year ago, as I began my term as chair of the RPPT Law Section, I stated that “I certainly did not anticipate that I would be stepping into this role at such an uncertain and unprecedented time.” At the time, we were less than three months into the pandemic. Life as we knew it (including the practice of law) had changed forever. When I wrote those words a year ago, I could not have imagined what was yet to come.

It’s been a challenging year for all of us (on both personal and professional levels). It was also a year when our section truly rose to the occasion to serve the profession and the citizens of our commonwealth. Let me highlight just a few of the accomplishments.

At the request of the PBA legislative staff, the section provided critical input for executive orders and regulatory action on the use of remote notarization for estate planning documents. The section conducted its first-ever virtual retreat, highlighted by a panel discussion of “Diversity in the Profession,” in collaboration with the Minority Bar Committee and the PBA Diversity Team. The panel discussion was later presented to the Allegheny County Bar Association Probate and Trust Section. Additionally, the section has drafted proposed legislation for remote witnessing of certain estate planning documents and is working collaboratively with the Elder Law Section to address other issues relating to the remote and/or electronic execution of estate planning documents. Rounding out the year, the section submitted official comments to the proposed Supreme Court Orphans’ Court Rule on personal representative access to digital assets.

The RPPT Law Section continues to be a leader within the PBA, and our section leadership continues to be active and engaged even beyond their leadership terms. This is evident by this year’s PBA Awards Luncheon, where two of our past chairs were honored. Congratulations to Eric Strauss and Marshal Granor, who both received PBA Special Achievement Awards. The recognition is so well deserved. Eric and Marshal are tremendous assets to our section and the PBA membership.

On Aug. 10, the section will host its inaugural pro bono event in conjunction with the Annual Retreat. We will

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partner with the SeniorLAW Center in Philadelphia to host a virtual life planning clinic for seniors where volunteer lawyers will draft wills, powers of attorney and advance health care documents for seniors. I hope this will be the first of an ongoing series of planning clinics hosted by the RPPT Section in collaboration with community organizations throughout the commonwealth. You can find additional information about this pro bono opportunity in the Annual Retreat brochure and this newsletter, including how to sign up as a volunteer.

Last but not least, before I officially sign off on this last report of my tenure as chair, I want to express my thanks and gratitude for the PBA staff who have been such a valuable resource. The section could not accomplish what we do (nor could I) without the PBA staff — Pam, Fred, Ashley and others who have stepped in and provided assistance over the last year. Their assistance and guidance have been invaluable and I am consistently impressed by their dedication, professionalism and knowledge.

I am extremely proud of the contributions that our section and individual members made during the last year to their clients, their profession and their communities, and I am inspired by their commitment. It has been an honor to serve as your chair.
RPPT Retreat, Aug. 11 – 13, in Philadelphia
Join Us If You Can!

By Marshal Granor, Retreat Chair

Live, from Philly, it’s the RPPT Retreat, Aug. 11 – 13, 2021. While things may change after penning this column, your section leaders are moving full speed ahead to bring you one of the best reasons to get back together after so much time living in quarantine and masks. I don’t know about you, but I’m ready to greet each of you personally and not through a Zoom screen.

Our tireless Retreat Committee has created a meaningful program. Our CLE topics include the opportunity to meet with, question and perhaps politely debate Pennsylvania Department of Revenue staff. We will explore the intersection of real property practice with nonprofit corporation and guardianship law with the judge who wrote the seminal case to preserve a mural at the Painted Bride.

Every year, the Year in Review for both “death” and “dirt” get rave reviews, and they’ll be back. Together we’ll explore remote notarization and have our obligatory two hours of ethics credits in fun and interactive topical classes. Additional sessions include leasing in the aftermath of COVID, special needs planning, the Abandoned and Blighted Property Act, and the collision of privacy and security: Pennsylvania’s Digital Assets Act.

Are you a fan of the National Constitution Center? It’s just a five-minute walk from our conference hotel and will be the location of our gala Thursday Night dinner ... but first, we will have the museum to ourselves for the unique live multimedia “Freedom Rising” presentation followed by time to visit the main exhibit hall. If you have never been to this landmark museum, be prepared for goosebumps and pride in our Constitution. If you are a longtime visitor, there is always something new to learn. Then, we will adjourn to the Great Hall for social time and dinner overlooking Independence Hall.

Our location at the spectacular Kimpton Monaco boutique hotel is right at Independence Mall, a short walk from all the history of the birth of our country, as well as the Delaware waterfront. Plan to bring your significant other and your kids, young and old.

We will be following all current best practices for a safe meeting environment, following CDC and state health guidelines. At the time of this writing, things seem open for indoor and outdoor unmasked gatherings. At the same time, we will do everything possible to honor everyone’s personal needs.

If you have never attended an RPPT Retreat before, please make this THE year. First-timers receive a special discount, and I promise you will receive a warm welcome from your section leaders and members.
After more than a year of masks, social distancing and alternative accommodations for everything from closings to client consultations, it appears we are finally emerging from the pandemic and returning to “normal.” But what will that normal be? And, how can we, as practitioners, take the lessons from the last 15 months to be prepared for the next major disruption?

While it will likely take years to fully grasp the impact of the COVID-19 pandemic, one of the goals of our section in the coming year is to continue to examine how we, as attorneys, can better serve our clients in this changed world. In May, Section Council elected me to serve as chair for the coming year. I am particularly honored to undertake this role as our world, and our bar association, begins the process of opening up and resuming the social activity that is so important to our personal and professional well-being.

During the pandemic, members of our section have taken leading roles to work around the restrictions imposed to provide important and necessary legal services to our clients through advocacy, adoption of technology and ingenuity. From the adopting of remote online notarization legislation, to figuring out creative ways to conduct closings and will signings without being in the same room, our lawyers were able to avoid just closing up shop and waiting for things to open back up. While many problems were solved, some of the solutions were only temporary, and over the coming year we plan to examine these situations and permanently address these challenges.

Fortunately, the coming year will not just be focused on the aftermath of COVID-19. Thanks to the leadership of my predecessor, Alison Smith, and her predecessor, Marshal Granor, the RPPT Section will be one of the first PBA groups to have an in-person event this summer with the resumption of our annual retreat. This event, to be held in Philadelphia, will feature the educational and social aspects that have made RPPT Section retreats such enjoyable events in the past. I am very excited to see my friends and colleagues from around the commonwealth and hope that you are able to join us this year.

A personal goal of mine in the coming year is to expand both the active membership and the overall membership of our section. I continue to be amazed and delighted at how collaborative and supporting members of both the “death” and “dirt” communities are of each other. One need only spend a few days reading our busy Listservs to see that our members are some of the friendliest, most helpful professionals on the planet. Still, many people are not aware of the value our section provides or are intimidated to join a group where many of the members have known each other for decades. I want to explore ways to share the work our section does with more attorneys and encourage “quiet” members to become actively involved.

One need only spend a few days reading our busy Listservs to see that our members are some of the friendliest, most helpful professionals on the planet.

Finally, in the coming year, I hope to meet as many members of our section as possible, gather their ideas and work to advance our profession. I would love to hear from you about any thoughts or suggestions you have for our section, be it activities, legislation or something else. I look forward to working with you!
For Mannion Prior partner Jennifer DiVetano Gayle, helping others is part of both her professional and personal lives. From dedicating her time to pro bono work and mentoring newly minted attorneys to coaching local youth hockey teams, Jennifer’s impact can be felt throughout the Montgomery County region. Her outstanding track record as a fiduciary litigator, coupled with her volunteer work, earned Jennifer the PBA Real Property, Probate and Trust Law Section’s 2021 Trailblazer Award, presented virtually this year at the May 20 awards luncheon during the PBA’s Virtual Annual Meeting.

The 2021 Trailblazer Award honors a “young lawyer” (an attorney who is under 40 or has been practicing less than five years by the nomination deadline) who primarily practices trust and estate law. Nominees must also demonstrate excellence in the practice of law and the highest ethical standards, professionalism through participation in the bar association or similar professional activities, and a commitment to pro bono legal services.

Jennifer’s efforts and accomplishments over more than a decade show why she epitomizes this excellence, professionalism and commitment.

Always Giving Back

Jennifer goes above and beyond when it comes to dedicating her time to pro bono work and other charitable activities. While the American Bar Association recommends that attorneys spend 50 hours a year providing pro bono services, Jennifer routinely devotes upward of 200 hours each year helping others.

Over the past six years, Jennifer has volunteered as a child advocate for the Montgomery Child Advocacy Project (MCAP). In this important role, she represents abused and neglected children in proceedings before the Montgomery County Office of Children and Youth, as well as the Juvenile, Family Law, Orphans’ Court, and Criminal Divisions of the Court of Common Pleas of Montgomery County.

The question on everyone’s mind, of course, is how does Jennifer manage to do it all?

“It’s a lot of long, long nights. The good part about volunteering after I had my own kids is that I already trained myself to not need much sleep,” she says. “I always say moms get stuff done. If I need to get something done, I just find a way.”

Through Jennifer’s work with MCAP, she has provided critical legal counsel and guidance to child victims of abuse navigating the criminal justice system, serving as a trusted resource and ally through each step of the process. Her work includes meeting with children and families or guardians to answer any questions, working closely with them to prepare them to testify in a courtroom, and guiding them in the preparation and delivery of victim impact statements. Jennifer has also represented children in adjudicatory hearings, disposions and permanency review hearings in the Juvenile Division, as well as handled termination of parental rights hearings in the Orphans’ Court Division. In this capacity, Jennifer serves as both a guardian ad litem and as legal counsel.

“I had parents who were great, and we never wanted for anything. I feel for kids who don’t have that,” Jennifer notes. “I feel almost like I have an obligation to do what I can to help kids like that.”

In addition to her work with MCAP, Jennifer serves as a pro bono attorney on trusts and estate litigation matters for the Philadelphia Volunteers for the Indigent Program (Philly VIP). Her work has had a tremendous impact on many people throughout the Philadelphia region. For example, Jennifer represented the guardian of an incapacitated person in getting court approval to invade the principal of the person’s estate in order to purchase a much-needed handicap-accessible van. She also mentors other pro bono attorneys through

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this program. When a fellow pro bono lawyer was navigating a tangled title matter involving the transfer of property previously owned by a client’s deceased grandmother, Jennifer offered her extensive trusts and estates experience to help guide the volunteer lawyer through this complex case.

Jennifer’s pro bono efforts include not only providing legal services but also serving as a leader to facilitate and promote pro bono work in the Montgomery County legal community. As co-chair of the Montgomery Bar Association’s Pro Bono, Access to Justice, and Community Service Committee, Jennifer volunteers at and organizes pro bono activities and community service projects aligned with the committee’s stated mission to “promote professional excellence, facilitate access to justice, and protect the integrity of the legal system through service to our members and community.” One of these impactful events was the Montgomery Bar Association’s first Reentry Day and Resources Fair. The event featured multiple clinics that were centered on the needs of recently incarcerated individuals, from helping them obtain identification to guiding them through criminal expungements.

In addition to promoting and providing pro bono legal services, Jennifer is also dedicated to giving back to her local community through volunteer work. A former member of the United States Women’s National Ball Hockey Team, she coaches youth hockey, including the 8U Mite program for the Pottstown Penguins Youth Ice Hockey Club, the Owen J. Roberts Wildcats Ice Hockey Club’s Elementary School team, and the dek hockey (a variation of ball hockey) program for the Pottstown Police Athletic League. Jennifer also guest coaches for different youth and girls hockey programs throughout her community.

An All-Star in Her Field

Since joining Mannion Prior in 2007 following her graduation from Charles Widger School of Law at Villanova University, Jennifer has become one of the region’s top fiduciary litigators, litigating a broad range of estate and trust disputes, surcharge and removal actions, interpretation issues, will contests, and other fiduciary matters before the Orphans’ Court Division of the Court of Common Pleas, the Register of Wills, and appellate courts throughout the Commonwealth. She guides her clients through each stage of litigation, from the initial consultation through trial, providing them with comprehensive counsel and zealous advocacy during what are often emotionally difficult situations.

Over the course of her career, Jennifer has handled numerous complex and sophisticated matters. For instance, she served as second chair in a will contest that went to a 15-day trial before the Orphans’ Court Division of the Philadelphia Court of Common Pleas. Jennifer represented the will’s proponent in a dispute in which the decedent’s three wills were challenged on the grounds that the decedent lacked capacity; that the wills were the product of undue influence, fraud, or insane delusion; and that the trial court lacked jurisdiction because decedent was not living in Pennsylvania when he died.

