create a grantor trust, even when the trust is irrevocable and the IRS has issued favorable gift and estate tax rulings on the use of those powers.

Under IRC section 675(4), the grantor is treated as the owner of any portion of a trust over which any person (not just the grantor) has a specified power of administration that is exercisable in a nonfiduciary capacity without the approval or consent of any fiduciary. The third “power of administration” listed in section 675(r) is “a power to reacquire the trust corpus by substituting other property of equivalent value.” So, if the grantor creates an irrevocable trust and retains the power (in a nonfiduciary capacity) to require the return of property held in the trust in exchange for property of equal value, the trust is a grantor trust even if the grantor has no other interest or power in the trust.

In Rev. Rul. 2008-22, 2008-16 I.R.B. 797, the IRS confirmed that the retention of a power of substitution described in IRC section 675(4) does not cause the trust assets to be included in the grantor’s gross estate under IRC section 2036 or 2038. In Rev. Rul. 2011-28, 2011-49 I.R.B. 830, the IRS went further and held that when a trust holds a policy insuring the life of the grantor, the grantor’s power of substitution for the policy is not in itself an “incident of ownership” within the meaning of IRC section 2042(2), so the power of substitution does not cause the policy to be included in the grantor’s gross estate.

These rulings confirm that the grantor of a trust can be considered the owner of the trust for federal income tax purposes, even though the grantor is not the owner of the trust assets for federal estate tax purposes.

Estate and gift tax advantage of irrevocable grantor trusts

Thus, an irrevocable trust that is a completed gift for federal gift tax purposes and which is not included in the grantor’s gross estate for federal estate tax purposes can be a grantor trust for federal income tax purposes. This means the income of the trust is subject to income tax at the grantor’s income tax rates and not as a separate taxpayer with its own income tax rates. Where is the tax advantage to that?

The advantage comes from who pays the tax. In Rev. Rul. 2004-64, 2004-27 I.R.B. 7, the IRS ruled that, when a trust is a grantor trust, the Internal Revenue Code makes the grantor liable for the tax on the trust’s income.

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Intentional grantor trusts
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Therefore, because the grantor is paying his own tax liability and not the liability of the trust, the payment of the tax by the grantor is not a gift by the grantor to the trust or its beneficiaries.

Notice that this ruling is not limited to any particular kind of income and applies to both capital gains and ordinary income. It does not make any difference whether the income or gains are distributed or accumulated. This means the grantor of a grantor trust can pay the income taxes for income paid to children and grandchildren or accumulated for their future benefit without making a taxable gift.

So, if a trust has $20,000 of income and would otherwise have to pay $6,444 of federal income tax to accumulate that income (at 2017 rates), but the trust is a grantor trust and the grantor pays the tax on the income, the grantor has effectively made a $6,444 gift to the trust without payment of any gift tax. The trust will continue to earn income for which the grantor will have to pay additional taxes each year, so the grantor can indirectly add substantial sums to that trust during his or her lifetime by paying the income taxes for the trust.

Possible income tax costs

There may be a small income tax cost to having income taxed to the grantor rather than the trust or its beneficiaries, because the grantor may be in a higher income tax bracket. However, this cost may be small in comparison to the gift and estate tax benefit, particularly if the income would otherwise be accumulated, because the tax brackets that apply to trusts were greatly compressed by the Tax Reform Act of 1986.

Before the Tax Reform Act of 1986, trusts were generally subject to the same tax rates and tax brackets as applied to married individuals filing separately. So, in 1985, a trust would need $84,510 of income to reach the top income tax bracket, and the tax on that income would have been $32,576. If the same income had been taxed to the grantor of the trust and the grantor had been in the top (50 percent) income tax bracket, the tax would have been 50 percent of that income, or $42,255. So putting income-producing property in trust and letting the income accumulate and be taxed at trust rates could save about $9,679 per year in income tax, compared to what the tax would have been on the income in the hands of the grantor.

Under current (2017) law, a trust reaches the top tax rate with only $12,500 of income, and the difference between the tax on that income ($3,232.50) and the tax at the top income tax rate of 39.6 percent ($4,950) is only $1,717.50. If both the grantor and the trust are investing in securities that pay qualified dividends taxed as capital gains and not ordinary income, then the difference between the income tax payable by the trust as a separate taxpayer (non-grantor trust) and the income tax payable by the grantor might be insignificant.

A trust accumulating income might also have to pay the 3.8 percent tax on net investment income under IRC section 1441, which the grantor might or might not have to pay because individuals have higher threshold amounts for that tax. It is possible that the income tax paid by the grantor might be more than the income tax that would have been paid by the trust, while the tax on net investment income would be less, offsetting some (or all) of the income tax increase.

Calculating the possible income tax cost of a grantor trust would require a number of different assumptions, and comparing that possible income tax cost of a grantor trust to the estate tax benefit of a grantor trust is beyond the scope of this article. However, whether the grantor will pay more in income tax on the income of a grantor trust than the trust or its beneficiaries would pay on the trust’s income if the trust were not a grantor trust is a factor that should be considered when deciding whether to create a grantor trust. (The author has created an online calculator that compares (a) the income tax costs of a grantor trust over an accumulating trust with (b) the potential estate tax benefits. See Webcalculators.com.)

Pennsylvania cases on tax reimbursements to grantors

As explained above, Rev. Rul. 2004-64 held that the grantor’s payment of income taxes on the income of a grantor trust is not a taxable gift. The revenue ruling actually went further than that, holding not only that the grantor can pay the income tax, but that the grantor must pay the income tax on the trust’s income in order to keep the trust assets out of the grantor’s gross estate. According to the IRS, if...
the trust document (or applicable local law) required the trust to reimburse the grantor for the income tax on the trust’s income, then the trust would be used to discharge a legal obligation of the grantor and the entire value of the trust would be included in the grantor’s gross estate under IRC section 2036(a)(2).

If, under state law, the grantor of a trust has a right of reimbursement for income tax paid by the grantor on the trust’s income, then the estate tax benefit of the trust is lost because the trust assets will still be included in the grantor’s gross estate. Unfortunately, there are Pennsylvania cases holding that a grantor might have that right of reimbursement.

In French Trust, 23 Fid. Rep. 296, 61 D.&C. 654 (O.C. Philadelphia 1963), the grantor established an irrevocable trust to pay income to her during her lifetime and to distribute the principal upon her death as she may direct by will. The trustees had distributed principal to the grantor in order to reimburse her for taxes paid on capital gains, and the court approved the distributions. “Equity similarly requires that although the Internal Revenue Code and Regulations impose upon the settlor-beneficiary the income tax liability on capital gains realized and retained by the trustees, the principal of the trust should be applied in relief of such tax.” 23 Fid. Rep. at 300 (emphasis an original). The court also ruled that, as a matter of administrative convenience, the measurement of the tax liability should be based upon the tax which would have been paid by the trust, rather than the tax actually paid by the grantor.

French Trust was cited and followed in Doughty Trust, 6 Fid. Rep. 2d 260 (O.C. Montg. 1985). In that case, capital gains were realized by a revocable trust shortly before the death of the grantor, but the court held that the same equitable principles applied, and the trust should reimburse the grantor’s estate for the taxes on the capital gains, because the grantor had not had an opportunity to request reimbursement prior to her death.

In Mathey Trust, 1 Fid. Rep. 2d 96, 19 D.&C. 3d 43 (O.C. Montg. 1981), the court approved the reformation of an irrevocable trust so as to direct distributions of principal to the grantor-beneficiary to reimburse the grantor for any federal income tax liability that may be assessed against him because of capital gains realized by the trust. The trust was created in 1955, shortly after the enactment of the Internal Revenue Code of 1954 and before regulations were issued that clarified the scope of the grantor trust rules. The court found it was “generally assumed among experts” that the capital gains of a trust would not be considered “accumulated income” that the grantor would have to report on his own income tax return. Because the trust was for the benefit of the grantor, and the payment of the taxes on capital gains would “result in the diminution of his personal assets and income,” the court approved the proposed reformation in order to carry out the intent of the grantor.

Mathey Trust is factually distinguishable from a trust that is intentionally a grantor trust because the grantor wants to pay the tax on the trust’s income. But arguing about the unstated intentions of the grantor is not an argument anyone should want to have with the IRS. The safer and more prudent course is to specifically waive any right of reimbursement for income tax in the grantor trust document.

**Conclusion**

An irrevocable and yet intentional grantor trust can have significant estate tax benefits, but a Pennsylvania grantor trust document should specify that the grantor does not want to have any right of reimbursement for income taxes paid on the trust’s income and that the grantor waives any right of reimbursement, in order to be sure that Pennsylvania decisions do not apply and that the trust assets are not part of the grantor’s gross estate for federal estate tax purposes.

Daniel B. Evans, of Evans Law Office, has over 35 years of experience in estate planning, estate administration, trust administration, small business planning and charitable planning.
Various legal issues arise in determining the authority granted to an agent under a power of attorney for a principal who is the settlor and/or trustee of a trust, in light of the provisions of the governing instrument of the trust. In a typical situation, a principal/settlor creates a revocable trust and retains numerous powers that essentially enable the principal/settlor to maintain control over the trust assets. These powers can include the power to direct distributions, make gifts, remove and appoint trustees, approve and/or make investment decisions, and amend or revoke the trust. In addition, the principal/settlor often serves as a trustee or co-trustee of the revocable trust. This article provides an overview of the factors to consider when determining what, if any, authority an agent under a power of attorney may have to exercise the principal’s powers as settlor or trustee.

The scope of an agent’s authority under a power of attorney is determined by the language of the power of attorney and the provisions of the [PEF] Code. In re Fiedler, 132 A.3d 1010, 1021 (Pa. Super. 2016) (citations omitted). Therefore, the first factor to consider is the language of the power of attorney itself. Does it contain language expressly giving the agent authority to exercise trust powers on behalf of the principal in the principal’s capacity as settlor or trustee? A power of attorney often contains powers that are statutorily defined, including the power “to withdraw and receive the income or corpus of a trust” and the power to “handle interests in estate and trusts.” This author suggests that the inclusion of these powers, without further analysis, is not sufficient to grant authority to the agent to exercise all powers the principal may have as settlor or trustee.

The power to withdraw and receive the income or corpus of a trust means that the agent may:

1. demand, withdraw and receive the income or corpus of any trust over which the principal has the power to make withdrawals;
2. request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distribution to or on behalf of the principal; and
3. execute a receipt and release or similar document for the property received under paragraphs (1) and (2).

20 Pa.C.S. § 5603(g). The power to “handle interests in estate and trusts” is defined as follows:

A power to “handle interests in estates and trusts” shall mean that the agent may receive a bequest, devise, gift or other transfer of real or personal property to the principal in the principal’s own right or as a fiduciary for another and give full receipt and acquittance therefor or a refunding bond therefor; approve accounts of any estate, trust, partnership or other transac-

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Determining an agent’s authority to exercise a principal’s powers

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tor’s power to amend or revoke a trust only if the power of attorney expressly grants the agent such authority. Additionally, an express grant of authority is required in order for an agent to exercise fiduciary powers. See 20 Pa.C.S. § 5601.4(a)(1) and (a)(7). For powers of attorney created prior to January 1, 2015, as discussed in more detail below, other provisions of the PEF Code may require express authority to enable an agent to exercise a settlor’s powers.

Whether an express grant of authority is required to exercise a principal’s powers as settlor or trustee, the exercise of an agent’s authority is still subject to certain duties imposed by statute. These duties include the duty to “act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest” and also to “act in good faith,” notwithstanding any provision in the power of attorney. 20 Pa.C.S. §5601.3. Further, except as otherwise provided in the power of attorney, an agent’s authority is subject to the following duty to:

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

(i) The value and nature of the principal’s property;
(ii) The principal’s foreseeable obligations and need for maintenance;
(iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes;
(iv) Eligibility for a benefit, program or assistance under a statute or regulation.

20 Pa.C.S. § 5601.3(6). Therefore, where the language in the power of attorney ostensibly grants an agent authority to exercise a right or power, an agent cannot unilaterally act without regard to the duties described above. Any act taken in violation of those duties is beyond the scope of authority granted to the agent under the power of attorney. As a result, if a third party being asked to accept a power of attorney as authority for an agent to take some action believes, in good faith, that the action contemplated by the agent would violate any of the duties described above, the third party may refuse to accept the power of attorney. See 20 Pa.C.S. § 5608(b).

The authority of an agent to exercise a principal’s powers as settlor or trustee may also be subject to provisions in the power of attorney relating to gifts. Specifically, in exercising powers of the principal/settlor, an agent may seek to direct a trustee to make distributions from a trust for the benefit of others. These distributions would typically constitute gifts. Thus, distributions beyond the gifting power granted to the agent in the power of attorney would exceed the agent’s scope of authority.

An agent’s authority to exercise powers of a settlor may also be subject to other provisions of the PEF Code, including the Uniform Trust Act, 20 Pa.C.S. §7701 et seq., which limits the authority of an agent to exercise certain powers of a settlor regarding revocable trusts. Section 7752 of the PEF Code provides as follows:

A settlor’s powers with respect to revocation or amendment of the nondispositive provisions of or withdrawal of property from a trust may be exercised by an agent under a power of attorney only to the extent expressly authorized by the trust instrument or the power. The agent under a power of attorney that expressly authorizes the agent to do so may amend the dispositive provisions of a revocable trust as the court may direct.

20 Pa.C.S. § 7752(e) (emphasis

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The Uniform Trust Act also establishes the terms by which a trustee can delegate duties and powers to another person. See 20 Pa.C.S. §7777. To the extent a principal grants authority to an agent under a power of attorney to exercise fiduciary powers, that grant constitutes such a delegation. Section 7777(a) requires a trustee to establish the scope and specific terms of the delegation, consistent with the terms of the trust. Id (emphasis added).

Assuming that a power of attorney contains the necessary language to grant authority to an agent to exercise powers of the principal/settlor to amend, revoke or withdraw assets from the trust and/or to serve as trustee, and assuming further, that the action the agent seeks to take does not violate any of the duties imposed upon the agent, any other provisions of the power of attorney or the PEF Code, the analysis doesn’t end there. Perhaps most importantly, any authority of an agent to exercise powers of the principal as settlor or trustee is always subject to the terms of the governing instrument granting such powers to the principal. As set forth in Section 5601.4 of the PEF Code, an express grant of authority authorized under that section is valid only to the extent “the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject.” 20 Pa.C.S. § 5601.4(a). Typical provisions in a revocable trust agreement provide that when the settlor becomes incapacitated, distributions are no longer made at the direction of the settlor, but rather become discretionary by the trustee. Additional provisions may provide that if the settlor becomes incapacitated and is no longer able to serve as trustee, another designated person who is not the principal/settlor’s agent shall become trustee. These provisions in the governing instrument of the trust would supersede any provision to the contrary in the power of attorney.

In conclusion, the determination of whether an agent has authority under a power of attorney to exercise powers granted to the principal requires consideration of multiple factors. Relevant factors include the language in the power of attorney relating to estates and trusts, gifts and fiduciary powers. The provisions of the power of attorney statute must also be considered, as well as certain provisions of the Uniform Trust Act regarding the powers of a settlor and trustee. Finally, the authority given in a power of attorney regarding the principal’s powers as settlor or trustee must comply with the terms of the governing instrument of the trust. The intent of the settlor is paramount, and to the extent the authority purportedly granted in a power of attorney conflicts with that intent, as determined by the terms of the governing instrument, the terms of the trust’s governing instrument should control.

Alison T. Smith is senior counsel at PNC Bank, NA. She provides internal legal support to trust accounts administered in the Pittsburgh wealth management market and to charitable trusts administered throughout the PNC footprint.

Disclaimer: The views expressed in this article are those of Alison T. Smith individually and should not be construed to be the position of PNC Bank, National Association or any of its affiliates.

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PROBATE & TRUST DIVISION

Recent cases in probate and trust law

Compiled by Daniel B. Evans, Esq.

Beneficiaries named in unsigned document lack standing


Beneficiaries named in a trust amendment prepared by a lawyer do not have standing as third-party beneficiaries to sue the lawyer for breach of contract when the trust amendment was never executed due to an admitted “oversight” by the lawyer.

Executor not liable for contractual debts of corporation


The Civil Division has jurisdiction over a contractual claim against an estate and its executor, but the trial court erred in “piercing the corporate veil” and finding an executor-beneficiary personally liable for debts incurred by a corporation of which the estate was the sole shareholder and of which the executor was an employee.

Concurrent jurisdiction over wrongful death proceeds


Both the Orphans’ Court of the county where letters of administration were issued and the Civil Division of the county in which the administrator brought a wrongful death and survivor action have jurisdiction over issues relating to the distribution of the judgment proceeds and standing. When post-trial motions question the standing of the plaintiff as an heir, which would invalidate the wrongful death verdict, judicial efficiency requires that the trial court determine the issue of standing before the Orphans’ Court addresses any distribution issues.

Proceeds of sale of jointly owned home


Although father testified that home he purchased for his own use was titled in joint names with his son for “estate planning purposes,” proceeds of sale were shown to have been paid to father and son equally, and deposit of those proceeds into a joint account resulted in equal ownership of the account.

Pre-2005 same-sex common law marriage is valid


A same-sex couple could enter into a valid common law marriage before 2005, and the evidence supported the existence of the marriage.

Non-litigating heir cannot challenge settlement


An intestate heir who does not join in an appeal from the probate of a will has no standing to challenge a settlement agreement between the beneficiary under the will and the other intestate heirs, which left the probate of the will intact and required the beneficiary to make payments to the intestate heirs who had appealed from probate.

Surviving spouse can compel portability election

_In the Matter of the Estate of Vose_, 2017 OK 3, ___ P.3d ___ (Okla. 1/31/2017)

The Oklahoma Supreme Court has held that a decedent’s unused federal estate tax exclusion amount (referred to in IRC section 2010 as the “deceased spousal unused exclusion amount,” or DSUE) is an asset of the decedent’s estate that the administrator of the estate has a fiduciary duty to preserve for the benefit of the surviving spouse by filing...
Recent cases in probate and trust law

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a federal estate tax return, even though a prenuptial agreement barred the surviving spouse from being a beneficiary of the estate. (The surviving spouse had agreed to pay the costs of the required estate tax return.)

Substituted judgment to change incapacitated person’s will


A change to an incapacitated person’s will was approved, the court exercising its power of substituted judgment, when the incapacitated person and her husband both had children from prior marriages, each had executed reciprocal wills leaving their estates to the other with their estates divided in equal shares among the children of both spouses upon the death of the survivor. The husband changed his will after his wife had become incapacitated and his estate went only to his children when he predeceased his incapacitated wife. The court agreed that the incapacitated wife would have wanted to disinherit her husband’s children.

Agent surcharged for breaches of fiduciary duties


Agent under power of attorney who was appointed “to serve jointly” with co-agent, but who acted alone, is surcharged for unexplained or unaccounted for expenditures, for changing an IRA beneficiary to herself, which was inconsistent with the principal’s intent as expressed in her will, and for unauthorized purchases on the principal’s credit card, all of which were the result of self-dealing and failure to exercise common prudence in the exercise of her fiduciary duties.

Trust voided for fraud in the inducement

Passarelli Family Trust, 7 Fid.Rep.3d 63 (O.C. Chester Co. 2016)

An irrevocable trust created by a husband and wife will be voided for fraud upon the petition of the wife when the wife was not involved in the planning of the trust or the selection of marital assets to be placed in the trust and the husband had purchased other properties with marital assets that were not known to the wife and omitted those properties from the assets included in the trust, while wife believed that the trust was intended to hold all of their marital assets.