Jennifer was instrumental from the beginning in securing a successful outcome for the client at trial, from drafting pleadings to preparing witnesses to reviewing documents received, such as medical records. Ultimately, Jennifer’s client prevailed—and the Orphans’ Court’s findings were upheld on appeal to both the Pennsylvania Superior Court and the Pennsylvania Supreme Court.

In the past 10 years, Jennifer has been honored multiple times for her standout work as a trusts and estates attorney. A Fellow of the American College of Trust and Estate Counsel (ACTEC), she has been included in The Best Lawyers in America for Litigation and Trusts & Estates since 2018, and was named a Pennsylvania “Super Lawyer Rising Star” at least five times. Jennifer was also highlighted by The Legal Intelligencer as a “Lawyer on the Fast Track” in 2015. As a result of her experience and knowledge in the field, Jennifer has served as a lecturer and panelist on a number of occasions, including at the Montgomery American Inn of Court and Temple University Beasley School of Law, and for the Pennsylvania Bar Institute event on attorney-client privilege in Orphans’ Court litigation.

At Mannion Prior, Jennifer’s peers view her as an invaluable mentor for new attorneys, particularly women. She recalls being the only female attorney at the firm when she joined and makes an effort to get to know incoming female associates. “I’ve tried to develop good relationships with them and let them know that I understand that it’s different—being a woman with responsibilities at work and at home,” says Jennifer. “I feel like there’s so much pressure on female attorneys now.”

Although her schedule is typically packed, Jennifer is known for always making time to help others, whether someone wants to discuss the nuances of one of their cases or needs advice on a personal matter. She is also known for her compassion and ability to help others find solutions for their

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problems. Her colleagues continue to be astonished by the way that she manages her pro bono efforts while continuing to be a leading attorney in her field.

“I’m very honored to receive this award,” Jennifer says. “It’s nice to know that you’ve been recognized for things you’re doing on a volunteer basis. My pro bono service is the most rewarding part of what I do as an attorney.”

As a prelude to its retreat, the RPPT Law Section is joining forces with SeniorLAW Center of Philadelphia to host a pro bono virtual Life Planning Clinic for Seniors on Tuesday, Aug. 10, at 9 a.m. Volunteer attorneys will partner with SeniorLAW Center to draft simple advance planning documents, focused on health care and financial decision-making for their clients. Consider joining your colleagues for this inaugural event.

No experience drafting wills or other estate planning documents? Don’t worry! We’ve got you covered. Training will be provided prior to and on the day of the event. Each volunteer attorney will be partnered with another volunteer attorney to meet virtually via Zoom with clients and draft documents for them. SeniorLAW Center Staff and Section estate and trust practitioners will be available as a resource to answer questions and assist as needed.

SeniorLAW Center is an independent 501(c)(3) legal services agency founded in 1978 as Senior Citizen Judicare Project by members of the Philadelphia Bar Association. Its original focus was to protect the legal rights and interests of Philadelphia’s needy, elderly residents through a volunteer-driven program. It has since grown to have an array of programs and services, a diverse staff of lawyers and advocates, and has expanded its outreach and services to communities throughout Pennsylvania. Through the efforts of its dedicated and experienced legal staff and volunteers from Pennsylvania’s legal community, SeniorLAW Center today serves approximately 10,000 older Pennsylvanians each year, including victims of elder abuse and financial exploitation, elders facing housing crises and homelessness, and grandparents raising grandchildren. Since its founding in 1978, SeniorLAW Center has provided free legal representation for over 50,000 seniors, focusing on the most vital and recurring legal problems facing our elders: housing, elder abuse, financial exploitation, consumer problems, grandparent custody, personal and end-of-life planning needs. For additional information about SeniorLAW Center, visit https://seniorlawcenter.org.

The Life Planning Clinic is part of the section’s initiative to increase pro bono opportunities for its members and promote engagement among section members. The event is open to all PBA members. For additional information or to register as a volunteer attorney for the RPPT Law Section Life Planning Clinic, please contact Pam Kance at Pam.Kance@pabar.org.
In a time of business as not-so-usual, it can be easy to lose sight of advancements made. As we begin to emerge from the COVID-19 pandemic, it feels like a good time to take a breath and survey the progress we’ve made and look toward new challenges we face, with new energy and renewed commitment.

Those of us who are members of the PBA Real Property, Probate and Trust Law (RPPT) Section understand first-hand the professional and personal toll the pandemic, social distancing and working remotely has taken on probate and trust practitioners and their clients over the last year.

At the same time, the Pennsylvania Legislature, the courts and our colleagues in the probate and trust bar have tackled significant legal, professional and civic issues. In addition, attorneys across the state continue to make a difference by donating their time and expertise to both the community and the Pennsylvania Bar Association.

As we approach the one-year anniversary of the enactment of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), it’s clear that the new law is a crucial tool for planning and administration practitioners throughout the commonwealth to help their clients navigate the reality of their lives increasingly lived online, which the COVID-19 pandemic only served to accelerate.

Pennsylvania finally enacted RUFADAA last July, giving certain fiduciaries like executors, trustees, agents under powers of attorney, and guardians the requisite legal authority to access and manage electronic records of decedents, principals and incapacitated persons.

Pennsylvania was one of the last states to embrace digital assets legislation and is now in line with most of the rest of the country, not to mention 21st century estate planning.

Meanwhile, in April, the Pennsylvania Supreme Court addressed the question of whether the Commonwealth recognizes the fiduciary exception to attorney-client privilege in In re: Estate of William K. McAleer. Courts and legislatures across the country are literally and figuratively all over the map on this issue.

In McAleer, the justices split 3-3 (with one justice abstaining) on the principal question of the fiduciary exception, yielding three separate opinions taking up the debate for and against the exception under Pennsylvania law.

What’s not up for debate, however, is that members of the PBA — and this section — continue to devote their time, energy and wealth of knowledge to professional and civic causes across the commonwealth. For proof of that, be sure to read this issue’s feature on Jennifer DiVeterano Gayle, the recipient of the PBA Real Property, Probate and Trust Law Section 2021 Trailblazer Award. Jennifer exemplifies the award’s criteria of demonstrated excellence in the practice of law and a commitment to pro bono legal services by devoting more than 150 hours a year to her pro bono work, as well as serving as a mentor to younger associates at Mannion Prior LLP in King of Prussia, where she is a partner.

Speaking of considerable contributions, I’d also like to express my appreciation to all members of the RPPT Section Council, and the RPPT Executive Committee, whose terms are ending, for their service and commitment to the PBA. I’d especially like to thank Alison T. Smith, the outgoing section chair, for her devotion and tireless efforts on behalf of our section and its membership during a particularly trying time.

I’m proud of how our members have led the way in the community and commonwealth while continuing to serve clients during the evolving realities of the COVID-19 pandemic. I also look forward to welcoming incoming new voices and energy.
The concept of family has changed significantly since Pennsylvania enacted the country's first inheritance tax act more than 150 years ago. Because Pennsylvania imposes inheritance tax at different rates depending on the relationship between the decedent and the beneficiary, defining family relationships is essential to calculate the inheritance tax due at the decedent's death. The General Assembly has attempted to keep up with our evolving culture by periodically incorporating the "modern family" into its inheritance tax laws, including a trend of expanding who are "lineal descendants." For example, a decedent's "stepdescendants" are included in the statutory definition of "lineal descendants" and, therefore, transfers to stepchildren are taxed at the 4.5% lineal rate. However, in some situations the Department of Revenue has read the statute narrowly and has attempted to characterize certain beneficiaries as "former stepchildren."

The term "former stepchildren," as used by the Department of Revenue, applies in situations in which the stepparent is no longer married to the stepchild-beneficiary's biological parent at the stepparent's death. For example, the biological parent could have predeceased the stepparent or been divorced from the stepparent when the stepparent dies. The situation becomes more complicated when the stepparent remarries after his or her marriage to the stepchild-beneficiary's biological parent ends.

Under these circumstances, the department has taken the position that these individuals are "former stepchildren" who are not "lineal descendants" subject to the 4.5% lineal rate. Instead, the department taxes these transfers at the 15% "collateral" rate. This is a question that the authors have successfully litigated on behalf of beneficiaries in a case that did not result in a published opinion, and they are aware of the department taking this position in similar cases that were not litigated because of the relatively small amount at issue. In other words, this is an issue that is not likely to go away absent a decision by an appellate court or a legislative fix.

Despite the Department’s position, more than a century of inheritance tax cases and statutes demonstrate that all stepchildren are, in fact, lineal descendants for inheritance tax purposes, and that the law does not recognize the notion of "former stepchildren" in this context. This article examines the development of the taxation of transfers to stepchildren, through both statutory and case law. Pennsylvania law, for inheritance tax purposes, recognizes that the family relationship between the stepchild-beneficiary and the decedent survives the severance of the marriage bond between the stepchild's natural parent and decedent-stepparent. Because this "step" relationship (i.e., the operative relationship for inheritance tax purposes) remains intact, such stepchildren are

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subject to the 4.5% lineal rate. Simply put, once a stepchild, always a stepchild.

Development of Pennsylvania Inheritance Tax Law

Pennsylvania’s Inheritance and Estate Tax Act, 72 Pa. C.S. §§ 9101-9196, provides that inheritance tax shall be at the rate of 4.5% upon the transfer of property to or for the use of a decedent’s “[g]randfather, grandmother, father, mother, … and lineal descendants.” 72 Pa. C.S. § 9116(a)(1)(i). The term “lineal descendants” is defined to mean “[a]ll children of the natural parents and their descendants, whether or not they have been adopted by others, adopted descendants and their descendants and stepdescendants.” Id. § 9102 (emphasis added).

The fundamental issue addressed in this article is whether the General Assembly intended to distinguish between beneficiaries whose natural parent remained married to the decedent-stepparent at the latter’s death, and beneficiaries whose natural parent predeceased or was divorced from the decedent-stepparent at the latter’s death. As such, the question in the first instance is one of statutory construction.

“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). Statutes imposing taxes shall be strictly construed. Id. § 1928(b)(3); see also Estate of Carlsson, 388 A.3d 726, 728 (Pa. 1978) (stating that the statute imposing an inheritance tax on lineal descendants “must not only be strictly construed, but all reasonable doubt must be resolved in favor of the taxpayer”). Moreover, official comments to a statute may be treated as evidence of legislative intent when the comments were before the General Assembly at the time of enactment and are appended to the statutory text. In re Trust under Deed of Kulig, 175 A.3d 222, 230 (Pa. 2017) (citing 1 Pa. C.S. § 1939).

1826 to 1904: ‘Lineal Descendants’ Do Not Include Stepchildren.

Pennsylvania enacted the country’s first inheritance tax act in 1826. See Act of April 7, 1826, 1826 P.L. 227 (the “1826 Act”). The 1826 Act imposed an inheritance tax on Pennsylvania property passing from a decedent “to any person or persons, or to bodies politic or corporate, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children, and lineal descendants born in lawful wedlock.” Id. at § 1. Accordingly, in its initial iteration, Pennsylvania inheritance tax law divided beneficiaries into two classes: the exempt class and the collateral class.1

The 1826 Act did not explicitly define “lineal descendants” when including them as members of the exempt class; however, the term was understood to mean “issue.” See Richard L. Grossman & M. Paul Smith, Pennsylvania Inheritance and Estate Tax, Part IV, Rate of Tax at 7 (Bisel, 6th ed. 2014). Therefore, parents, children and issue born in lawful wedlock were exempt from the initial inheritance tax.

In 1887, the General Assembly passed a new act, which primarily compiled and re-enacted all of the previous laws in force regarding Pennsylvania inheritance tax. See Act of May 5, 1887, 1887 P.L. 79 (the “1887 Act”). The 1887 Act identified those members of the exempt class as “father, mother, husband, wife, children and lineal descendants born in lawful wedlock, or the wife or widow of the son of the person dying seized or possessed thereof.” 1887 P.L. 79, § 1. By adding the latter categories, the General Assembly expanded the exempt class.

1905 to 1960: ‘Lineal Descendants’ Expanded to Include “Children of a Former Husband or Wife”

A significant change occurred in 1905, when the General Assembly expanded the exempt class of beneficiaries identified in the 1887 Act to include the following: “father, mother, husband, wife, children, and lineal descendants born in lawful wedlock, children of a former husband or wife, or the wife or widow of the son of the person dying seized or possessed thereof.” Act of April 22, 1905, 1905 P.L. 258, § 1 (emphasis added) (the “1905 Act”). This reference to “children of a former husband or wife” later appeared verbatim in the Act of June 20, 1919, 1919 P.L. 521, § 2 (the “1919 Act”), and the Act of May 15, 1925, 1925 P.L. 806, § 2. As discussed below, several Pennsylvania courts interpreted this amendment to include stepchildren in the exempt class.

In 1909, the Pennsylvania Supreme Court analyzed this language in Com. v. Randall, 73 A. 1109 (1909). In Randall, 1

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1 In 1917, the Commonwealth imposed a 2% inheritance tax on the previously exempt class, redefining it as the lineal class. Act of July 11, 1917, 1917 P.L. 832.
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the testatrix devised property to her stepson, being her husband’s son by a former wife. Id. at 1109. The stepson argued that under the new language of the 1905 Act, he should be included in the class of exempt beneficiaries. The Court recognized that the 1905 Act added “children of a former husband or wife” to the exempt class. Id. In concluding that the gift to the stepson was exempt from taxation, the Court provided the following reasoning:

The act of 1905 disregards the distinction [between lineal and collateral kindred] and allows the exemption to stepchildren. The reasons for this particular legislation were not so cogent as those which prevailed to exempt property passing to husband and wife, yet the distinction here observed has still a basis in the marital and family relation, and it is upon this relation that the whole scheme of classification rests. Id. at 1110. The justification that the exemption derives from the “family relation” between the decedent and the stepchild receiving the testamentary gift has been cited by later court decisions.

The Dauphin County Orphans’ Court applied that interpretation in In re Seltzer’s Estate, 19 Pa. D. 1070 (O.C. Dauphin 1910). In Seltzer, the testator gave property to his stepdaughter, i.e., the daughter of his deceased wife by a former husband. Id. at 1070. The court construed “children of a former husband or wife” as follows:

It is suggested by petitioner that a stepchild is not within the meaning of this term. It is difficult to understand whom it embraces if not stepchildren. Manifestly, the purpose of the Act of 1905 was to add to the class of those exempt from the tax. If the term means the child of a former wife or of a former husband of the decedent, it would mean no more than the decedent’s child, for whom exemption was already provided in the general Act of 1887. To give the Act of 1905 any effect the term must necessarily mean the child of a former husband of the decedent’s wife, or of a former wife of the decedent’s husband, and such child would be the decedent’s stepchild. Id. The court followed the precedent set by Randall and concluded that “there is no doubt as to the meaning of the term or as to the purpose of the Act of 1905 to exempt from the tax an estate passing from a stepparent to a stepchild.”

Id. Importantly, the fact that the testator was predeceased by the stepdaughter’s natural mother, to whom the testator was married until her death, did not affect this conclusion. Stated otherwise, there was no discussion of whether one could become a “former stepchild” of the decedent.

In In re Butcher’s Estate, 110 A. 163 (Pa. 1920), the Pennsylvania Supreme Court expanded on its interpretation of the 1905 Act by noting that the exempt class includes a stepchild whose stepparent was divorced from his or her natural parent at the time of the stepparent’s death. In Butcher, the testatrix left her entire estate to her stepdaughter despite being divorced from the stepdaughter’s natural father at the time of her death. Id. at 163. The stepdaughter’s natural mother was the testatrix’s sister, to whom the natural father was married until her death. The Commonwealth argued that the beneficiary’s identity as the testatrix’s niece trumped her identity as stepdaughter and, therefore, she should be subject to the collateral inheritance tax. The Court disagreed, holding that the stepdaughter’s identification as a child of the testatrix’s former husband prevailed. Id. The fact that the testatrix was divorced from the stepdaughter’s natural father did not affect this conclusion. Again, there was no discussion of whether one could become a “former stepchild.”

To the contrary, the trial court’s adjudication had observed that “in common parlance the term stepchild is still used, after the divorce as well as after the death of the parent, to describe the relationship that arose by the remarriage of the parent.” Butcher’s Estate, 29 Pa. D. 109, 109 (O.C. Phila. 1920) (emphasis added).

In In re Belosevich’s Estate, 29 Pa. D. & C. 682 (O.C. Wash. 1937), which interpreted the 1919 Act, the Washington County Orphans’ Court considered the Commonwealth’s position that legacies “to three stepchildren, children of the [decedent’s] widow by a former marriage” were subject to tax at the collateral rate. Id. at 682. The court noted that “[i]t is conceded [by the Commonwealth] that … the words ‘children of a former husband or wife’ included in the class subject to the collateral tax of 2% means, in general, stepchildren.” Id. The issue before the court was whether the phrase “children of a former husband or wife” requires that the former husband or wife must have predeceased the decedent-stepparent. The court held that no such condition applied. Id. at 684-85. Citing Randall, the court noted that the “marital and family relation” between the decedent and the stepchild is the basis of the distinction and such relation is the same regardless of

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the natural parent being alive or dead. Id. at 684.

In In re Balthaser’s Estate, 40 Pa. D. & C. 322 (O.C. Berks 1941), the Berks County Orphans’ Court considered whether the children of a surviving spouse are synonymous with the children of a former spouse for Pennsylvania inheritance tax purposes. Id. at 324. The testator gave his wife a life estate in his real and personal property and named her seven children as the remainder beneficiaries. Id. at 323. Four of these children were the testator’s natural children and three were his stepchildren (i.e., children of his surviving wife by a former husband). Id. The executors paid inheritance tax at the lineal rate for all remainder beneficiaries; however, the register of wills filed a transfer tax appraisement applying the collateral rate to the stepchildren. Id. at 323-24. The Commonwealth argued that the words “children of a former husband or wife” only applied to those children whose natural parent predeceased the decedent-stepparent or whose natural parent divorced the decedent-stepparent, thus distinguishing a “surviving spouse” from a “former spouse.” Id. at 324. The court held that “only such stepchildren as are the children of a former husband or wife, deceased or divorced at the beginning of tax liability, fall within the class subject to the [lineal tax rate].” Id. at 325. However, because the testator’s stepchildren did not receive their testamentary gifts until their natural mother’s death, at which point she became the testator’s “former wife,” such stepchildren were subject to the lineal inheritance tax rate. Id.

In In re North’s Estate, 67 Pa. D. & C. 201 (O.C. Jeff. 1949), the Jefferson County Orphans’ Court considered whether a transfer made to the decedent’s stepdaughter within one year of death should be taxed at the lineal rate or the collateral rate under the 1919 Act, as amended. Id. at 202. The court rejected the Commonwealth’s position that to be a “child of a former husband or wife” required the child’s natural parent to be dead or divorced from the decedent at the decedent’s death. Id. at 205. Noting Randall’s statement about the “marital and family relationship” being the basis for the tax exemption, the court found that “[u]nquestionably there is a closer knit family relationship existing between a stepfather and stepdaughter during the time the mother and stepfather are living together in happy harmony as husband and wife than would exist between the stepfather and stepdaughter after the dissolution of such marriage.” Id. at 205-06. Furthermore, the North court held that under the Commonwealth’s restrictive interpretation, the stepchild “would be the tax victim because of the dissolution by death of the happy family relationship existing between her mother and stepfather.” Id. at 206. Therefore, the court clarified that the phrase “children of a former husband or wife” is synonymous with stepchildren, regardless of whether the stepchild’s natural parent is alive or dead at the time of the decedent-stepparent’s death. Id. This is consistent with the Supreme Court’s ruling in Randall and other cases cited above.

In Zipperlein’s Estate, No. 492 of 1949 (O.C. Dela., Nov. 30, 1949), the Delaware County Orphans’ Court followed North. In Zipperlein, the testatrix left her entire estate to her stepson and his wife as tenants by the entireties. The testatrix was predeceased by her husband, the natural father of the stepson. The court noted that, although the 1919 Act, as amended, “does not use the term ‘stepson’ or ‘stepchildren,’ it has been held that the phrase ‘children of a former husband or wife’ refers to stepchildren, and that an inheritance by a stepson is therefore taxable at the rate of 2%. It has also been held that it is immaterial whether the former marriage was terminated by death or divorce, the two percent rate being applicable to children of such previous marriage in either event.” Id. (citations omitted). The court ruled that the entire gift was taxable at 2%. On appeal, the Supreme Court confirmed the assessment of tax against the stepson’s one-half undivided interest at the 2% lineal rate, but reversed and remanded to have the wife’s one-half undivided interest taxed at the 10% collateral rate. Zipperlein Estate, 80 A.2d 817 (Pa. 1951) (stating that if the gift “had been made to the stepson alone it would have been subject only to a 2% direct inheritance tax by virtue of the clause ‘children of a former husband or wife’”).

1961 to 1981: Change in Language from ‘Children of a Former Husband or Wife’ to ‘Stepchildren’ but No Change to Substantive Law

In 1961, the General Assembly passed the Inheritance Tax Act of 1961, which not only provided a definition for “lineal descendants” but also changed the classification of beneficiaries for inheritance tax purposes to include Class A and Class B beneficiaries. See Inheritance and Estate Tax Act of 1961, 1961 P.L. 373, §§ 102(13), 403, 404 (the “1961 Act”).

Under § 403 of the 1961 Act, Class A beneficiaries were subject to an inheritance tax rate of 2%, and Class B beneficiaries were subject to an inheritance tax rate of 15%. Id. §§ 403, 404. Class A beneficiaries included the decedent’s grandfather, grandmother, father, mother, husband, wife, lin-

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eal descendants, and wife, widow, husband or widower of a child. Id. § 403. Class B beneficiaries included all others. Id. § 404. Section 102(13) of the 1961 Act provided the following definition of “lineal descendants”:

“Lineal descendants” includes children and their descendants, adopted descendants and their descendants, stepchildren, illegitimate descendants of the mother and their descendants, and children and their descendants of the natural parent who are adopted by his spouse. It does not include descendants of stepchildren, illegitimate children of the father and their descendants or adopted children and their descendants in the natural family, except as above set forth.

Id. § 102(13). Thus, the 1961 Act expanded who are lineal descendants by adding certain adoptees. The 1961 Act also distinguished between stepchildren (Class A) and descendants of stepchildren (Class B). In acknowledging this distinction, the official comment to Section 403(1) states that “[s]tepchil-
dren are taxable at the lower rate under existing law (Act of 1919, P.L. 521, § 2), and the taxation of transfers to descendants of stepchildren at the higher rate also conforms with existing law.” Id. § 403, Jt. St. Govt. Comm. Comment. Pointing out the change in the statutory categories, the official comment also notes that “‘Class A’ is substantially the same as ‘lineals’ and ‘Class B’ is substantially the same as ‘collaterals.’” Id. The Appendix to the Pennsylvania House of Representative's Legislative Journal for the Session of 1961 includes these comments. As such, the comments “were published or generally available prior to the consideration of the statute by the General Assembly” and may be considered when interpreting the 1961 Act. 1 Pa. C.S. § 1939.

These comments indicate that the General Assembly did not intend the change in language from “children of a former husband or wife” to “steotchil-
dren” to result in a substantive change regarding the application of inheritance tax rates. Instead, as the comments to the 1961 Act make clear, the General Assembly was merely rewording existing law. Moreover, the 1961 Act could be considered to have codified the common law, as set forth in Randall, et al., with respect to the 1905 Act and the 1919 Act. Considering the many disputes regarding the language “children of a former husband or wife,” as noted in the several cases discussed above, the General Assembly presumably intended to clarify that “children of a former husband or wife” was synonymous with “stepchildren.”

The official comment to Section 403(1) that “[s]teotchil-
dren are taxable at the lower rate under existing law (Act of 1919 P.L. 521, § 2)” evidences this intent. 1961 Act § 403, Jt. St. Govt. Comm. Comment. Section 2 of the 1919 Act includes the language “children of a former husband or wife” to identify stepchildren as members of the lineal class. See 1919 Act § 2. Therefore, by saying that “steotchil-
dren” are taxable at the lower rate under the 1919 Act, which refers only to “children of a former husband or wife,” it is apparent that the 1961 Act was intended to simplify the often-interpreted language of the 1919 Act.