Jurisdiction to determine incapacity

Greco Estate, 7 Fid.Rep.3d 50 (O.C. Montgomery Co. 2016)

The court lacks jurisdiction to determine incapacity when Pennsylvania is not the “home state” of the incapacitated person under the Uniform Adult Guardian and Protective Proceedings Jurisdictional Act (20 Pa.C.S. 5901 et seq.) and an agent under a power of attorney has objected to the court’s jurisdiction, because the agent is a person entitled to notice of the proceeding.

Jurisdiction over family settlement agreement


Court does not have jurisdiction to enforce a family settlement agreement that settled an estate within the jurisdiction of a different county.

Same-sex common law marriage not proved

Gessner Estate, 7 Fid.Rep.3d 72 (O.C. Chester Co. 2016)

Surviving “life partner” is not entitled to zero percent spousal inheritance tax rate, despite years of continuous co-habitation, when there was no evidence that the parties had ever contracted to marry by exchanging verba in praesenti.

Independent guardian appropriate to protect incapacitated person’s funds

Schofield Estate, 7 Fid.Rep.3d (O.C. Bucks Co. 8/18/2016)

Appointment of an independent plenary guardian of the person and estate of an incapacitated person, and not a family member, is appropriate to protect the incapacitated person’s special needs trust when multiple family members live in the house owned and maintained by the trust and might improperly use trust funds for their own benefit and maintenance resulting in the premature depletion of the trust.

Agent ordered to file account


When there is clear evidence that a substantial amount of money is missing, an agent will be required to file an account even though the agent lacks records to prepare a full account.

Objections to executor commissions and legal fees denied

Keller Estate, 7 Fid.Rep.3d 90 (O.C. Montgomery Co. 2016)

Objections to executor commission and legal fees denied when executor-lawyer, who was one of three executors, claimed commission of $70,000 and legal fees of $90,000 out of an estate of almost $10 million.

Daniel B. Evans, of Evans Law Office, has over 35 years of experience in estate planning, estate administration, trust administration, small business planning and charitable planning.
There is a bright energy in Colleen Stumpf’s voice as she describes how life and law merge in her world. Colleen is a trusts and estates attorney at Quinn Buseck Leemhuis Toohey & Kroto Inc. in Erie.

Why Erie?
It was a compromise location for Colleen and her husband, neither of whom wanted to live in the other’s hometown. Here, Colleen has a short five-minute commute and flexibility while still practicing in a large firm. That comes in handy with her children Hannah, age one, and Nathaniel, age six.

In selecting her areas of practice, Colleen points to two individuals. Todd Fuller, her mentor during her high school years, was a trust and estates practitioner first in Harrisburg and then Pittsburgh. But Colleen wasn’t focused on law as her future back then, because she didn’t want to be a litigator. While her undergraduate studies at Grove City College focused on international business and finance, Colleen was always interested in the human side of law, along with numbers. A second mentor, Dr. Andrew Markley, a professor at Grove City College, for whom Colleen worked during her time there, shared his interest in business law, particularly that of corporate governance.

Studying at Penn State’s Dickinson Law School, Colleen was influenced by Vicki Trimmer, former RPPT Council member. Colleen’s love of business and taxes and finance then combined into a career in the law.

Colleen clerked with and then joined the Quinn Law Firm, where she was encouraged to expand her passion for helping others, while also increasing her client contacts.

“I find a wealth of information having access to the RPPT Listserv. I read it regularly. The ability to access the PBA website and go back and see prior discussions, for me, is invaluable.”

“When you become an attorney and you are new to town and new to the firm, you get out there so people get to know you. And board service is one of the ways the firm encouraged me. Shortly after joining the firm, I joined the board of L’Arche Erie Inc. After six years of service, I’m off the board, and my husband, Ben, is on it.

“I enjoy women’s issues. Athena PowerLink here in Erie is really strong in promoting women in business. I’ve worked as an attorney mentor for women-owned businesses, whether it be an art gallery or awning shop or hair salon.

“I’m also involved with Catholic Charities of Diocese of Erie Inc., which provides grants to several affiliates, helping those in need, including refugee settlement and family development.”

With all those worthy activities, why would Colleen volunteer on the RPPT Council?

“I find a wealth of information having access to the RPPT Listserv. I read it regularly. The ability to access the PBA website and go back and see prior discussions, for me, is invaluable.”

“Art is important to me, so I’m on the board of Erie Arts and Culture. I’m very passionate about art and education. And what a grant from the National Endowment for the Arts did here in Erie is to get two artists into our technical school. Working with our kids on design, CAD software, and working with manufacturers who donated scrap metal to the kids who were learning how to weld, they developed, built and installed a life-sized sculpture of a horse pulling a globe, symbolic of Erie’s industrial growth and leadership in the 1900s.”

With a practice covering estate planning and administration, long term care, guardianships, elder law, trust administration, as well as corporate counsel, business work and representing school districts, does Colleen ever have down time?

“One of the gems, if you don’t know Erie, is Presque Isle. So, if I’m not in the office, you’ll probably find me there with the kids and my husband, riding bikes and flying kites. And in the winter, we’re over the border skiing in New York.”

The RPPT Council welcomes Colleen Stumpf and her passion for service to others.
Thank you for allowing me to serve as vice chair for the Real Property Division. It is an honor I do not take lightly. Since Judge William (Chip) Mackrides, then section chair, invited me to join the RPPT Council, I have been continually in awe of the work our section accomplishes.

But even more important than our legislative accomplishments — and they are many — we have created a support network through our Listserv, which only grows stronger with time. More and more, the new members and leaders of our section mention the Listserv as a reason for becoming more involved. Civil discourse and well-considered advice is abundant. If you do not subscribe (and why not? — it’s free) to the Listservs for both real property and probate & trust, please let me know why.

One of the initiatives I’d like to undertake in my tenure is to visit county bar associations to present an interactive program, hopefully CLE-accredited, reviewing our section’s role in shaping legislation, as well as giving an overview of the legislative process as I have experienced it. We would also discuss pending legislation and our section’s role in helping pass, edit or quash various bills. If you are involved in your county bar’s educational opportunities, please reach out to me if this would be of interest to your membership as a whole, or to any real property committee or sub-group.

I have made deep friendships through the RPPT Section. Have you? It doesn’t take much effort. Answer a Listserv question. Provide an article for our newsletter. Better yet, join us at Nemacolin in August for fun and CLE in an affordable, family-friendly resort. While on the retreat, participate in our wine-pairing dinner and enjoy the company of your colleagues.

My top goal is to continue to help our section strengthen and grow. In that regard, please bring your friends and associates to join RPPT (first-year membership is typically free, so there is nothing to lose!). We always look for younger attorneys and those from diverse locations throughout the commonwealth. We currently have members from 64 of the 67 counties — come on Forest, Juniata and Montour.

I’ve used the word “please” above three times, and I’ll beg you one more time. Please let me know if you hear of real property legislation which concerns you, or if you uncover areas where the law should be strengthened or altered. I would be grateful for your communication and input into the work our section performs.

I hope I can meet each of you in Nemacolin this August and that you will take that one small step by becoming an active member of our section.

Marshal Granor is the managing member of Granor & Granor PC in Horsham. He is vice chair of the Real Property Division of the RPPT Law Section and is executive editor of this newsletter. He is a member of the College of Community Association Lawyers and concentrates on condominium and homeowners association law.
REAL PROPERTY DIVISION

The (not-so) new notary public law to take effect on Oct. 26, 2017

By Ronald M. Friedman, Esq.

A not-so-new Notary Public Law is about to become effective in Pennsylvania. Because of the nature of our practices that require acknowledgments and witnesses to signatures, many of our section members, both dirt and death sides, have a notary in their offices or within easy access. Some important rule changes are ahead.

Overview

The Pennsylvania Department of State published notice in the Pennsylvania Bulletin on April 29, 2017, that Act 67 of 2013, also known as the Revised Uniform Law on Notarial Acts (RULONA), will take effect on Oct. 26, 2017. RULONA replaces the Notary Public Law of 1953 and the Uniform Acknowledgment Act of 1941, both of which remain in effect until then. While RULONA was passed four years ago, there has been substantial delay pending implementing regulations, the continuing education components and the examination procedures. The 180-day delay in the effective date allows notaries public to become competent in the requirements of RULONA. Note that all notaries are required to complete an approved notary education course in order to be appointed or reappointed, including those notaries previously “grandfathered” by the Pennsylvania Supreme Court decision in Tritt v. Cortés, 851 A.2d 903, 578 Pa. 317 (Pa., 2004).

Changes under RULONA include major alterations to the application process, such as a requirement that all applicants who do not hold an active notary commission when their application is received by the department must pass an examination. Testing was not required under prior law. Notary applicants have six months from the time they are authorized to sit for the examination to pass the test. They may take it as many times as needed within that six-month period.

A required basic educational course includes a review of the statutes, regulations, procedures and ethics relevant to notarial acts. Also included in the course and examination are the duties and responsibilities of the office of notary public and electronic notarization.

Powers, duties and obligations of notaries

RULONA enumerates the powers for notaries. These include the following:

• Taking an acknowledgement;
• Witnessing or attesting to a signature;
• Noting a protest of a negotiable instrument;
• Certifying or attesting a copy or a deposition (taking a deposition is no longer an enumerated power under the new law).

RULONA sets out the form of notarial stamp. It no longer is referred to as a “seal.”

• The words “Commonwealth of Pennsylvania;”
• The words “Notary Seal;”
• The name as it appears on the commission of the notary public;
• The words “Notary Public;”
• The name of the county in which the notary public maintains an office;
• The date the notary public’s commission expires;
• The notary commission number for that notary.

The stamp will no longer contain the municipality in which the notary maintains an office.

A notary public who holds a commission on the effective date of RULONA need not procure a new stamp until the notary is reappointed under the provision of RULONA.

RULONA also sets forth the requirement for maintaining a notarial journal as follows:

• The date and time of the notarial act;
• A description of the record, if any, and type of notarial act;
• The full name and address [city and state only] of each individual for whom the notarial act is performed;
• The fee charged by the notary public.

If identity of the individual is based on personal knowledge, a statement to that effect. If identity of the individual is based on satisfactory evidence, a brief description of the method of identification and any identification credential presented, including the date of issuance and expiration of an identification credential.

Under RULONA, the journal records the time of day of the notarial act, the customer’s address, whether identification was based on personal knowledge or satisfactory evidence and the type of identification credential presented (see below for verification of identity requirements).

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A journal may be created on paper or by using an electronic format. A notary public may maintain a separate journal for paper records and another for electronic records. If the journal is maintained on paper, it must be a bound register with numbered pages. If the journal is maintained in an electronic format, it must be in a tamper-evident electronic format complying with the regulations of the Department of State. A notary public who holds a commission on the effective date of RULONA may continue to use his or her journal until the expiration of that commission. However, it is assumed that the information required to be included in the journal must be compliant with the new law.

**Appearances and verification of identity**

The rules governing appearances of signatories is the same under RULONA as under former law. If a notarial act relates to a statement made in or a signature executed on a record, the customer must be physically present before the notary when the notarial act is executed. The notary and the customer must be able to see, hear, communicate with, and give identification documents to each other without the use of electronic devices. Communication such as with FaceTime, Skype, or similar electronic video methods is not permitted. “In person” means in person.

As for verification of identity, the rules under RULONA are substantially the same. However, RULONA requires that there be two forms of government-issued identification. These could be a passport, driver’s license or unexpired government-issued non-driver identification card. This is the same standard as for transit through a TSA checkpoint at a commercial airport. The second form of government identification must be current and contain the signature or photograph of the individual. In all cases, the notary must be satisfied with the identification documents presented for proof or identity.

**Additional provisions**

The maximum fee is $5 and that fee belongs to the notary (not to the notary’s employer, unless the parties have agreed otherwise). The fee schedule must be posted in a conspicuous place, and the charges must be disclosed in writing to a customer.

The conflict of interest rules in RULONA prohibit the notary from acting in a matter where the notary or the spouse of the notary has a direct or pecuniary interest.

The use of the term “notario” or “notario public” is prohibited. In some countries, notarios perform legal functions beyond the scope of the services permitted under RULONA. There also are limitations and disclosures required for notaries who wish to advertise their services. There must be a disclaimer that the notary is not an attorney-at-law and that the notary cannot perform legal services like giving legal advice, drafting documents or providing advice on immigration matters. The new law includes civil penalties for violations of RULONA.

**Conclusion**

RULONA is designed to require more accountability from notaries, to tighten up the identification requirements and to help reduce fraud. Practitioners should make sure current notaries understand the requirements of RULONA, and they should monitor the expiration date of office notaries and be aware of the requirement for new notary commissions.

Anyone who evaluates Pennsylvania’s Mechanic’s Lien Law of 1963, 49 P.S. §§ 1101-1902, as amended (the Lien Law), and the case annotations is probably struck by the 50-year age of its current iteration. Yet, even with that maturity, there is not much appellate case law interpreting it. That began to change roughly 10 years ago when the Pennsylvania Legislature determined the statute needed modernization. Instead of proceeding with a wholesale restoration of the statute or trading the Lien Law in for an entirely new model, the Legislature made what it considered to be necessary improvements to portions of the statute. These changes did not necessarily consider how they would impact well-established principles embraced by many who had previously worked with and interpreted the Lien Law. Some of the changes also potentially presented more uncertainties for those who, while already familiar with the statute, had hoped for elimination of some existing eccentricities of Pennsylvania’s aging Lien Law (as opposed to the creation of further confounding complications).

In 2014, Pennsylvania enacted two more sets of amendments, one of which only became effective on Jan. 1, 2017 because the Department of General Services (DGS) launched the State Construction Notices Directory (directory) in late December 2016, a condition for implementation of the latter of the 2014 amendments.

The Lien Law had undergone two previous amendments in 2007 and 2009. And while those amendments were far more extensive, the impact of the 2014 amendments is surprising. The first of these early 2014 modifications was largely reactionary in nature due to two appellate decisions. These decisions impacted how the priority of the liens perfected under the Lien Law would be considered in relationship to certain lenders’ security interests.

The year 2014 saw the Legislature taking another effort to customize the existing Lien Law, as already amended. 2014 Act 142, P.L. 2494 (Act 142) focused on creating the directory.

With Act 142, the legislature brought Pennsylvania in line with other states that have similar provisions requiring notices by the owner, contractors and subcontractors prior to or, in some instances, during the performance of work on a project. However, Act 142’s effectiveness was dependent upon the DGS bringing the directory online prior to Dec. 31, 2016. If the directory had been delayed, these changes would not be effective. DGS did release the directory before the deadline, and it is at http://www.scnd.pa.gov/ and through an app, http://apps.pa.gov/scnd.

Act 142 appears to be a reaction to the 2007 amendments’ expansion of the term “subcontractor” to include those who are engaged by subcontractors, whether they be sub-subcontractors or suppliers. Because of this exponential increase of potential lien claimants, it became very difficult for owners and even contractors to police the prompt and timely payment of these various project participants. This left the owners and general contractors at risk to claims from a variety of sources of a given project.

Now, for projects in excess of $1.5 million, identified as a “searchable project” under Act 142, “[p]rior to the commencement of labor, work or the furnishing of materials for a searchable project that may give rise to a mechanic’s lien under this act, the searchable project owner or agent of the searchable project owner [which can be the contractor provided there is compliance with the requirements of Act 142] may file a Notice of Commencement with the [D]irectory.” That sets into motion certain obligations of the owner or its agent to provide infor-

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information regarding the contractor on the project, the project’s name and location, including identifying the county and providing a legal description of the property, information regarding the owner, the identities of project sureties, if any, and the identification number given to the project when the notice of commencement is filed. The owner must post this notice at the project, pursue “reasonable measures” to make sure the notice stays posted and take “reasonable efforts” to have the notice and its content incorporated into the contract documents provided to subcontractors. Additionally, the owner is obligated to include a warning in the contract that the subcontractors will lose their lien rights in the event the subcontractors do not file a notice of furnishing within 45 days of first performing work, services or materials to the job site.

This notice of furnishing must contain: (i) a general description of the labor or materials furnished; (ii) the full name and address of the person supplying such labor or materials; (iii) the full name and address of the person that contracted for such labor or materials; and (iv) a description sufficient to identify the searchable project, based on the description in the notice of commencement. Thereafter, a form for the notice of furnishing is provided, which “must be substantially” followed. Act 142 at § 501.3(b). There are consequences if a subcontractor fails to comply with these requirements. Section 501.3(c) provides: “A subcontractor that fails to substantially comply with this section forfeits the right to file a lien claim.”

While there are merits to the foregoing provisions, there are also shortcomings. Initially, it is advantageous that the owner is now obligated to notify all project participants of the legal descriptions for the property on which the project and its improvements will be located (assuming, of course, the owner wants to take advantage of the benefits of the directory). This has always been a challenge for contractor and subcontractor claimants filing liens in Pennsylvania, particularly where the right of amendment is extremely limited and where a strict construction has been applied to issues of lien perfection. What is not clear, however, are the full consequences if the owner fails to provide accurate information. There appears to be nothing specifically contained in the body of Act 142 that would indicate the claimant would be relieved of obligations otherwise contained in the Lien Law (outside of Act 142) due to misidentification of property interests by the owner. There are some consequences of an owner’s failure to comply with provisions of Act 142 that could benefit subcontractors, discussed below. However, the language of Act 142 does not appear to excuse subcontractor transgressions of the requirements for perfecting a lien claim (beyond Act 142 compliance).

An additionally interesting amendment is “actual completion of work” under the main heading, “Notice of Completion for Informational Purposes Only,” focuses on the term “actual completion of work” with two definitions. The first definition is “issuance of an occupancy permit to the searchable project owner, or his agent, and the acceptance by the searchable project owner, or his agent, of the work accompanied by cessation of all work on the searchable project.” The alternate definition is the “cessation of all work on the searchable project for thirty (30) consecutive days, provided that work is not resumed under the same contract.” Act 142 at § 501.4(a). While there has been an effort to constrain the impact of these statements about actual completion of the work to the directory, they will likely be reviewed with interest by courts looking for legislative guidance on the meaning of “actual completion of work” for other reasons related to perfection and prosecution of lien claims (including analysis of project completion for other purposes associated with the project and relevant contracts). Otherwise, the language becomes curious, even though it is under the heading “Notice of Completion for Informational Purposes Only.”

Notable is § 501.4(b), clearly indicating that while a subcontractor may file a “Notice of Nonpayment with the searchable project owner or owner’s agent or the subcontractor in the directory for informational purposes only,” it “shall not relieve a subcontractor from complying with other written notice requirements under this act.” Then, § 501.4(c) states: “[a] Notice of Completion shall not be considered by a court in determining compliance with timing requirements under this act or in determining the completion date for a timing purpose, including limitation periods or warranty obliga-

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tions.” At best, these amendments appear to provide the owner with a reasonable heads-up that a subcontractor, sub-subcontractor or supplier is not being paid.

Next, there are a number of provisions that seek to protect those using the directory. These are generally contained under § 501.6, “Prohibition,” and focus on those who try to force or dissuade a subcontractor from filing a notice of furnishing. However, the subcontractor is not given this relief if such owner, agent or contractor has simply provided incorrect information under or innocently failed to comply with § 501.3(a). Subcontractors are provided a cause of action against these parties for violations of § 501.6(a).