In the 1961 Act and the comments thereto discussed above, the General Assembly was acknowledging that it did not intend to change the law, and it was necessarily aware of the line of cases interpreting the prior acts, beginning with Randall. There is nothing in any statute, comment or case to indicate that the General Assembly intended to narrow the class of lineal descendants by its 1961 definition.

1982 to Present: ‘Lineal Descendants’ Expanded to Include Steotchil-
dren.

In 1982, the General Assembly added Chapter 17, regarding Inheritance and Estate Taxes, to Title 72 (Taxation and Fiscal Affairs) of Pennsylvania Statutes. Section 1702 defined lineal descendants as follows:

All children of the natural parents and their descendants, adopted descendants and their descendants, stepchildren and their descendants and children and their descendants of the natural parent who are adopted by his spouse.

72 Pa. C.S. § 1702 (repealed). Thus, the General Assembly once again expanded the classes of individuals who would be taxed at the lineal rate rather than at the higher collateral rate by now including descendants of a stepchild.

In 1991, the General Assembly repealed Chapter 17 and added the Inheritance and Estate Tax provisions as Article XXI of the Tax Reform Code of 1971. At that time, the General Assembly again amended the definition of lineal descendants to mean “[a]ll children of the natural parents and their descendants, whether or not they have been adopted by

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others, adopted descendants and their descendants and step-
descendants.” 72 Pa. C.S. § 2102 (repealed). This remains
the current language under 72 Pa. C.S. § 9102. In none of
the above-cited statutes, or the official comments thereto, did
the General Assembly indicate that it intended to change the
law by excluding the “children of a former husband or wife”
from the definition of “lineal descendants.” As demonstrated
by the comment to the 1961 Act, the General Assembly
instead intended to maintain the status quo as it related to
such individuals.

In a case interpreting the current
language of 72 Pa. C.S. § 9102, the York
County Orphans’ Court held that “step-
descendants” includes descendants of a
decedent’s former spouse, regardless of
whether the marriage bond was broken by
death or divorce and regardless of whether
the decedent remarried. Hartenstein-
Weaver Estate, 1 Fid. Rep. 3d 309 (O.C.
York 2011). In Hartenstein-Weaver, the
decedent made a testamentary gift to the
grandchildren and great-grandchildren
of her late husband. Id. at 311. The gifts
were made to “the grandson of my late
husband” and the “great-grandchild of my late husband.” Id.
at 319. Following the death of her husband, the decedent
remarried. Id.

The court framed the issue as follows:
Are the grandchildren and great-grandchildren of a de-
cedent’s former spouse the decedent’s “lineal descendants”
(specifically including “stepdescendants”) for inheritance
tax purposes when after her former spouse’s death, de-
cedent remarried another person and remained married to
that new spouse until decedent’s death? This is an issue
of first impression in Pennsylvania. More simply, the issue
could be stated: Once a stepchild, is that person always a
stepchild for inheritance tax purposes?
Id. at 313 (emphasis added).

The court first considered whether the death of the de-
cedent’s husband had terminated the status of his children as
the decedent’s stepchildren. The court noted that “death of
the natural parent does not positively terminate the step rela-
tionship between the stepparent and the stepchild for inheri-
tance tax rate purposes.” Id. at 318 (quoting Zipperlein, No.
492 of 1949, supra); see also Butcher, 29 Pa. D. at 109-10
(“The relationship, however, is not between the decedent and
the parent, but between the decedent and the child, and as
this relationship is not dissolved by the death of a parent, by
a parity of reasoning, a divorce can have no greater effect.”).

The court then considered whether the remarriage of the
decedent terminated the step-relationship between the stepp-
parent and the stepchild. The court held that it did not. Id. at
329-30. The court found persuasive support for its position
in Depositors Trust Company of Augusta v. Johnson, in which
the Maine Supreme Court opined that the remarriage of a
stepparent “would not appear to have
any compelling significance for inheri-
tance tax purposes requiring the adop-
tion of a different rule.” 222 A.2d 49,
52 (Me. 1966).

Furthermore, the York County
Orphans’ Court noted that “this issue
of whether a beneficiary is a stepdescen-
dant for imposition of rate of inheri-
tance tax will only arise when a testator
has provided for those ‘step’ beneficiaries
by will.” Hartenstein-Weaver, 1 Fid. Rep.
3d at 331. By including a bequest to a
stepchild in the will, the testator indicates that the step-rela-
tionship between the testator and the beneficiary remained
intact beyond the marriage that initially created the relation-
ship from the testator’s perspective. Id. at 331-32. For the
foregoing reasons, and because a court must strictly con-
strue any ambiguity in a tax statute in favor of the taxpayer,
the court held that the testamentary gift to the decedent’s
stepdescendants should be taxed at the lineal rate of 4.5%.
Id. at 331-33; see also Carlson, 388 A.2d at 728 (stating that
the statute imposing an inheritance tax on lineal descendants
“must not only be strictly construed, but all reasonable doubt
must be resolved in favor of the taxpayer”).

The case litigated by the authors resolved in the benefici-
aries’ favor by order of the Montgomery County Orphans’
Court in 2018. The case involved a woman (decedent) who
died in 2015 and had made testamentary gifts to the children
of her former husband, whose death in 1986 ended their
23-year marriage. Decedent subsequently remarried in 1990,
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and her surviving spouse was her executor. Decedent’s will, which she executed in 2012, included specific gifts totaling $2 million to the children of her predeceased former husband.

The executor took the position that these specific legatees were “stepchildren” and paid $90,000 tax at the 4.5% lineal descendants rate. The Department of Revenue issued a Notice of Inheritance Tax Appraisement, Allowance or Disallowance of Deductions and Assessment of Tax, in which it assessed tax on the transfers to the stepchildren at the 15% rate (the “assessment”), thus increasing the tax by $210,000, not including interest. The executor filed a formal protest of the assessment with the Department’s Board of Appeals, which upheld the assessment.

On appeal to the Montgomery County Orphans’ Court, the executor relied on the statutory and case law set forth above and prevailed, with the Orphans’ Court concluding that the transfers should be taxed at the 4.5% rate. The department did not pursue the matter further.

Department of Revenue’s Positions

Both in Hartenstein-Weaver and in the case litigated by the authors, the Department of Revenue sought to impose tax at the 15% collateral rate on gifts to “former stepchildren” but did not cite to any tax statute or tax-based court decision to support its contention. In Hartenstein-Weaver, the department relied solely on a will interpretation statute relating to the time for ascertaining a class of beneficiaries, 20 Pa. C.S. § 2514(5), and a case addressing whether an individual was a beneficiary for purposes of distributions from a trust, Borie Estate, 74 Pa. D. & C.2d 441, 26 Fid. Rep. 347 (O.C. Phila. 1976). Neither references inheritance tax or tax rates.

The Department’s Board of Appeals relied on the same two authorities in the authors’ case. Before the Montgomery County Orphans’ Court, the department cited five cases that do not involve inheritance tax, two of which are unpublish ed and only one of which was decided by a Pennsylvania state court. See J.C. Penney Life Ins. Co. v. Wons, 2001 WL 327127 (E.D. Pa. 2001) (unpublished decision involving rights of a stepchild in an insurance policy); Brotherhood of Locomotive Firemen & Enginemen v. Hogan, 5 F.Supp. 598 (D. Minn. 1934) (rights of a stepchild in an insurance policy); Hays v. Hays, 946 So.2d 867 (Ala. Civ. App. 2006) (adult adoption); D.O. v. M.O., 2017 WL 4390420 (Del. Fam. Cr. 2017) (unpublished decision involving the right to a protection from abuse order).

The only Pennsylvania state court cited by the department in the authors’ case found that a stepparent is not liable for the support of a stepchild after the termination of the marriage to the natural parent. McNutt v. McNutt, 496 A.2d 816 (Pa. Super. 1985). However, it should be apparent that the public policy behind not requiring a stepparent to involuntarily make support payments is completely different than the issue presented here, in which inheritance tax is being imposed on a voluntary gift made by the stepparent to the stepchild.

Conclusion

With the prevalence of blended families in today’s society, the Department of Revenue’s distinction between stepchildren and “former stepchildren” can affect the tax planning of many families. However, this distinction is absent from the legislative history and case law regarding Pennsylvania inheritance tax dating back to 1905. Furthermore, Pennsylvania courts have consistently ruled that the fact that a stepchild’s natural parent predeceased, or was divorced from, the decedent-stepparent had no impact on the stepchild’s status as a “lineal descendant” within the meaning of the inheritance tax act then in effect. The reason, going back to Randall in 1909, is that the “family relationship” between the stepchild and the decedent is the operative relationship for inheritance tax purposes, and what greater evidence can there be of such a relationship than the decedent making a provision for the stepchild in his or her will?

Pennsylvania courts have unfailingly ruled that the 4.5% lineal descendant rate applies to stepchildren in the multitude of circumstances presented in this article. As such, these cases demonstrate that, for inheritance tax purposes, once a person is a stepchild of a decedent, he or she is always a stepchild.

Adam T. Gusdorff is a partner at Heckscher, Teillon, Terrill & Sager PC in West Conshohocken and focuses his practice on Orphans’ Court litigation involving trusts, estates, nonprofit corporations, guardianships and other fiduciary matters.

Erica A. Russo is an associate at Heckscher, Teillon and focuses her practice on estate planning and the administration of trusts and estates.
The Pennsylvania Supreme Court on April 7 issued its much-anticipated decision in the case of In re: Estate of William K. McAleer, Deceased, (248 A.3d 416 (Pa. 2021)), in which the court was asked to weigh in on whether Pennsylvania recognizes a “fiduciary exception” to the attorney-client privilege. Unfortunately, the justices did not reach a majority decision on the issue, splitting 3-3, while one justice abstained. The justices ultimately issued three opinions illustrating divergent viewpoints on the subject.

The Privilege Question

As a general principle, the communications between an attorney and a client for the purpose of seeking or providing legal advice are privileged from disclosure to third parties unless a recognized exception applies. In jurisdictions that have adopted a fiduciary exception to the attorney-client privilege, fiduciaries (trustees and executors, for example) are limited in their ability to assert the attorney-client privilege in response to a beneficiary’s request for otherwise privileged material; however, there is considerable division throughout the country, at both the state and federal levels, on whether to recognize a fiduciary exception and, if so, how the exception should be applied.

For example, some federal circuit courts have expressly adopted the fiduciary exception in the context of employee benefit plan administration but not in the context of estate and trust administration. In Florida, the state legislature has specifically addressed the issue through a statute providing for the application of the attorney-client privilege even in instances where the client is a fiduciary, which was eventually approved by the Florida Supreme Court.

The question presented to the high court in McAleer was “whether the attorney-client privilege and the work product doctrine may be invoked by a trustee to prevent the disclosure to a beneficiary of communications between the trustee and counsel pertaining to attorney fees expended from a trust corpus.”

Disclosure of Billing Records

In McAleer, William K. McAleer established a revocable living trust for the benefit of his son, who he also appointed as trustee, and his two stepsons. Following the settlor’s death, the trustee filed a First and Partial Accounting in the Allegheny County Court of Common Pleas, Orphans’ Court Division. The stepsons, as beneficiaries of the trust, challenged certain aspects of the trustee’s administration, and the trustee retained two law firms to represent his interests in the case. Two years of litigation ensued, and the Orphans’ Court ultimately dismissed the stepsons’ objections.

The trustee subsequently filed a Second and Final Accounting, which showed that he had incurred approximately $124,000 in attorneys’ fees during the course of the litigation. The stepsons filed objections to the Second and Final Accounting, challenging the payment of the trustee’s commission and his attorneys’ fees from the trust account. The Orphans’ Court permitted the parties to conduct discovery on the objections.

The stepsons sought the billing invoices of the trustee’s counsel through the discovery process. In response, the trustee produced heavily redacted invoices. The stepsons filed a motion to compel production of the unredacted invoices; the Orphans’ Court determined that the trustee did not present any facts to support the privilege claim and directed the production of the unredacted billing invoices.

In reaching its decision, the Orphans’ Court found Judge R. Stanton Wettick’s decision in Follansbee v. Gerlach, 56 Pa. D. & C.4th 483 (Civ. Div. Allegh. 2002), to be persuasive and interpreted the Follansbee case as requiring a trustee who...
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obtains legal advice from an attorney relating to the trust to share that advice with the beneficiaries. The trustee appealed to the Superior Court of Pennsylvania.

Shifting Burden
The Superior Court quashed the trustee’s appeal, finding that the trial court order regarding discovery was not an immediately appealable order, and remanded the matter to the Orphans’ Court.

Although the Superior Court quashed the appeal in such a way that it need not address the merits of the attorney-client privilege issue in its August 2018 opinion (194 A.3d 597 (Pa. Super. 2018)), it went on to find that it was “constrained to agree with the trial court” that the trustee failed to establish that the invoices were privileged. In doing so, the Superior Court recognized the shifting burden of proof in disputes over the disclosure of communications allegedly protected by attorney-client privilege.

Generally, the party invoking the privilege bears the initial burden of establishing facts sufficient to demonstrate that the materials sought are privileged. The burden then shifts to the party seeking disclosure to present facts proving that privilege does not exist or that some exception, like the fiduciary exception, applies.

The Superior Court found that the trustee did not file objections to the discovery requests and the record did not contain sufficient facts to support the application of the attorney-client privilege at the trial court level; therefore, the Superior Court concluded, the trustee failed to meet his initial burden. As a result, the Superior Court did not address the second step of the shifting burden analysis.

Superior Court Discusses the Exception
While the Superior Court did not proffer a detailed analysis of Follansbee, it briefly discussed the Restatement (Third) of Trusts and the Pennsylvania Supreme Court’s decision in Estate of Rosenblum, 328 A.2d 158 (Pa. 1974). According to the Superior Court, the Supreme Court in Rosenblum concluded that Section 173 of the Restatement (Second) of Trusts is declaratory of Pennsylvania common law in that the “right of access to trust records is an essential part of a beneficiary’s right to complete information concerning the administration of the trust.” The Superior Court also pointed to Section 82, cmt. f. of the Restatement (Third) of Trusts, considered by Judge Wettick in Follansbee, which provides that a “trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee’s personal protection in the course, or in anticipation, of litigation (e.g., for surcharge or removal).”

In applying these principles, the Superior Court noted that the trustee failed to present any facts establishing that the redacted information on the legal invoices pertained to communications with counsel retained for the trustee’s personal protection or in the course of or in anticipation of litigation. Accordingly, the Superior Court was “left to conclude that the information contained in the attorney invoices qualifies as communications subject to the general principle entitling a beneficiary to information reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary’s rights under the trust.”

Divergent Viewpoints
When the Pennsylvania Supreme Court was presented with the question of whether a trustee can invoke the attorney-client privilege to prevent the disclosure to a beneficiary of communications between the trustee and counsel, the justices could not reach a consensus.

Justice David N. Wecht authored an opinion, in which Justices Debra Todd and Kevin M. Dougherty joined, supporting a “categorical” application of the fiduciary exception. While Justice Wecht’s opinion placed significant emphasis on Follansbee and Rosenblum, it also materially diverged from the analysis set forth in the Superior Court’s McAleer decision and Judge Wettick’s opinion in Follansbee. In fact, Justice Wecht’s opinion rejected the “in the course, or in anticipation, of litigation” standard stated in Restatement (Third) of Trusts, Section 82, cmt. f., asserting that such a standard would “increase uncertainty with regard to disclosure disputes in probate matters rather than diminish it.”

Justice Wecht’s opinion found that beneficiaries should be entitled to examine the contents of all communications between the trustee and counsel where counsel is paid from the trust. To the extent that trustees wish to maintain the confidentiality of their communications with counsel, Justice Wecht proffered that “Pennsylvania law already offers a simple solution: do so at your own expense.”

Justices Christine Donohue, Sallie Updyke Mundy and Thomas G. Saylor, on the other hand, rejected the fiduciary exception to attorney-client privilege. In an opinion authored by Justice Donohue and joined by Justice Mundy, this faction of the Supreme Court found that reliance on Follansbee
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to support the fiduciary exception is misplaced. The justices specifically disagreed with Justice Wecht’s and Judge Wetrick’s analysis of Rosenblum. Justice Donohue expounded that in Rosenblum, “[t]here is no indication that the trustee asserted any claims of privilege and the Court did not adopt, or even consider, the adoption of a fiduciary exception to the privilege.” Justice Donohue also noted that Follansbee relied on an outdated version of the Restatement of Trusts and involved a third-party subpoena served on the fiduciary in the context of civil litigation.

Furthermore, Justices Donohue and Mundy found Justice Wecht’s position concerning the source of the payment of counsel fees to be untenable. Justice Donohue explained that the “Court should not place obstacles to prevent trustees from seeking confidential legal counsel when faced with [circumstances that exceed the scope of a trustee’s expertise] by raising cost as a barrier to responsible administration.”

Finally, Justice Saylor authored a third opinion, taking the position that “policy-based exceptions to the attorney-client privilege … are better considered by the policy-making branch of government.” Justice Saylor further found Justice Wecht’s “approach of admonishing trustees that they may personally shoulder the expense for legal services associated with their official responsibilities to be wholly impracticable, particularly relative to complex matters in which the cost is prohibitive.”

Public Policy Concerns

Each of the three Supreme Court opinions highlighted the various public policy concerns underlying the arguments in support of and against the fiduciary exception. Justice Wecht’s group noted broader policy objectives, such as promoting transparency in fiduciary relationships and ensuring predictability when it comes to restricting attorney-client confidentiality. On the other hand, Justice Donohue’s faction stressed the more practical implications, suggesting that fiduciaries could be discouraged from retaining outside counsel or even agreeing to serve as a fiduciary in the first place if required to pay legal fees from their own pockets just to preserve their right to communicate freely with counsel.

Justice Saylor, while noting that the Legislature is best suited to address the issue and the opposing public policy interests, also warned against underestimating the role of the fiduciary exception as a deterrent on a fiduciary’s willingness to seek advice of counsel.

Despite the divergent viewpoints, a majority of the justices appeared to agree that the identity of the person or entity paying the legal fees is an element of the debate. The proponents of the fiduciary exception argue that if the trust pays the fiduciary’s legal fees, it is the equivalent of the beneficiaries footing their own legal bill as well as the fees incurred by the fiduciary. Alternatively, the opponents of the fiduciary exception cite the Rules of Professional Conduct, arguing that the source of payment bears no correlation to the identity of the client, nor does it create a right on the part of a third-party payor to direct the legal services of the client.

The End Result

As a result of the Supreme Court’s split, the Pennsylvania Superior Court’s decision to compel disclosure of the attorney invoices was affirmed by operation of law. See Creamer v. Twelve Common Pleas Judges, 281 A.2d 57, 58 (Pa. 1971).

For an opinion of the state high court to be precedential, a majority of justices who participated in the case must join in the opinion. Bata v. Central-Penn Nat. Bank, 293 A.2d 343 (Pa. 1972); LeGare v. Com., Unemployment Comp. Bd. of Review, 444 A.2d 1151, 1154 n.3 (Pa. 1982). While some courts have considered plurality opinions and the opinions of evenly divided courts to have persuasive value, McAleer produced three entirely different opinions on whether a fiduciary can assert the attorney-client privilege in response to requests for information from beneficiaries, leaving beneficiaries, fiduciaries and the attorneys who represent them with a Superior Court decision that cites Follansbee yet relies on analysis that none of the Supreme Court justices endorsed.

Despite hope for a definitive opinion from the Supreme Court, the 3-3 split in McAleer leaves the door open for debate, absent a future majority decision by the Pennsylvania Supreme Court or legislative action.

Amanda K. DiChello is a member of the Private Client Services Group at Cozen O’Connor in Philadelphia, where her practice focuses exclusively in trusts and estates.

Richard L. Holzworth is an experienced trial attorney in Cozen O’Connor’s Private Client Services practice group. His practice is devoted to fiduciary litigation and representing high-net-worth individuals and corporate fiduciaries throughout Pennsylvania in estate and trust disputes, including cases involving the validity and interpretation of wills and trusts, breaches of fiduciary duty, and trustee removal and surcharge actions.
The recent decision of the Pennsylvania Supreme Court in *In re: Estate of William K. McAleer, Deceased*, (248 A.3d 416 (Pa. 2021)), is a common topic of discussion in the legal community, especially in the context of whether the opinions and time records of the counsel to the fiduciary are discoverable and to what extent. However, there is an additional implication of the decision, which is that a fiduciary who claims some privilege in communications with counsel may be admitting that those communications and the services related to those communications were not sought for the benefit of the beneficiaries and that therefore, the fees for those services should not be paid from the estate.

In this respect, the *McAleer* decision is consistent with other appellate and Orphans’ Court opinions holding that, when legal fees are incurred by a fiduciary taking positions that are adverse to beneficiaries of the estate or trust, and really serve the personal interests of the fiduciary, those legal fees should be paid by the fiduciary, and not the estate or trust. (For simplicity, this article will refer to the fund being administered by the fiduciary as the “estate” regardless of whether it is a decedent’s estate, a minor’s or incapacitated person's estate, or a trust.)

This article will provide an analysis of those decisions that stand for the proposition that the fiduciary should pay its own legal fees for representation in disputes with beneficiaries, and compare this analysis with the *McAleer* opinion.

**Legal Fees of Fiduciaries in General**

The ACTEC Commentaries on the Model Rules of Professional Conduct (American College of Trust & Estate Counsel, 5th Ed. 2006), distinguishes between representation of fiduciary in a “representative” capacity and representing the fiduciary as an individual:

*If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity — the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries — not to perform ser-

vices that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate.

ACTEC Commentary on MRPC 1.2, page 35.

The commentary goes on to state that a lawyer is representing a fiduciary in an individual capacity, and not a representative capacity, if the lawyer is “retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate.” This is consistent with the decisions cited below regarding legal fees incurred in disputes between the fiduciary and the beneficiaries over the compensation of the fiduciary or in actions in which a surcharge of the fiduciary is sought.

**Distribution Disputes**

The personal interests of the fiduciary are clearly at stake when the fiduciary claims an interest in the estate for himself or herself. The Pennsylvania Supreme Court has therefore held that an executor cannot pay legal fees out of an estate for litigation over the personal interests of the executor. *In re Estate of Pitone*, 489 Pa. 60, 65-66, 413 A.2d 1012 (1980).

In *Pitone*, the executor was also named on a joint bank account with the decedent and expended legal fees and other costs in a dispute with the beneficiaries of the estate over the ownership of the account. Not surprisingly, the Supreme Court held that the executor “was under a duty to see that her purely private interests were not advanced at the expense of the estate.” 489 Pa. at 66. The fees and costs were therefore payable by the executor and not the estate.

See also, *Estate of Bruner*, 691 A.2d 530, 535, 456 Pa.Super 705 (Pa. Super. 1997) (legal fees incurred to defend the executor’s interpretation of the will as giving the residue to himself did not benefit the beneficiaries and the fees were not properly chargeable to the estate).

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As discussed in other cases cited below, an executor’s legal fees may be reduced or denied even when the only interest of the fiduciary in the estate is a commission or fulfilling a duty.

Defending Fiduciary Compensation

Orphans’ Court decisions have held that fiduciaries may not be reimbursed from an estate for expenses incurred in defending their own compensation or commissions. See, e.g., Moss Estate, 21 Fid.Rep.2d 151 (Phila. O.C. 2001); Powers Estate, 58 D.&C. 379, 386. These decisions rest on the conclusion that litigation over the compensation of a fiduciary does not benefit the beneficiaries or advance the administration of the estate, but are over the personal interests of the fiduciary in being compensated. In those situations, the “American Rule” should apply, i.e. that each party should bear his or her own costs of litigation.

One argument in support of allowing fiduciaries to be reimbursed for defending their own compensation is that they may be victimized by beneficiaries making unreasonable objections to clearly reasonable compensation, and so fiduciaries may be forced to pay legal fees routinely in order to defend their compensation. However, any abuse of legal process can be remedied by the discretion of the court to award legal fees under 42 Pa.C.S. § 2503(7) for conduct that is “dilatory, obdurate, or vexatious,” or under § 2503(9) for commencing an action that is “arbitrary, vexatious or in bad faith.” These provisions have been applied in litigation in the Orphans’ Court. See, e.g., Estate of Liscio, 432 Pa.Super. 440, 638 A.2d 1019 (1994); Pfeiffer Estate, 25 Fid. Rep.2d 254 (Phila. O.C. 2005); Kesler Trust, 3 Fid.Rep.3d 59 (Montg. O.C. 2012); Mumma Estate, 7 Fid.Rep.3d 323 (Cumb. O.C. 2017), appeal quashed, 319 MDA 2017 (Pa. Super. 10/2/2017).