Finally, in the subsection titled “Abuse,” the legislature equally admonishes all parties that filing a notice in the directory without a good faith basis, with an intent to exact more payment than is due or to obtain an unjustified advantage or benefit will result in an assessment of damages, either actual or $2,000, whichever is greater. Note there is no security for recovery of these amounts, which is the whole purpose of the Lien Law.

The real teeth of these provisions will await judicial interpretation and enforcement. Nevertheless, with the release of the directory, Act 142 is now the law of the land in Pennsylvania.

Edward B. Gentilcore is a shareholder and director of Sherrard, German & Kelly PC. He practices in the areas of construction law and complex commercial litigation. ebg@sgkpc.com

REAL PROPERTY DIVISION
Real estate case law update
By Frank Kosir Jr., Esq.


Must a property owner pay realty transfer tax on a lease that has a primary term of less than 30 years but includes options that would extend the term beyond 30 years?

Saturday entered into a ground lease for the property with Techspec, with an initial term of 29 years and 11 months. Techspec had the option to renew the lease six times at five-year intervals, at a monthly rent of the fair market value, as determined by the parties at the time of renewal or by appraisal if the parties disagreed.

Saturday and Techspec recorded a memorandum of ground lease, asserting the transaction was exempt from realty transfer tax because the lease was less than 30 years. The Pennsylvania Department of Revenue (DOR) concluded the renewal options would extend the term of the ground lease beyond 30 years, thus realty transfer taxes were due.

DOR’s Board of Appeals affirmed DOR, as did the Board of Finance and Revenue.

On appeal, the Commonwealth Court reversed based on 61 Pa. Code § 91.193(b)(24)(i), wherein the formula for determining the length of a lease for real estate transfer tax purposes excludes the duration of any option terms if the parties are not permitted to renegotiate the amount of rent owed or the method for establishing monthly rent. Also, 61 Pa. Code § 91.193(b)(24)(v) provides that renewals which state monthly rent will be based upon fair market value at the time of the extension or renewal are not to be included in establishing the duration of a lease since the actual monthly rent has not been established at the time the lease was executed.

Therefore, since the primary term of the ground lease is 29 years and 11 months, the ground lease falls short of the 30-year threshold for realty transfer tax liability, and no transfer taxes were owed.


In distributing the proceeds of a sheriff’s sale in mortgage foreclosure, are realty transfer taxes to be paid out of, or added to, the prevailing bid?

Northwest obtained a default judgment in mortgage foreclosure against the owners. Thereafter, the property was scheduled for sheriff’s sale, with the notices of sale providing the prevailing bidder must pay sheriff’s poundage of 2 percent of the prevailing bid, and local and state real estate transfer taxes, calculated based upon the assessed value of the property.

Travel Services purchased the property at the sheriff’s sale, and the Venango County sheriff added to the prevailing bid to cover transfer taxes.

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Travel Services paid under protest and filed exceptions to the proposed distribution schedule, asserting the transfer taxes should have been deducted from the prevailing bid, not added to it. The trial court denied the exceptions.

On appeal, the Superior Court reversed. Pursuant to 72 P.S. § 8104-C and 72 P.S. § 8107-D, state and local transfer taxes must be paid out of the proceeds of any judicial sale and have priority over any other claims against the property. Since the statute is silent as to whether realty transfer taxes are to be paid out of, or added to, the prevailing bid, the issue was one of statutory interpretation. Since the statute specifies that transfer taxes have “priority” in a “free and clear” sale, if these taxes were added to the prevailing bid, there would be no reason for them to be given priority since they would be paid out of monies collected separately from the purchase price. For this reason, realty transfer taxes must be paid out of the prevailing bid, and Travel Services was entitled to a refund of the taxes paid.


Is a non-owner spouse an indispensable party to a mechanic’s lien claim?

Schell contracted with Mr. and Mrs. Murphy to install underground drainage lines, a retaining wall and a concrete driveway at the Murphys’ residence. Although the Murphys were married, the property was titled solely in Mr. Murphy’s name. After Schell completed most of the work, a dispute arose and the Murphys ordered Schell to leave the property. The Murphys refused to pay for the completed work, and Schell filed a mechanic’s lien claim against Richard W. Murphy.

Mr. Murphy filed preliminary objections asserting that, since Phyllis was a party to the contract, she was in indispensable party to the proceeding, and Schell’s failure to name her as a defendant deprived the trial court of subject matter jurisdiction. The trial court sustained the preliminary objections and struck the mechanic’s lien claim.

On appeal, the Superior Court reversed, noting there is a significant difference between mechanic’s lien claims and those claims brought on the underlying contract. Specifically, a mechanic’s lien does not create a right to recover unliquidated damages for breach of contract, nor does a mechanic’s lien proceeding settle the contractual obligations of the parties. Rather, a mechanic’s lien claim is a separate and distinct proceeding. 49 P.S. § 1503(a) only requires that a mechanic’s lien claimant name the record owners of the property against which the lien is asserted, not the parties to the contract from which the lien claim arises. In this matter, the record established Mr. Murphy as the sole owner of the property. As such, the trial court incorrectly found Mrs. Murphy was an indispensable party to the mechanic’s lien proceeding, and its determinations had to be reversed.


Does a tax upset sale of a portion of “Clean and Green” tax-reduced land trigger the assessment of roll-back taxes on the entire parcel?

Maula owned three contiguous parcels receiving preferential tax treatment pursuant to the Pennsylvania Farmland and Forest Land Assessment (Clean and Green) Act of 1974. When one parcel was lost at a tax sale, the county, concluding the tax sale constituted a split-off of the preferentially assessed lands, revised the assessment of the entire parcel and imposed roll-back taxes thereon. Maula appealed to the board of assessment, which affirmed the roll-back taxes. The trial court reversed.

On appeal, the Commonwealth Court affirmed, deciding a “split-off” requires a “conveyance or other action of the owner.” Because Maula did not commit an affirmative act causing a separation of the enrolled lands, he was not liable for roll-back taxes. It was the subsequent sale of the parcel by the County Tax Claim Bureau, not Maula’s inaction in failing to pay real estate taxes, which resulted in the severance.


Is a county liable for personal injuries sustained by an individual who slipped and fell at the county recorder of deeds office while performing research?

Ronhilde Gillingham worked at one of many computer research cubicles in the office of the Delaware County Recorder of Deeds. As she stood up to leave, she tripped on computer cables on the floor, fell and sustained injuries. Gillingham alleged the county was negligent in failing to both maintain the floor area and assure that the floor was free of computer cables. The county filed a motion for summary judgment, asserting the claims were barred by the Political Subdivision Tort Claims Act (Act) (42 Pa. C.S. §§ 8541-8542). In support of its motion, the county attached an affidavit of the cubicle installer, affirming that the cubicles and computers are fully removable and not affixed in any manner. The trial court entered summary judgment for the county.

On appeal, the Commonwealth Court affirmed, based on 42 Pa. C.S. § 8542(b)(3) (the “real property exception” to governmental immunity). The appellate courts have repeatedly held that the relevant inquiry is whether an

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injury was caused by personal property that is not attached to the real estate (in which event governmental immunity applies) or by a fixture attached to the real estate (in which event governmental immunity does not apply). In this instance, the record established that Gillingham’s injuries were caused by computer cables that were not affixed to the real property. Therefore, the computer cables constituted personal property, and the trial court properly concluded the county was immune from liability.


Is a trial court’s order in a partition action directing real property to be sold a final order subject to appellate review?

In December 1997, Zablocki, a married couple, and Beining, an individual, purchased real property together. Each held equal one-half shares, and they intended to operate a business. The business never materialized, and Zablocki constructed a single-family residence, with Beining’s permission. Zablocki occupied the residence and paid the all mortgage and real estate taxes.

Years later, Zablocki commenced a partition action against Beining. Beining filed an answer and new matter, and the Zablocki filed a reply. Thereafter, the matter remained dormant for more than seven years, at which time the Zablocki motioned for a status conference, at which the trial court appointed a master. The master conducted a hearing and issued a report concluding that subdivision of the property was not possible and recommending the property be sold. The trial court accepted the master’s findings, and issued an order directing that the property be listed for sale.

Zablocki filed exceptions to the order, which were denied, and then appealed to the Superior Court, which quashed, noting that, pursuant to Pa.R.C.P. 1557, a trial court must first order that a partition take place before referring a partition action to a master. In this instance, the trial court never ordered a partition. Rather, the only orders entered were to appoint the master, and the order accepting the master’s report and directing that the property be sold. For this reason, the order directing the property to be sold was not a final appealable order disposing of all claims, and the Superior Court lacked jurisdiction to hear the appeal.


May the owners of property in a planned community withhold assessment payment for a claimed lack of services?

The McCabes live in Logan's Reserve, a planned community under the Pennsylvania Uniform Planned Community Act, 68 Pa.C.S. §§ 5101 et seq. The planned community association’s declaration and bylaws require all property owners to pay common expense assessments to the association.

After paying assessments for a time, the McCabes ceased, claiming the common area located directly behind their property was not being properly maintained. The association commenced an action seeking to recover the amounts owed, and the McCabes asserted they were permitted to exercise self-help and to refuse to pay assessments as long as the association failed to maintain the common areas. The association filed a motion for judgment on the pleadings, which was granted by the trial court.

On appeal, the Commonwealth Court affirmed. An association has an automatic lien against a unit “for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due.” The act has no language authorizing an aggrieved owner to withhold payment of common expenses until its grievances are addressed. Rather, the only remedy available is to bring complaints to the association. As such, the trial court properly entered judgment on the pleadings for the association, and its determinations had to be affirmed.


Does a lis pendens properly attach to property in an action where the plaintiff seeks only monetary relief?