Defending Legal Fees (Fees on Fees)

For similar reasons, a lawyer should not be allowed any fees from an estate for defending his or her own fees. As the Philadelphia Orphan’s Court stated in Nicely Estate, 18 Fid. Rep.2d 397, 415 (Phila. O.C. 1998), “[T]ime expended by counsel in seeking its own compensation is of no benefit to the fund but only benefits counsel. Accordingly, it is not compensable from the fund.” Other courts in other states have reached similar conclusions and disallowed compensation to lawyers for defending their own fees. See, e.g., Estate of Larson, 103 Wash.2d 517, 694 P.2d 1051 (1985); Estate of Painter, 628 P.2d 124 (Colo. App. 1981); Estate of Reynell, 516 So.2d 26 (Fla. App. 1987). Contra, Estate of Trynin, 49 Cal.3d 868, 264 Cal.Rptr. 93, 782 P.2d 232 (1989), rev’g 205 Cal.App.3d 1040, 252 Cal.Rptr. 787 (1988).

Defense Against Surcharge


However, legal fees for successful surcharge defense may be payable from an estate. Wingert Estate, 30 Fid.Rep.2d 106, 133 (York O.C. 2009).

If those are the applicable principles, should a fiduciary be allowed to pay his or her counsel from the estate while the surcharge dispute is pending? The arguments against paying the costs of a fiduciary’s defense from the estate rely on the proposition that doing so puts the parties on an unequal footing:

1. The beneficiaries will be expected to pay their legal fees as they are incurred, but the fiduciary can effectively borrow from the estate without paying any of the current costs of the defense.
2. Because a fiduciary will not be paying any of the current costs of the defense, the fiduciary may feel no urgency to settle, and may actually seek to drag out the proceedings for as long as possible in order to “wear down” the beneficiaries.
3. If the beneficiaries are successful and a surcharge is imposed, the beneficiaries might still not have an effective remedy because the judgment against the fiduciary may be difficult or impossible to collect if the fiduciary resides out of state, is insolvent, has declared bankruptcy, or has died. It should still be possible to seek return of the relevant fees from the fiduciary’s counsel, but these complications could be avoided if the legal fees were paid by the fiduciary from the beginning.

For these reasons, it may be prudent for beneficiaries to seek a court order blocking the fiduciary from paying legal fees from the estate when an account has been filed, the beneficiaries have filed objections to the account, and it appears that the fiduciary has been paying legal fees for the defense of the fiduciary from the estate.

Defense Against Removal

The general approach of the courts towards legal fees relating to the removal of the fiduciary seems to be similar to the

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approach to legal fees in defense of surcharge: payable from the estate if the defense is successful, but otherwise not.

Courts have held that a fiduciary is not entitled to charge to the estate fees for counsel retained for the purpose for preventing his or her removal. In re Clark’s Estate, 14 D.&C. 751, 753 (O.C. Phila. 1930) (counsel fees incurred by guardian in opposing her removal are not chargeable to the estate, being expended on her own behalf and not for the benefit of the estate). See also, Francis Edward McGillick Foundation, 537 Pa. 194, 642 A.2d 467 (1994) (a trustee who is removed for cause is personally liable for the legal fees and costs incurred); Kreisel Trust, 9 Fid.Rep.2d 151 (Montg. O.C. 1989); Ray, Incompetent, 14 Fid.Rep.2d 245 (Montg. O.C. 1994).

However, one court has allowed payment from an estate of legal fees paid for the successful defense against a petition for removal. Coffin Estate, 16 Fid.Rep. 627, 633 (Bucks O.C. 1965).

Opposing the Duty to Account

While the costs of preparing and filing an account of the administration of the estate is usually considered a normal cost of estate administration and is chargeable to the estate, legal fees incurred to oppose the beneficiaries of an estate and to resist the filing of an account are not chargeable to the estate but must be paid by the executor personally. Feise Estate, 21 Fid.Rep.2d 317, 322 (Montg. O.C. 2001) (fees paid to counsel for executor who was also the agent for the decedent under a power of attorney should not be paid by estate, but by the executor/agent, when time was spent by counsel resisting the efforts of the beneficiaries to obtain an accounting from the agent).

Counsel Confidentiality

In a dispute over legal fees paid by a trustee, the Orphans’ Court had ordered the trustee to turn over to the beneficiaries unredacted invoices for legal fees paid, and the order was ultimately affirmed by operation of law by a split Pennsylvania Supreme Court. In re: Estate of William K. McAleer, Deceased, 248 A.3d 416 (Pa. 2021), aff’ng 194 A.3d 587, 2018 PA Super 227 (2018).

Reduced to its simplest terms, the Orphans’ Court, the Superior Court and a split Supreme Court held that, if the funds of the estate were used to pay legal fees, then the beneficiaries were entitled to know the purposes and results of those fees. This is implicit in the Superior Court opinion, and explicit in Justice Wecht’s opinion in the Supreme Court.

The trial court’s opinion stated that “Pursuant to Follansbee [v. Gerlach, 56 D.&C.4th 483, 22 Fid.Rep.2d 319 (Allegh. C.D. 2002)] and the logic set forth in that opinion, the billings that are the subject of this appeal should be shared in full, since the beneficiaries, in effect, paid for the legal services rendered,” and the Superior Court stated that “We are constrained to agree with the trial court.” 194 A.3d at 596.

Justice Wecht was more explicit in the choice faced by the fiduciary and explained that the rule announced by the Superior Court, and endorsed by Justice Wecht and two other justices, would not deny any possible attorney-client privilege to fiduciaries. “To the extent that trustees wish to maintain the confidentiality of their communications with counsel, we would find that Pennsylvania law already offers a simple solution: do so at your own expense.” Slip opinion, p. 32.

For the purpose of this article, the reasons why a fiduciary would want to keep communications with counsel secret must be questioned. The obvious (and perhaps inescapable) answer is that the fiduciary wants communications with counsel to be secret because the personal interests of the fiduciary may be damaged by disclosure. The McAleer decision is therefore like the other decisions described above, because it is a case in which the interests of the fiduciary are adverse to the interests of the beneficiaries and the legal fees paid by the fiduciary are for the protection of the fiduciary and not for the administration of the estate.

It should also be observed that, if a fiduciary has a choice about whether to pay counsel fees from the estate and waive any privilege, or preserve privilege by paying counsel fees from the fiduciary’s own funds, then the beneficiaries should also have a choice. If a fiduciary has paid legal fees from an estate and has nevertheless sought to assert a privilege by redacting descriptions of legal fees or otherwise withholding information about communications between counsel and the fiduciary, then:

- The beneficiaries can pursue discovery to obtain unredacted attorney time records or other evidence of communications between the fiduciary and counsel, in accordance with the McAleer decision; or
- The beneficiaries should be able to treat the redactions or other assertions of privilege as admissions that the communications in question were personal to the fiduciary and not for the benefit of the estate or trust, and to seek to have the fiduciary surcharged for the legal fees incurred in connection with the communications withheld. In the case of redacted time records of legal counsel, this would mean that the fiduciary would be surcharged for the fees
paid in connection with the redacted descriptions.

Summary and Conclusion

As shown by the cases cited above, Pennsylvania courts are generally opposed to fiduciaries paying legal fees from estates when those fees are incurred in litigation with the beneficiaries of the estate that the fiduciary has been charged with administering.

When representing a fiduciary, a responsible attorney should at the very least keep time records that separate the tasks necessary for the ongoing administration of the estate, such as accounting for ongoing receipts and disbursements and preparing annual tax returns, from the tasks related to the litigation, and the fiduciary should be made aware that the costs of litigation are not necessarily payable by the estate. Ideally, the costs of litigation should be billed to the fiduciary and not the estate, with a request to the court for reimbursement for the fiduciary only when the litigation has been successfully completed.

Two pieces of legislation recently introduced by Senate Democrats promise to shake up the estate planning industry. First, the For the 99.5 Percent Act (99.5% Act), written by Senators Sanders and Whitehouse, seeks to dramatically change estate planning by drastically reducing the federal estate and gift tax credits, increasing tax rates on estates, gifts and generation-skipping transfers (GSTs) and including certain trust assets in a decedent’s estate. Second, the Sensible Taxation and Equity Promotion (STEP) Act written by Senators Booker, Sanders, Van Hollen, Warren and Whitehouse would eliminate stepped-up basis at death and would treat most asset transfers, including those that occur at death, as taxable events. The effects of these two acts would eliminate trusted estate planning strategies and require estate planners and administrators to carefully review their clients’ plans.

Key Components

The 99.5% Act would reduce the federal exemption from $11.7 million to $3.5 million and increase taxes on estates. The new estate tax rates would be tiered and assess 40% on estates valued between $3.5 and $10 million, 50% on estates valued between $10 and $50 million, 55% on estates valued between $50 million and $1 billion and 65% on estates valued in excess of $1 billion. Additionally, the annual gift tax exemption limit would be lowered from $15,000 to $10,000 and be subject to a cap of $20,000 per donor, per year. This limit would apply to 1) transfers to a trust, 2) transfers of any pass-through entity, 3) transfers of interests subject to prohibitions on sale and 4) any other transfer that cannot immediately be liquidated by the donee. One effect of the annual cap on gift tax exemption would be that it essen-
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tially eliminates trusts with Crummey provisions for transfers of these assets.

The STEP Act would impose a tax on the transfer of assets with a net gain regardless of whether the transfer occurred during a person's lifetime or at death. The act allows the first million dollars of gain to be excluded from the transfer tax. However, lifetime transfers to a trust or a non-spouse would only have a $100,000 exemption, a dramatic departure from the current $11.7 million. Transfers to trusts that are not included in the grantor's estate (including Intentionally Defective Grantor Trusts (IDGT), as discussed in more detail below) would be subject to this tax. However, under the same rationale, lifetime transfers to revocable trusts would not be subject to the tax. The $500,000 exemption for personal residences would still apply, and assets held in retirement accounts would be exempt from capital gains tax, as well as charitable gifts.

The theory of the STEP Act is to close an income tax loophole by imposing a “transfer tax” on unrealized capital gains when heirs inherit appreciated assets on which the original owner never paid income taxes. However, there would be unintended concerns that drafters may not have considered. The process of estate administration is a tedious one and many times important documents cannot be found. If a decedent had the asset for a long period of time, if may be impossible to locate the basis information. There are additional concerns that this would impose a double taxation since the current version of the STEP Act would assess a tax at the time of death, even if the assets were not liquidated and no gain was realized and again once the asset is sold.

Additionally, all non-grantor trusts would have to report gain on appreciated assets every 21 years and any established trusts would automatically report their gain in 2026.

The proposed legislation, if enacted, would be a stark departure from where we are now. Below are only some examples of how new legislation may render ineffective many relied-upon estate planning strategies.

Effect on Estate Planning Tools

STEP UP IN BASIS

Currently, the IRS allows inherited assets to reset their basis at the decedent's death, so that heirs avoid paying capital gains tax on unrealized capital gains. For example, a child may quickly sell the family home upon a parent's death and no capital gains would be owed. The STEP Act would fundamentally change this since all previously untaxed gains over $1 million would now be subject to tax in the year of death.

IDGTs

IDGTs have been a historically popular estate planning tool. This technique is often used to benefit a grantor’s spouse and descendants by allowing a client to transfer assets out of his/her estate while retaining the grantor's basis and having the trust income taxed at the grantor level. Within an IDGT, under current law transfers between the trust and the grantor are respected for gift and estate tax purposes but disregarded for income tax purposes. If enacted, there would be little appeal to use IDGTs as an estate planning tool because a transfer or sale to the IDGT would become a taxable event under the STEP Act. Further, the 99.5% Act specifically provides that any asset in an IDGT would be included in the grantor's estate for federal estate tax purposes. The 99.5% Act also deems any distributions from the IDGT to beneficiaries during the grantor’s lifetime as taxable gifts. Importantly, this provision would be effective as of the date of enactment and may also be applicable to IDGTs that were created prior to that date when additional contributions are made to the trust. These changes would totally reverse the reasons for creating the IDGT.

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**GRATs**

Grantor-Retained Annuity Trusts (GRATs) allow a grantor to contribute assets with appreciation potential to a fixed-term, irrevocable trust. The grantor retains the right to receive an annuity stream over the trust’s term, after which the assets are distributed to the non-charitable beneficiaries. The two primary benefits of utilizing this type of trust is that 1) a GRAT freezes the value of the property at a moment in time, allowing for a beneficiary to receive the benefits of the trust and any subsequent appreciation of the trust assets without gift or estate tax, and 2) the annuity can be valued to approximate the transferred asset value (zeroed-out), thereby virtually eliminating a taxable gift upon the trust funding. The 99.5% Act would make GRATs less effective in transferring wealth due to the new restrictions that would impose limitations on terms and restrictions on the value of remainder interests that would generate gifts upon funding. The new minimum term would be 10 years, instead of only the two-year term required now, and there would be a maximum term of the annuitant’s life expectancy, plus 10 years. This would prevent short-term, rolling GRATs. In addition, the remainder interest may not be less than the greater of 25% of the fair market value of the trust assets or $500,000.

**GENERATION-SKIPPING TRANSFER TAXES**

Another technique that would no longer be as effective is a trust that continues for multiple generations. Dynasty trusts are able to successfully leverage transfer tax exemptions because the trust assets are not included in anyone’s estate as succeeding generations become beneficiaries of the trust. However, the 99.5% Act would require an irrevocable trust to terminate for estate tax purposes after 50 years. This would be an extra estate tax in addition to the transfer tax applicable under the STEP Act.

**ACTION ITEMS**

While this legislation is pending, the retroactive provisions in the acts would eliminate the ability to do proactive planning as they would apply taxes to any gifts or inheritances after Dec. 31, 2020. Estate planning practitioners would be wise to begin thinking about how their practice may be affected by upcoming tax proposals. In addition, attorneys may want to:

- Discuss impacts of possible legislation with clients;
- Evaluate benefits of accelerating the funding of GRATs and other Grantor Trusts;
- Potentially accelerate IDGT sales;
- Be organized to use the lifetime exclusion prior to enactment; be wary of Deceased Spouse Unused Exemption (DSUE) ordering rules;
- Be prepared to pay gift tax at 40% prior to enactment;
- Consider recommending estate tax be paid for 2020 and 2021 deaths at 40% rather than higher future rates.

**CONCLUSION**

The proposed pieces of legislation represent an aggressive stance and the terms will likely be negotiated. Additionally, it is likely that lawmakers will be focused on pandemic relief this year, which may buy wealthy families more time for estate planning and asset transfers. However, attorneys should not wait for the terms of legislation to be finalized. The government will need a way to pay for the relief as the U.S. is expected to lose almost $42 billion on tax revenue this year alone, according to the Joint Committee on Taxation. The new proposed legislation, if passed, would surely put more money into the government. Accordingly, there may be real benefit to clients by implementing certain wealth transfer planning techniques while they are still available.

Rebecca Sallen of Sallen Law LLC is active in the Main Line suburbs and Greater Philadelphia area since 2011. Her practice focuses on trust and estate planning and estate administration. Rebecca is a board member of the Montgomery Bar Association, Vice-Chair of the Probate and Tax Section, and a regular lecturer and educator on estate planning topics.

A special thank you to Kevin Birkhead, Esq. for his supporting contribution to this article.
What a difference a year makes. Reflecting on the summer of 2020, the Pennsylvania real estate market sat in a paradox. The residential rental market was heavily restricted under the Cares Act, the governor’s executive order halting evictions and by Labor Day, the Center for Disease Control’s moratorium on evictions. Under the Emergency Order from the Pennsylvania Supreme Court, county President Judges were tasked with their own local restrictions on landlord and tenant matters. Similar limitations were in place for residential foreclosures all while the residential sales market was seeing home prices rise due to a growing demand and limited supply. While many practitioners faced challenges advising clients of a fast-paced and ever-changing legal landscape, others found themselves in a holding pattern as their real estate practice was paused. On the commercial side, restaurant and store closures, company bankruptcies and a migration from company settings to home offices put the question mark on the future value of standalones, mixed-use and skyscrapers. While there was a concern for the survival of commercial space, warehouses and industrial prices were surging.

Now, as many restrictions have been lifted and appeals courts are issuing decisions on the constitutionality of our government’s response to the pandemic, the real estate market, like many other industries, looks quite different. According to the Pennsylvania Association of Realtors, home sales in April 2021 were up 38% from April 2020, and sales prices were 11% higher than last year. Nationwide, the commercial real estate market is recovering, although commercial real estate transactions and the underlying market fundamentals are still weak compared to pre-pandemic conditions. In the first quarter of 2021, commercial transactions were 28% below the level one year ago. Commercial real estate prices continue to stabilize, but valuations were broadly down by 6% from one year ago. Foreclosures and tax sales are once again on the calendars in county courthouses. Evictions are moving forward with rent relief packages for landlords waiting to further stall the displacement of non-paying tenants.

So how will real estate attorneys in the commonwealth adapt? We just started getting comfortable with online meetings, remote closings by mail or in parking lots and virtual CLEs. Can dirt attorneys who are “rooted” in their practice retool their approach once again?

The Real Property, Probate and Trust Section has not only been fluid throughout the pandemic, but has helped to shape some of these new policies and legislation. While last year’s annual meeting of the section was held virtually, and this year’s meeting in Philadelphia will once again be in person, we have found some of these temporary adjustments during the pandemic year may be permanent fixtures. Working from home and online screen meetings are certainly new for all industries, but remote notarization and court and municipal hearings are a direct change for many real estate practitioners.

2021 is certainly a year of transition and new ideas. Will the migration from cities to suburbs continue? How will home builders handle the surge in demand? Will cities begin to remove highways that run through their borders and opt for more pedestrian-friendly streets? Will wholesaling be a thing of the past? No matter the direction, you can be sure the Real Property Division will be at the forefront in the conversation.

Michael A. Burns is a real estate attorney in Media, Delaware County. He handles litigation and transactional affairs for a book of investors and individuals in both commercial and residential matters. Michael is also a licensed real estate broker maintaining an associate license with Chaddsford Realty LLC. He also serves the public as a magisterial district judge for Court 32-2-42 in Glenolden.
Deed Restrictions Cause Pain

By Marshal Granor, Esq.

When my wife and I purchased the land where we built our house 30 years ago, the real estate lawyer in me was anxious to review the deed restrictions listed in Schedule B of the title report. As the pages of the search came across my fax machine, I was amused to read that the home we were planning to build had to be a minimum of two stories tall and cost at least $2,500. The next deed restriction I read said that no alcoholic beverages could be served on the property which, while amusing, really was not going to put a significant limitation on our lifestyle.

What is a deed restriction? Any owner of land can go to the courthouse and restrict the use of their land for a limited period or in perpetuity. When a farmer or large landowner subdivides his property there might be very legitimate reasons for recording a restriction against the property. The large manor home being retained by the landowner at the top of the hill and with a beautiful view might impose a restriction on other homes to limit the height of roofs, outbuildings and trees so the main house continues to have those wonderful views forever. Some owners, wishing to “extend a hand from the grave,” limit land use to only permit residential single-family homes or to prohibit the removal of natural features.

Unfortunately, deed restrictions that can be helpful for the future value and use of the property, the preservation of natural resources and the pleasure of all current and future occupants can also be used to restrict who inhabits the property. Throughout our commonwealth and the country, there are restrictions still recorded against land stating that no Italians, no Catholics, no Irish, no Jews (or, as some of them say, “People of Semitic Origin”) and no Blacks are permitted to own — or even to live on — the property. Many decades ago, the U.S. Supreme Court stated that these racial restrictions are unenforceable under the Constitution and the laws of the United States of America. *Shelley vs Kraemer* was decided in 1948, but nothing in our court cases can physically remove the restrictions from the public record. Thus, if you receive a title search today it will most likely contain the American Land Title Association’s standard disclaimer, “… omitting any covenant, condition or restriction, if any, based on race, color, religion, sex, handicap, familial status, or national origin …”

If these restrictions are unenforceable against the property owner, then what problem could they possibly pose? The answer is simple. They perpetuate the story of a sad history of discrimination against all sorts of people in our country. Perhaps even you. And, for people who are cognizant of this jaded history, it indicates that they are less than wanted in their new neighborhood.

Considering the reawakening of knowledge and understanding about the harm that these restrictions impose, the question arises whether something can be done to make these blemishes disappear. The debate begins with the question as to why the erasure of these restrictions would be a good thing. After all, they educate us about a sad time in our collective history — a time that is not all that long past and which, unfortunately, still exists in some places. As with statues of Confederate soldiers or the adulation of slave owners, is it appropriate to just remove these deed restrictions from history? In fact, many of the people working to remove racist monuments are not looking to destroy them but to house them in locations where their history can be put into context, much like the monuments to both the North and South on the Gettysburg battleground.

Is there a way to remove the sting of these painful deed restrictions and yet to retain them in an instructive way? A number of state legislatures have begun the process of thinking through this question. The State of Maryland has established a method where a person or community association with deed restrictions against their property can have them removed by requesting approval of the county deed recorder and then literally eradicating the bad language.

The State of Indiana is currently considering legislation that would do something similar. There, House Bill No. 1314 would permit either all participants in a conveyance to include a statement that the offending restriction is unenforceable or, if all participants will not consent, then an individual may record a separate document to the same effect.

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The Indiana Legislature’s notice language, which would be required should this bill pass, is:

“The chain of title for the real property described herein contains a restrictive covenant that, if enforced, would discriminate against individuals based upon their race, color, sex, religion, familial status, or national origin. The covenant is invalid, unenforceable, and antithetical to American values of equal justice and equality under the law.”

In 2020, Orange County, California, began a program to allow homebuyers and others who need to record official property documents with the county clerk-recorder’s office to have any discriminatory language removed for free. In Orange County, deed restrictions exist prohibiting housing for Black, Jewish, Italian, Russian, Muslim, Latino, Asian and other Americans.

Also, in 2020, Florida recognized this problem and passed a law, Senate Bill No. 374, containing the following:

“Any discriminatory restriction contained in a previously recorded title transaction is extinguished and severed from the recorded title transaction and the remainder of the title transaction remains enforceable and effective.”

While this language is laudable, the process for extinguishing and severing the offensive restriction in Florida remains unknown.

In Pennsylvania, with our many counties and their varied processes for recording documents, it seems highly unlikely that we could get into the existing electronic and paper records and extract the unenforceable and damning language. However, an interesting idea was suggested in the book *Color of Law* by Richard Rothstein. Professor Rothstein suggests that perhaps the current landowner, rather than attempting to eradicate the history, proposes words of repudiation which would be recorded as part of the public record, somewhat as Indiana has proposed. In this way, history stands and yet a new layer of awakening sits on top of the old.

In this regard, I have reached out to a few Pennsylvania recorders of deeds to see whether the Recorders Association in Pennsylvania would be willing to work with our section and perhaps with other trade organizations to find a way to modernize and recognize the harm that some of our predecessors have done by imposing these restrictions on land. I am hopeful I can report back to you about our success.

If you are interested in joining this effort, please let me know. Please also think carefully about whether you believe this effort has merit. As someone who is Jewish but lives in the Philadelphia suburbs and has felt very little discrimination in my life, I have at times found it wryly humorous when I learn about a restriction trying to keep me out of a place. But then I have visited the slave market in Charleston, South Carolina, and the death camp at Auschwitz, where the harm that some people have inflicted upon others becomes vividly clear. If there is something that we as individuals or our section can do to recognize the pain and to make efforts to ameliorate it, then I believe we are doing the right thing.

Marshal Granor is the managing member of Granor & Granor PC in Horsham. He is the immediate past chair of the PBA Real Property, Probate and Trust Law Section. He also served as the vice chair of the section’s Real Property Division and executive editor of this newsletter. He is a member of the College of Community Association Lawyers and concentrates on condominium and homeowners association law.
There is perhaps no species of ownership known to law which is more complex or which has given rise to more diversity of opinions and even conflict in decisions than which sprung from the mortgage of Real Property. (Barrett v. Hinkly, 124 Ill. 32, 14 N.E. 863 (1883).)