Michael, a former employee of GLD Foremost Holdings LLC (GLD), sued GLD in U.S. District Court alleging breach of contract, asserting GLD failed to pay him from the sale of his interest in the LLC. Michael filed two praecipes for lis pendens against GLD’s real property asserting that his federal court action concerned the property. GLD had entered into negotiations to sell the property and was unable to do so due to the existing lis pendens. GLD filed an emergency motion to strike the lis pendens asserting that, since Michael’s claims were solely monetary in nature, title to the property was not in dispute. The trial court denied the motion, and GLD appealed.

The Superior Court reversed and remanded with directions to enter an order striking the lis pendens. A lis pendens is only proper where any interest acquired by a third party will be subject to the results of the litigation. In this matter, Michael’s federal court action sought only monetary damages and did not include any claims to the property. Furthermore, to the extent Michael had not been paid the balance of the purchase price for his share of GLD, his signing an agreement to sell

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his interest limited his rights to that of a security interest and did not vest in him the right to file a \emph{litis pendens} against GLD’s realty.


Does one-time common ownership create an implied sewer line easement?

Gurecka contracted to sell her home, and the buyer’s inspection discovered a sewer blockage. While making the required repairs, the plumber discovered Gurecka’s sewer lateral proceeded from her property under a public street, and onto the lands of Carroll, where it connected with the main sewer line. Carroll ordered the contractor to cease and desist, resulting in a termination of the agreement of sale.

Gurecka sued Carroll, seeking an implied easement for the sewer line, and the trial court granted a preliminary injunction.

At a subsequent hearing, Gurecka showed the two properties were once titled in a common grantor, who subdivided the lands and constructed both residences. This grantor resided in the Gurecka house for approximately 20 years after constructing the dwelling and, since the Gurecka property did not have direct access to a public sewer line, connected the sewer lateral through the Carroll property.

Carroll replied they had no notice of Gurecka’s sewer lateral on their property and that continued maintenance of this lateral would render a significant portion of their property unusable. The trial court found an implied easement and issued an order making the injunction permanent. On appeal, the Pennsylvania Superior Court reversed, but Gurecka’s application for reargument was granted.

Following reargument, the Superior Court affirmed the trial court, based on the “traditional test” for implied easements, which requires: (1) a separation of title; (2) that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest, as to show that it was meant to be permanent; and (3) that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.” The court found a common grantor severed title, that the sewer lateral was in existence at the time that title was severed, and that the sewer lateral was necessary for the beneficial use of the Gurecka property. Further, there were four manhole covers on the Carroll property, which put Carroll on notice that sewer laterals other than their own were located on the property.


Does a transfer of title to a political subdivision serve to interrupt, or merely toll, the period of adverse possession?

Wells took title in 1965. The adjoining property was purchased by Weible by deed from Jefferson and Clearfield Counties in 1998. From 1995 through 1998, the counties operated a mental health facility on the Weible property.

In 2008, Weible commissioned a survey that concluded a portion of the Wells’ driveway and landscaping encroached onto the Weible property (disputed property). When Wells refused to leave the disputed property, Weible commenced an ejectment action. Wells counterclaimed for adverse possession. The trial court found for Weible since, although Wells met all other tests for adverse possession, title to the Weible property had previously been in the counties, and Pennsylvania law provides that adverse possession cannot be taken against a political subdivision. Thus, the conveyance to the counties served to interrupt, not merely toll, the Wells’ period of adverse possession.

On appeal, the Superior Court reversed, concluding that whether a claim of adverse possession can be asserted against a landowner is distinguishable from whether the claimant can adversely possess that land during the time period that it is titled in the same landowner. Although Pennsylvania courts hold an adverse possession claim cannot be asserted against a political subdivision, the mere fact that a parcel of land is titled in a municipal subdivision does not, in and of itself, mean the land cannot be concurrently used in an adverse manner. Here, Wells had openly possessed the disputed property for more than 21 years, including the time period that it was titled in the counties. Therefore, while Wells could not have asserted an adverse possession claim over the disputed property during the time that it was titled in the counties, once the counties had conveyed title to Weible, the Wells could assert such claim and the time it was titled in the counties could be used to calculate the requisite 21-year period to obtain adverse possession.

\textit{Adams Township v. Richland Township, 2017 Pa. LEXIS 393 (2017)}

May a board of commissioners appointed to ascertain the location of a disputed boundary between two municipalities take into consideration the boundary line previously “acquiesced to” by those municipalities?

Adams and Richland townships dispute the location of their shared boundary. Although Adams was created in 1870 out of a piece of Richland, the document creating Adams had been lost, and no documentation existed to establish the boundary. Ad-
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Ams and Richland treated a boundary line depicted in the Cambria County tax assessment records as the common boundary. In 2004, Adams and Richland retained a professional surveyor to locate the boundary. This surveyor relied upon surveys performed by other neighboring townships, as well as monuments, to identify the disputed boundary. Adams accepted the boundary location found by the surveyor, but Richland preferred the boundary line in the tax assessment records. Adams commenced a declaratory judgment action seeking a judicial determination that the surveyor’s proposed line represented the location of the boundary between Adams and Richland. Pursuant to Section 303 of the Second Class Township Code (53 P.S. § 65101, et seq.), the court appointed a board of commissioners to determine the location of the disputed boundary. The board conducted several hearings at which owners of real property along the disputed boundary testified they had built their homes and made other improvements based upon their understanding that the boundary line in the assessment records was accurate. The board found that, based upon the evidence presented, it was unable to determine the location of the disputed boundary. As such, since Adams and Richland and the owners along the disputed boundary had previously relied upon the boundary location established by the tax assessment records, the boundary had to be set at that location. Adams filed exceptions. The Commonwealth Court reversed and remanded the matter to the trial court, concluding the board exceeded its authority by placing the boundary at a location it deemed fair and not a location supported by evidence. Richland filed a petition with the Supreme Court, which granted allocator on the sole issue of whether the doctrine of acquiescence permitted the adoption of the tax assessment boundary despite the fact there was no question this line was not the original boundary.

The Supreme Court reversed, finding the doctrine of acquiescence can be applied to municipal boundary disputes where private property owners have made substantial improvements induced by a municipality’s long-time acquiescence to a boundary location. Furthermore, the board of commissioners is the fact-finder charged with determining the credibility of witnesses, weighing the evidence and determining whether there is sufficient evidence to locate the boundary. If a board is unable to locate the boundary based upon the evidence presented, it may then consider applying the doctrine of acquiescence. In such circumstances, if the record establishes property owners along the disputed boundary have made substantial improvements to their property based upon reasonable reliance on the location of the boundary, the disputed boundary can then be placed at that location.


Does reassessment of real property due to improvements made prior to the current owners’ purchase constitute impermissible spot reassessment?

Fasnacht purchased a property in 2013. In 2015, the Schuylkill County tax assessment office issued a notice doubling the assessment, pointing to a 2010 building permit to construct a sunroom. Construction was completed in 2015, at which time the reassessment took place. The owners appealed to the county board of property assessment appeals, asserting the reassessment constituted an impermissible spot reassessment. The board held a hearing where the field appraiser testified it was the office’s practice not to issue assessment change notices until all construction work was completed. The board, concluding that the reassessment notice was properly issued, denied the owners’ appeal, and the trial court affirmed.

On appeal, the Commonwealth Court affirmed, based on Section 8813 of the Consolidated County Assessment Law (53 Pa.C.S. §8813), by which a county assessor may revise an assessment absent a county-wide reassessment when, among other changes, additional improvements have been made. Furthermore, Section 8813 does not establish any specific time limits for the completion of such reassessments.


Must a non-titled spouse be named as a defendant in a mortgage foreclosure proceeding?

Bryan Watters and Diane Watters, a married couple, purchased a home. Due to Diane’s poor credit rating, the Watters decided to title the property solely in Bryan’s name, and Bryan alone gave a mortgage on the property. On April 16, 2013, Bryan Watters filed for divorce and moved from the property, while Diane continued to reside there. Bryan ceased making mortgage payments, and U.S. Bank commenced foreclosure. Although Diane was served with a copy of the complaint as the occupant, she was not named as a defendant. A default judgment was entered against Bryan, and the property was scheduled for sheriff’s sale where it was purchased by the bank. More than one year later, the Watters filed a petition seeking to open or strike the default judgment, set aside the sheriff’s sale, or obtain leave to intervene in the foreclosure.

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sure action. Watters asserted that, since Diane held an equitable interest in the property as a result of the divorce proceeding, Pa.R.C.P. 1144 required that she be named as a party to the foreclosure action. Therefore, since the bank failed to name her, the trial court was without subject matter jurisdiction and unable to enter a default judgment.

The trial court denied the petition, concluding Diane Watters did not have an ownership interest in the property as defined by Pa. R.C.P. 1144. The court further noted Diane had notice by virtue of being served with a copy of the complaint as the occupant, and had every opportunity to intervene in a timely manner, but chose not to do so.

On appeal, the Superior Court affirmed, noting Pa.R.C.P. 1141 through 1150 govern actions in mortgage foreclosure, and that Pa.R.C.P. 1144(a)(3) provides that a plaintiff must name as defendants “...the real owner of the property, or if the real owner is unknown, the grantee in the last recorded deed.” In this matter, since only Bryan Watters’ name appeared on the deed, Diane was not a “real owner” and her possessing an equitable interest in the property by virtue of the divorce proceeding was irrelevant. Therefore, the trial court properly concluded the Bank had no obligation to name Diane Watters as a defendant in the foreclosure proceeding.


Is a foreclosing lender of a mortgage evidenced by a note endorsed in blank required to establish the history of assignments of the mortgage?

Steven and Barbara Bach gave a mortgage to Financial Mortgage Corp., which assigned to First Horizon Home Loan Corp., which assigned it to Bank of New York Mellon as trustee. Bachs defaulted, and a foreclosure followed. Bachs filed an answer wherein they denied the validity of the assignments of the mortgage.

At a non-jury trial, the bank produced the original note which was executed by the Bachs and endorsed in blank. The Bachs did not deny the validity of the mortgage, nor that they had failed to make requisite payments. Their sole defense was that there was a prior assignment of the mortgage from the original lender to another party which rendered the original lender’s assignment of the mortgage to First Horizon, and the subsequent assignment to the bank, invalid. The trial court entered a verdict for the bank and subsequently denied the Bachs’ post-trial motions.

On appeal, the Superior Court affirmed, following precedent that a note secured by a mortgage is a negotiable instrument, and the right to enforce the debt evidenced by the note is vested in any party possessing the note. Here, the bank produced the original note endorsed in blank, and the Bachs did not challenge the authenticity of the note, nor their failure to satisfy their obligations under the note. As such, the history of assignments of a note endorsed in blank was irrelevant.


May an equitable lien be imposed upon a party’s ownership interest in a parcel of real property?

Finkel and Bryan purchased property as tenants in common. At purchase, Finkel gave a mortgage against her interest to Wells Fargo, while Altieri paid cash. Both Finkel and Altieri were listed as grantees on the deed. However, only Finkel executed the mortgage, note and other related loan documents, each of which was solely in her name. Finkel and Altieri subsequently married, and later the mortgage went into default. Lender commenced an action to reform the mortgage to name Altieri as a mortgagor or, in the alternative, to impose an equitable lien on Altieri’s interest. The bank asserted a mutual mistake caused Altieri not to be named as a mortgagor. Altieri answered that, since he had paid his portion of the sale price in cash, it was never his intention that his interest be encumbered.

The trial court entered partial summary judgment for the bank and imposed an equitable lien on Altieri’s interest.

On appeal, the Superior Court reversed and remanded to the trial court for further proceedings. The court noted Pennsylvania appellate courts have repeatedly held that mere borrowing of money is insufficient to create an equitable lien. Rather, in order for an equitable lien to be imposed, there must be clear evidence that the parties to the transaction intended for that party’s interest to be encumbered. In this matter, Finkel’s answer to the complaint specifically denied any intent to encumber Altieri’s interest in the property, and Altieri similarly denied any such intent. Furthermore, in response to discovery, requests served upon them by the bank, Finkel and Altieri asserted that the bank purposely did not include Altieri on the mortgage and note due to its concerns that his lackluster credit rating would negatively impact Finkel’s abilities to qualify for a mortgage loan. As such, significant questions of material fact existed such that the trial court’s entry of partial summary judgment was inappropriate, and the matter had to be remanded to the trial court for a trial on the merits.

Frank Kosir Jr. is counsel to Meyer, Unkovic & Scott LLP in Pittsburgh and is a member of the firm’s Real Estate and Lending, Litigation and Dispute Resolution and Construction Law Groups. fb@muslaw.com.
LISTSERVS

List Threads of Interest

What is a Listserv?

A Listserv is an electronic mailing list that allows subscribers to exchange information with each other simultaneously. Joining a list is like having a live conversation with a group by email. When you subscribe to a list, you email all list members via just one email address.

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- To reply only to the sender, 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 manually add 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.

For customer service, contact Daniel Fuentes, PBA internet coordinator, 800-932-0311, ext. 2255.

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Curious parenthetical in metes-and-bounds description in deed

Q Tail end of description: “… thence along said last mentioned line South 28° 30’ West a distance of 107.48 (survey, a distance of 107.60 Deed) feet to the northeasterly side of Jackson Street, Pittsburgh, Pennsylvania…”

The parcel is also identified by block and lot number and the prior conveyance is duly identified. Should I worry about the parenthetical?

- If you are preparing a new deed you describe it according to the survey and in the parenthesis indicate the deed distance. At the end of the description recite the survey: i.e., “The above legal description is in accordance with that certain survey prepared by ______, Registered Professional Land Surveyor, dated _____, at Drawing No. _____.”

Joint tenants with ROS or tenancy in common?

Q Mother owns parcel in fee simple. In 1988, mother conveys to son “an undivided ½ interest in and to all those certain lots…” In 1991, son conveys to mother “an undivided ½ interest in and to all those certain lots....”

Do mother and son own as JT-WROS, TIC, or does mother own the whole? Or, does mother now own 3/4 undivided interest as a tenant in common and the son retains a 1/4 undivided interest as a tenant in common?

Since the uncertainty probably arises because the Deed did not explicitly state that the mother now was intended to be the fee owner of the whole, if there is any question, it might be appropriate to file a declaratory judgment action. All successors in interest to mom’s interest and son’s interest if either or both are dead should be parties. If they all agree now and a deed to someone is about to be delivered they all could join. Otherwise, the Dec. Judgment method is what I would likely use.

- The textbook answer is that to create a joint tenancy, there has to be a unity of time, title and interest. Unless the first deed was from Mother, as sole owner, to mother and son, and using specific words of survivorship, my vote is tenancy in common.

As to who owns now, while inelegant, I’d go with Mom owns 100%. But it would have been much better to say son conveys MY ½ interest in the property ...

Tree damage responsibility

Q Client has a big tree in his yard that hangs over neighbor’s yard. In the past, branches have broken off and landed in the neighbor’s yard, doing damage to neighbor’s property. Neighbor has asked client to either have the tree topped off or removed. Client has limited funds.

What is client’s (a) responsibility to maintain the tree in a “safe” condition and (b) liability for damage to neighbor?

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bor’s property?
• The neighbor is allowed to trim back to the property line. The owner can be sued for negligence or nuisance if they fail to maintain the tree. That’s the short version.

(The poster went on to provide a complete list of cases and legal research on point. See the Listserv archives for this extremely helpful and in-depth analysis.)

Common elements conveyed to HOA by declarant
Q May homeowner’s associations refuse to take title to common elements that are not adequately constructed?

UPCA is surprisingly silent on this issue. Assuming our declaration lacks the procedural protections required by Section 5205, there still must be some protection somewhere that would prevent a declarant from omitting the protective wording from the declaration and then dumping cheaply/inadequately constructed common elements upon the HOA by simply recording a deed.

• It doesn’t relate to the discretion in taking title, but the warranty against structural defects may be applicable (Section 5411).
• Great question, and often a bone of contention between declarant and association. I have seen owners refuse to assume positions on the board of the condo or HOA to pressure the declarant to properly perform. This can leave the board with no members, so not a good choice.

Many declarants wish to convey UPCA common elements as soon as possible, to make the tax assessment go away. Of course, mere conveyance does not absolve the declarant from responsibilities to the township, utility companies, association or owners.

• You might use a trust. But you would need to provide a source of funding for the payment of taxes, insurance, repairs and improvements.

• I recommend the PBI book and CD package: “Estate Planning for the Family Vacation Home” from 2015. It considers all kinds of issues, including ownership structures, estate planning, operating provisions, exit strategies, family and emotional issues, estate and gift tax issues and deduction of costs, among other things.

• You may want to further clarify what their goals are and why the unequal interests. Division of rental income? Ability to afford expenses? Who gets priority for holidays? Who gets what? You don’t want to create something that leads to a partition action. I like to use a trust in this situation, but the trust would need cash to fund ongoing maintenance and upkeep of the home, if it is not rented.

Recording 1993 POA
Q I’m looking for some long-shot advice here. Person created his own POA form in 1993 (typed and signed by him but not witnessed or notarized). He had a major stroke last year, and is not able to communicate effectively. All of his doctors agree he doesn’t have the capacity or understanding to execute any new documents.

His wife & family have been able to use the POA for his health care and other financial matters. However, now they want to transfer the house into wife’s name only.

Is there any way the POA can get recorded? I’m pretty sure all recorders require every document being recorded to be notarized/acknowledged, but I was hoping for a suggestion to get around this. I know guardianship is probably the only answer here, but just looking for another avenue.

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• Long shot answer. Record the POA in the Orphans Court and not with the Recorder of Deeds. The OC does not require the POA to be notarized. Recite the OC recording in the deed. The Recorder of Deeds will, or should, record the deed. But, will you have a valid conveyance by an agent? You will need to check the law which was applicable to the valid creation of a POA at the time the gentleman wrote his POA. You may also want to check with your regular “go to” person at your friendly title insurance company to see if they will insure the property when the wife wants or needs to sell. Good luck.
• You may want to run this by counsel for the county Recorder of Deeds. But perhaps you can get a notarized affidavit from two witnesses who can attest to the authenticity of the signature? I used this effectively to probate a non-self-proving will where the witnesses were both dead.
• I have done this same procedure and obtained a certified copy of the POA from the RW and recorded it at the RD.

JTWROS property

Q Bank account of decedent was jointly-owned with a child (by survivorship). The child knows under law the account is hers, but nonetheless wants to “disclaim” the account. Is there any tax ramification of her disclaimer (gift tax return required?) or other estate administration implication?

• The problem with a disclaimer is it is likely to result in additional inheritance tax.
• If an account is in joint names, then only half of the account is subject to inheritance tax. But if the surviving account owner disclaims the right of inheritance, then the entire account is subject to inheritance tax.

My recommendation is usually that the surviving owner accept the account, and then make gifts to siblings (or whatever). In most cases I deal with, the resulting gifts are less than $14,000, so I don’t even need to talk about federal gift tax consequences.

POA waiver of accounting

Q In reviewing a power of attorney, I noticed an interesting paragraph I have not seen before:

“Waiver of Accounting Obligations: My Agent shall not be required to comply with the accounting obligations set forth in the Pennsylvania Probate, Estates, and Fiduciaries Code.”

I am curious whether it would be enforceable. Would it actually relieve the agent of the obligation, or would it give the agent a false impression they do not have to worry about an accounting, when in fact a court could still order one?