Pennsylvania court rulings, statutes and regulations are no exception to this declaration from the 1883 Illinois Supreme Court. The Pennsylvania Supreme Court in Pines v. Farrell, 848 A.2d 94 (Pa. 2004), held that a mortgage is a conveyance when interpreting the recording acts of Pennsylvania, but recognized that in Pennsylvania a mortgage “can be considered both a conveyance in form as well as a security interest,” i.e. a lien. The court specifically limited its ruling to the recording acts and 42 Pa. C.S. § 3733 (a.1) (1)(v) and purposefully avoided addressing the conveyance theory in regard to bankruptcy and foreclosure matters. (See, Footnote 7). Justice Saylor filed a dissenting opinion, detailing the Pennsylvania cases the earliest cited case from 1858 holding mortgages are liens and not “property transfers”, i.e. conveyances. Who would have thought that, after years of controversy, the clearest direction from the court is “(t)hus, a mortgage has a dual nature, acting as a conveyance of property between the mortgagor and mortgagee, while also acting as a (sic) lien between the mortgagor or mortgagee and third parties.”

Does this direction conflict with the statutory authority of issuing a mortgagee’s title insurance policy? Title insurance, as statutorily defined, “means insuring, guaranteeing or indemnifying against loss or damage by owners of real property or by others interested therein”… (40 P.S. § 910-1). Could it be argued that title insurance underwriters are third parties to an insurance contract between the underwriter and mortgagee, thereby classifying the recorded mortgage as a lien and resulting in underwriters not being classified as “others interested therein” under § 910-1? Title insurance underwriters and agents need not worry, since § 910-8, specifically states a mortgagee shall have the benefit of title insurance. This author highlights these statutory sections to evidence the conflict between conveyance theory and lien theory in our case law as well as our statutes. Also see 21 P.S. § 721-2 and § 951.

Do the different theories affect the treatment of a mortgage at the time of the purchase or sale of the real estate? From a title insurance viewpoint, the different theories do not make a practical difference. However, it may shape an attorney’s advice when a defeasible deed is employed as a financing tool. (The Hahnemann Medical College v. Commonwealth of Pennsylvania, 416 A. 2d 604 (Pa. Commonwealth 1980). Classifying the instrument as a defeasible deed may incur transfer taxes or other incidents of ownership, i.e. maintenance of the real property. For the practitioner whom may encounter a defeasible deed at the disadvantage of the client, see 21 P.S. § 951 on the criteria to reduce the deed to a mortgage.

Is it not time for Pennsylvania to take an affirmative stance on which theory mortgages derive from? The court’s statement that a mortgage has a dual nature gives one a slight shade of Plutarch’s Theseus’ Paradox. The Ancient Greek paradox is the ship that had sailed from Crete to Athens and over the years the decaying wooden planks and oars were replaced, raising the question: Is it still the same ship? The principle of granting a mortgage has been a function since at least the time of Ancient Rome, and then evolved through the Norman Conquest, American colonies and to our present common law and statutes. Each of these civilizations came to judge granting indicia of ownership to the mortgagee was punitive to the mortgagor, since in these societies a mortgagee had the right to enter the mortgagor’s property and thereby terminating the mortgagor’s fee. One has to wonder if their laws and our laws gradually refitted the planks of the mortgage with lien planks — our own Theseus’ Paradox — given that there are always more debtors than creditors?

Nevertheless, Pennsylvania’s debtors and creditors deserve a resolute decision on the meaning of a mortgage. It is not intellectually consistent for the Courts to apply the conveyance theory to collect revenues for the government — as they did in Pines v. Farrell and The Hahnemann Medical College v. Commonwealth of Pennsylvania — then use their equity powers to convert a mortgage to a security lien when the outcome seems too harsh toward the debtor. Laws need to be consistent to afford reasonable expectations to both parties and afford their attorneys a fair opportunity to dispense reasonable advice.

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Are You Able to Lean on the Mortgage Lien?

By James Lomeo, Esq.
Are You Able to Lean on the Mortgage Lien?
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For the policymakers whom may not think this dichotomy is relevant, they may want to consider proposed ordinances and statutes to hold mortgage holders responsible for the blighted condition of the properties in question. Responsibilities flow to society from ownership of any type of property, whereas a secured creditor only has a duty to collect repayment.

Therefore, we may be able to lean on our mortgage lien, however, please do not lean too far — or you may fall.

James Lomeo has been practicing law since 1987 and is a graduate of the University of Pittsburgh School of Law. Married with three adult daughters, he proudly served on the Monroeville Planning Commission from 1998-2002 and as mayor of Monroeville from 2002-2008. He can be reached through lomeolaw.com.

Real Property Case Law Updates
By Frank Kosir Jr., Esq.

In In re Consolidated Appeals of Chester-Upland School District, 55 MAP 2020 (2020), the Pennsylvania Supreme Court ruled that the existence of commercial billboards on a parcel of real property could be taken into account when valuing that real property for real estate tax purposes where the property owner receives income from those billboards. The Chester-Upland School District and Chichester School Districts filed assessment appeals against 26 properties that had billboards, asserting that the billboards resulted in an increase in the properties’ respective fair market values and needed to be taken into consideration when the properties were assessed. The Delaware County Board of Assessment Appeals denied the appeals and the Delaware County Court of Common Pleas affirmed, concluding that, since Section 8811 of the Consolidated County Assessment Law (53 Pa.C.S. §8811(a)) specifically excludes signs and sign structures from real estate tax assessment, any value that the billboards add to the properties could not be considered in determining assessed value.

On appeal, the Pennsylvania Commonwealth Court reversed and the Pennsylvania Supreme Court granted allocatur and affirmed. In issuing its ruling, the court noted that, while it is true that Section 8811 specifically precludes the value of the signs and sign structures from being taken into account in assessing real property, the statute is silent as to whether the increase in valuation to the property resulting from the presence of these improvements can be considered. There is no dispute that a parcel of real property with billboards receives a steady stream of income there from. Since the Assessment Law provides that real property is to be assessed in accordance with its actual value, it follows that the presence of this revenue stream would lead to a potential purchaser paying more for the property than they would if the billboards were not present. Therefore, while the value of a billboard itself cannot be taken into account when assessing the real property upon which it is located, the increase in value that can be attributed to the existence of that billboard can be considered.

In Lohr v. Saratoga Partners, 67 MAP 2019 (2020), the Pennsylvania Supreme Court held that the lack of a statutory right of redemption in the Pennsylvania Real Estate Tax Sale Law (the RETSL) (72 P.S. § 5860.101) did not violate the Equal Protection Clauses of the United States Constitution. In Pennsylvania, real estate tax sales in Philadelphia and Allegheny counties are governed by the Municipal Claims and Tax Lien Act (the MCTLA) (53 Section P.S. § 7101 et seq), while such sales in all other counties are governed by the RETSL. The MCTLA provides a property owner whose land has been sold at tax sale with a nine-month period in
which it can redeem the property by paying the delinquent taxes and all costs associated with the tax sale. Conversely, the RETSL provides no right of redemption. The Lohrs were the owners of two parcels of real property situated in Huntingdon County that were exposed to tax sale. After the sale, the Lohrs filed a petition to redeem the properties, asserting that the lack of right of redemption in the RETSL was a violation of the Equal Protection Clause as property owners in Philadelphia and Allegheny counties are given protections not afforded to property owners in the other counties of the commonwealth. The trial court applied the rational basis test and dismissed the petition.

On appeal, the Pennsylvania Commonwealth Court affirmed, concluding that there was a rational basis for treating property owners differently as the applicability of the RETSL or the MCTLA was based solely upon the population of a given county. On appeal, the Pennsylvania Supreme Court affirmed, noting that, since the right of redemption set forth in the RETSL was statutory in nature, the rational basis test was properly applied. Therefore, as the purpose of taxing statutes is to assure the efficient collection of taxes, and bidders at real estate tax sales are more likely to bid higher amounts when they are assured of obtaining title, a legitimate state interest was served by excluding the right of redemption from the RETSL.

In Grove v. Lutz, 2021 Pa. Super. 1, (2021), the Pennsylvania Superior Court concluded that a property owner who had previously sold a parcel of real property was not entitled to collect any rents arising from the subsequent renewal of a cellular tower lease on that property. Joan P. Grove and her husband were the owners of a farm (the property) situated in Chanceford Township, York County. The property, which consisted of two parcels totaling 67 acres, was subject to a 1993 Land Lease Agreement (lease) with Pennsylvania Cellular Telephone Company (tenant), which permitted the installation and maintenance of a cellular tower on the property. In 2003, the Groves sold the property to Perry A. and Lana R. Lutz (the Lutzs), and the deed of conveyance included a provision stating that the Groves reserved the right to collect rents under the lease through its scheduled expiration in 2019.

In 2015, after Mr. Grove had passed and unaware that the property had been sold, the tenant approached Mrs. Grove and inquired as to her willingness to renew the lease. Mrs. Grove agreed and entered into an agreement extending the lease through 2059. Mrs. Grove then commenced an action against the Lutzs and the tenant seeking declaratory judgment that she, although no longer the owner of the property, continued to enjoy a right to collect rents under the lease. The Lutzs filed a counterclaim asserting that, pursuant to the terms of the deed, Mrs. Grove’s rights to collect rents under the lease terminated once the lease in place at the time of the property’s conveyance expired. The trial court entered judgment for Mrs. Grove and the Lutzs appealed.

On appeal, the Pennsylvania Superior Court reversed. In issuing its ruling, the court noted that, when a parcel of real property is conveyed, the grantee receives all rights not specifically excepted or reserved, including the right to lease the property conveyed. In this matter, the deed into the Lutzs specifically stated that Mrs. Grove reserved the right to collect rent payments on the lease “for the remainder of the term of the lease and for the additional term extensions as set forth in the lease dated Dec. 21, 1993.” Therefore, since the agreement that Mrs. Grove and the tenant entered into in 2015 was not an extension of the existing lease but, rather, an entirely new lease, it was not included within the reservation language of the deed and Mrs. Grove was not entitled to continue collecting rents for the cellular tower after the expiration of the lease.

In Barna v. Langendofer, 2021 PA Super. 17 (2021), the Pennsylvania Superior Court held that language in a restrictive covenant requiring all garages to be attached to a residence by a party wall precluded the use of a breezeway as a means of connection. David Barna and Gail Barna (the Barnas) and Gerard D. Langendofer and Jean M. Langendofer (the Langendoifers) are the owners of adjacent single-family residences in Canaan Township, Wayne County. The Barnas and the Langendoifers trace their respective titles back to a common grantor, with each being subject to a series of restrictive covenants including one stating that “There shall be no other buildings, besides a residence with an attached garage, constructed on the property.”

During the summer of 2016, the Langendoifers obtained a building permit from Canaan Township to construct a detached garage on their property immediately adjacent to their residence. However, this garage was not connected to the Langendoifers’ residence in any manner, and the Barnas brought an equity action in the Wayne County Court of Common Pleas seeking a judgment requiring the Langendoifers to attach the garage to their residence. Following
the completion of a bench trial, the court concluded that the Langendoerfers’ construction of the garage violated the restrictive covenant, and ordered them to attach the garage to their home no later than March 31, 2019. In an effort to comply with the court’s order, the Langendoerfers erected a pergola between their home and the garage, thereby connecting the roofs of the two structures. In response, the Barnas brought a petition for contempt asserting that the pergola did not serve to “connect” the garage to the home as the two structures still did not share a common wall. The trial court held a hearing on the petition and found the Langendoerfers in contempt. In support of its conclusions, the court held that the purpose of the restrictive covenant was to limit the number of structures that could be erected on a single lot. Therefore, since the construction of the pergola did not result in the garage and home being connected by a common wall, the Langendoerfers were in contempt of the court’s order.

On appeal, the Pennsylvania Superior Court affirmed. In issuing its ruling, the court noted Pennsylvania’s longstanding principle that restrictive covenants are unfavored in the law. However, covenants that are legal and valid are enforceable against the parties who have agreed to be bound by such restrictions. In this matter, there was no dispute that the Langendoerfers were aware of the subject restriction at the time that they took title to their property. Furthermore, when reviewing an ambiguous term, the court must take the parties’ intentions into account. Doing so, it is evident that the purpose of the restriction was to limit the number of structures that could be erected on a single parcel of land. Therefore, the trial court’s determination that a pergola connecting a home and a detached garage did not comply with a restrictive covenant precluding the construction of detached structures was a reasonable interpretation of the restriction, and would not be disturbed on appeal.

Frank Kosir Jr. is a partner at Meyer Unkovic Scott LLP in Pittsburgh. He has significant civil litigation and general practice experience in all areas of real property law. He is the former chairman of the Allegheny County Bar Association’s Real Property Section and currently serves as an elected member of Peters Township Council.

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