• I was taught that the essence of the fiduciary relationship was a duty to account. After all, if there’s no duty to account, then the money belongs to the fiduciary for all practical purposes. This is explicit in the Uniform Trust Act, because 7705(b) (8) provides that a mandatory rule is “The duty of a trustee under section 7780.3 (relating to duty to inform and report).”

BUT… Our legislature in its very limited wisdom provided in section 5601.3(b) that, “Except as otherwise provided in the power of attorney,” an agent shall “(4) Keep a record of all receipts, disbursements and transactions made on behalf of the principal.”

So it appears that the duty to keep records (and therefore account) can be waived.

• The inherent weakness in 5601.3(b) is that the scrivener can draft away this foundational fiduciary duty. 5601.3(b) is, however, a two-edged sword which, when properly wielded, provides the proper protections for both agent and principal without forfeiting the fundamental duties of a fiduciary.

This is precisely why a boilerplate Power of Attorney form is no longer acceptable. The over (or under) inclusion of duties without proper discussion with the principal (and also agent, as necessary) might create some very unintended consequences.

A mess

Q Testator signed will in hospital room with 2 witnesses, all notarized. Will later admitted into Probate by ROW. A will contest ensues. At depositions, it turns out that neither of the witnesses were present at the signing. They signed at the scrivener’s office and notarization occurred there. Witnesses did not know testator and are not familiar with his signature.

Putting aside all issues involving the notary, is this will valid? If not, can it be rehabilitated by 2 witnesses familiar with testator’s signature, even after being admitted into probate? Any other thoughts?

• Yes & Yes. Yes - there is no requirement that the Will contain subscribing witnesses. Any two witnesses with affidavit will suffice.

Yes - If the ROW will allow, but if not, and assuming that the Will is otherwise valid, how could the Will, upon resubmission, be rejected?

Probate in Pennsylvania is a process. The first step is registering the Will. Not a big deal (usually). Then comes the one year for anyone to challenge that registration.

• Agreed. See 2502 and 2504.1 of the PEF Code

• I agree the will could still be valid, and could still be proven, but I’m not sure of the proper procedure at this point.

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The OC could vacate the probate of the will and remand to the Register in order to allow the proponent to prove the will by the testimony of two persons familiar with the testator’s signature, or perhaps with handwriting analysis. Or, the judge could figure that the Register already took one stab at it, and allow the proponent to present testimony in the OC appeal to rehabilitate the probate. I think that the first procedure is probably the “right” one, but the second one might be more expeditious.

One problem is the scrivener of the will, who is presumably a lawyer, has presented what he/she must have known was a false affidavit to the Register, committing a fraud on the Register. That means that he/she is probably no longer a credible witness in favor of the will, and could be facing disciplinary charges.

Is a will signed by POA valid?

Q

I have a Will executed by a POA. The POA does not specifically grant the authority to execute a Last Will and Testament. The Will does not contain any language that the testator was unable to sign and directs the POA to sign on her behalf. Unfortunately, the testator is now deceased. Is the Will signed by a POA valid?

A: No. Simple answer. A signature by mark of another or something similar might at least raise an interesting discussion. A LWT executed by an agent on a POA? No.

• Correct. See Estate of Pendergrass, 26 A.3d 1151.
• The Superior Court quashed the appeals, and so never reached the merits. The lower court opinion is published at 30 Fid.Rep.2d 430, and the guts of the opinion is as follows: “… an agent under a power of attorney does not have the power to execute a testamentary document on behalf of his or her principal. This concept is axiomatic—so much so that we can find and were cited to no Pennsylvania cases that spell it out, although numerous legal treatises, commentaries and internet blogs and commentaries affirm it.”

The court also found noncompliance with the “execution by another” provisions of section 2502(e).

Incidentally, for those who don’t recognize the name, these cases (and a later decision that found that the probated will was a forgery, published at 5 Fid.Rep.3d 159) relate to the estate of singer Teddy Pendergrass, who was paralyzed in an automobile accident in 1982, and died in 2010 at the age of 60.

Islamic will

Q

Does anyone have experience drafting estate planning documents compliant with Islamic law?

• This is a troublesome question. Some time ago I had a Muslim come to me to prepare a will to leave property as the local Imam may determine. I told him it had to be “his Will” and not that of the Imam. He was very unhappy.

• Some years ago a Muslim family came to me. Husband, wife, son and 2 adult daughters. He wanted everything to go to the eldest son. Nothing for wife or daughters, who all sat in my office and agreed. They understood the eldest son would provide for them.

Since it was not my culture, ultimately I could not satisfy me, let alone them. I also had issue with a Saudi man who brought his wife here and bought a house as H & W. They returned home and he wanted to sell the house. I was the title agent and insisted on wife’s notarized signature. He said in his culture she had no status. I said she is on the deed, so she has status in PA. I told him to have the US Embassy notarize her signature before I could accept the deed for recordation, which he did.

• That sounds like a general power of appointment, making it a gift to the Imam.

• What I would be concerned about is the person holding the power giving all of the property to himself. And, if you name someone to exercise the power and exclude them from appointing the property to himself, you don’t want that person to also be the sole executor because then there would be no one to know to whom the estate was given.

If the Imam is to have the power to dispose of the estate, you probably want to specify that the Imam not give the property to himself, and that there be an executor other than the Imam.

• This raises interesting questions, among them inheritance tax. If the will says all to [proper given name], Imam, who is not a close relative, there will be 15% tax. If the Testator really means for the Imam to use the money for furtherance of religious mission, then it should be left to the [proper name of recognized religious organization], and would be zero taxed. Or if he means it to be used for the wife and children, then the Imam should be trustee with named beneficiaries so it can be taxed at zero and/or 4.5%. Even more drastic issues if it happens to be Federal Estate Taxable. In my experience, vague dispositions lead to court, for various reasons.
Real Property, Probate and Trust Law Section Leadership • 2017-2018

Brett Solomon, Chair
Tucker Arensberg PC
1500 One PPG Place, Pittsburgh, PA 15222
(412) 594-3913
bsolomon@tuckerlaw.com

Mark A. Mateya, Vice Chair, Probate Division
Mateya Law Firm PC
55 W. Church Ave., Carlisle, PA 17013
(717) 241-6500
mam@mateyalaw.com

Marshal Granor, Vice Chair, Real Property Division
Granor & Granor PC
721 Dresher Rd., Suite 1000, Horsham, PA 19044
(215) 830-1100
marshar@granorprice.com

Alison Smith, Secretary
PNC Bank NA
300 Fifth Ave., Pittsburgh, PA 15222
(412) 762-1544
alison.smith@pnc.com

James S. Tupitza, Treasurer
Tupitza Associates PC
212 W. Gay St., West Chester, PA 19380
(610) 696-2600
Jim@Tupiztalaw.com

Jennifer L. Rawson, Immediate Past Chair
Immediate Past Chair
Eckert Seamans Cherin & Mellott LLC
600 Grant St., Fl. 44, Pittsburgh, PA 15219
(412) 566-6784
jrawson@eckertseamans.com

Kirby G. Upright, Section Delegate
King Spry Herman Freund & Faul LLC
One W. Broad St., Suite 700
Bethlehem, PA 18018-5717
(610) 332-0390
kuright@kingspry.com

COUNCIL MEMBERS:

Michael A. Burns
Burns Law PC
110 W. Front St., Media, PA 19063
(610) 566-1606
legal@burnslaw.org

L. Christian DeDiana
533 Rugh St., Suite 3, Greensburg, PA 15601
(724) 219-3906
chris@dedianaelderlaw.com

Amanda K. DiChello
Saul Ewing LLP
Centre Sq. W., 1500 Market St., Fl. 38
Philadelphia, PA 19102
(215) 972-7761
ADiChello@saul.com

Melissa Lynn Dougherty
Cohen & Grigsby PC
625 Liberty Ave., Pittsburgh, PA 15222
(412) 297-4686
MelissaDougherty@cohenlaw.com

Ronald M. Friedman
PO Box 10362, State College, PA 16805
(814) 234-3500
attyronfriedman@aol.com

Cristin Long
McQuaide Blasko
811 University Dr., State College, PA 16801
(814) 238-4926
crlong@mqlaw.com

Eugene Orlando Jr.
Orlando Law Offices PC
2901 St. Lawrence Ave., Suite 202,
Reading, PA 19606
(610) 779-3830
eorlando@orlandolawoffices.com

Lisa A. Shearman
Hamburg Rubin Mullin Maxwell & Lupin PC
375 Morris Rd., PO Box 1479, Lansdale, PA 19446
(215) 661-0400
LShearman@HRMML.com

Orlando R. Sodini
Thompson Calkins & Sutter LLC
850 Ridge Ave., Ste 300, Pittsburgh, PA 15212
(412) 904-4682
osodini@tcslawfirm.com

Colleen Rachel Stumpf
Quinn Buseck Leemhuis Toohey & Kroto Inc.
2222 W Grandview Blvd
Erie, PA 16506
(814) 833-2222
cstumpf@quinnfirm.com

Kenneth J. Yarsky II
Sherrard German & Kelly PC
535 Smithfield St., Suite 300, Pittsburgh, PA 15222
(412) 355-0200
KJY@sgkpc.com

Charles J. Vogt, Board Of Governors Liaison
Law Offices of Charles J. Vogt LLC
PO Box 103, Tannersville, PA 18372
(570)420-0438
cjvogt@gmail.com

Marshall Granor, Newsletter Executive Editor
Granor & Granor PC
721 Dresher Rd., Horsham, PA 19044
(215) 830-1100
marshar@granorprice.com

Pamela Kance, Staff Liaison
Pennsylvania Bar Association
(717) 238-6715, ext. 2243
Pam.Kance@pabar.org

Diane Banks, Staff Editor
Pennsylvania Bar Association
(717) 238-6715, ext. 2217
diane.banks@pabar.org
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