SECTION REPORT

From the Chair
By Brett A. Solomon, Esq.

It has been a very busy and exciting few months for the Pennsylvania Bar Association Real Property, Probate, & Trust Law Section (RPPT). The section hosted its annual retreat in August at Nemacolin Woodlands Resort in Farmington that was well received by the 100-plus attendees. In November, we took steps to reinvigorate an already active section by reintroducing a variety of committees we believe will help the section operate more efficiently. And finally, the section chose to participate in the PBA Young Lawyers Division's initiative to integrate YLD members into our section as liaisons between the YLD and RPPT section.

Annual Retreat 2017

This year’s retreat was one of the best-attended meetings we have had since I joined the section. We welcomed 139 guests to Nemacolin, including 86 section members and their families and 35 YLD members. The weather was beautiful, except for a few rain showers, and the resort’s plethora of activities kept us and our families engaged.

We were fortunate to have Pennsylvania Supreme Court Justice David Wecht open the programming with a discussion about the Code of Professional Responsibility. Justice Wecht’s hour was engaging, informative and entertaining. It was an honor and pleasure to have him join us. Following Justice Wecht’s hour of ethics were nine hours of substantive CLE credits from attorneys throughout the commonwealth, including Delaware County Judge William “Chip” Mackrides, a past RPPT chair, as well as Lisa Grayson, the register of wills of Cumberland County. “Chip’s Tips” is always a popular session, which provides practical guidance and “lessons learned” for attorneys appearing before trial court judges. Throughout the two days of programming, I was most impressed with how engaged the audience was for each program. Our section has so many knowledgeable and involved members who add to the lectures. And the lively atmosphere made each hour interesting.

But RPPT retreats are never solely focused on education alone. We always make sure to eat well, have fun and spend quality time catching up with section members we know, as well as meeting new members interested in learning more about RPPT. We enjoyed a delicious wine dinner on Wednesday evening hosted by one of Nemacolin’s sommeliers, followed by a humorous who-done-it mystery dinner on Thursday evening that involved some section members and their guests in the performance.

YLD Liaisons

As I mentioned, 35 YLD members joined us for the retreat. Many were lured by the majesty of Nemacolin and the CLE programming, while others were enticed by our section’s special financial incentives. Our Council members were looking for ways to engage and encourage YLD members to join our section. We believe many YLD members do not attend retreats such as ours for many reasons, including the cost. This was particularly the case this year as Nemacolin is one of our pricier venues. While we will not be able to underwrite the accommodations of YLD members every year, we were happy to do so in 2017 and believe our section and the YLD members who attended both benefited from this experiment. I had an opportunity to meet and talk with many of the YLD members and was impressed...
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with how interested they were in our section and what makes us tick. Members of the RPPT Council were so impressed with the level of engagement that when we were asked if the RPPT section would be interested in having a YLD liaison appointed to the section, we enthusiastically agreed. Due to the size of our section and the overwhelming interest in YLD members, we expect to soon welcome two YLD liaisons, one on the “dirt” side and one for “death.” The liaisons will also help promote RPPT events or projects of interest to YLD members. In return, the liaisons will report to our section regarding the initiatives and interests of the YLD that may be relevant to our group. It’s a win-win for our section and the YLD, and we look forward to welcoming our YLD liaison(s) as they are assigned to us.

RPPT Committees

Recently, Mark Mateya, vice chair of the RPPT Probate and Trust (“Death”) Division, suggested our section revive a committee structure to help deal with the abundance of legislation the section is asked to review, along with numerous other tasks. Until I became section chair, I didn’t realize just how many requests we receive to comment on pending legislation. Plus, there are many other requests made of the leadership of the section. While the PBA staff keeps us productive, Council leadership spends many hours each month on section duties. Frankly, it’s what we signed up for when we joined Council and took on leadership roles. But we have so many engaged members that we may not have been involving everyone to their potential.

As a result, and thanks to the hard work of our ad hoc “Committee Committee,” our section reconstituted four committees: Probate and Trust Law Legislation, Real Property Legislation, Programs, and Publications, to add to our Membership Committee. The Legislation Committees will review new legislation that may impact our areas of the law, review and discuss any new state or federal case law that may impact our disciplines, and discuss any other topics that arise. The goal is to stay ahead of legislation as it is proposed and before it is enacted.

The Programs Committee will be chaired by the immediate past-chair, Jennifer Rawson. She will work with several other past-chairs, among others, to plan our programming for the year, as well as work with PBA staff to plan our yearly retreat.

The Publications Committee will be led by Marshal Granor, vice-chair of the Real Property (“Dirt”) Division, and Melissa Dougherty. Marshal has been the editor-in-chief of the RPPT newsletter for several years. He was instrumental in revisions to the newsletter that included, most prominently, printing in full color, adding photos of all authors, expanding the number of all authors, and an overall modernization. He has done an amazing job editing the newsletter and ensuring that there is always sufficient content each month and that it is published on time.

All-in-all, it has been a busy and exciting six months for the RPPT section, and I look forward to the next six as we continue to advance our section’s interests.

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

One of the benefits of achieving the age of AARP membership is that our tuition bills are well behind us, as are our children’s. This gives my wife and me the luxury of travel, and we have been lucky to experience many parts of our country and others.

Last summer, we visited states we had never encountered before (still aiming for the full 50) as we were awe-struck by Grand Teton and Yellowstone National Parks. There is a lot of real estate out there in Idaho, Montana and Wyoming! Tremendous natural beauty is on display in the rivers, wildlife, geysers and other weird geological formations. Photos do no justice to the awe of these places. Our national parks are an asset and treasure we all should enjoy and cherish.

We also had occasion to make an unexpected trip to Australia. Yes, unplanned and unexpected. My wife, the software guru, was hired as an expert witness in a contract dispute. She was originally on call in February (think southern hemisphere summer during the cold Pennsylvania winter), but the case was continued. In Australia, that’s an automatic six-month delay to August.

Never expecting the defendant to refuse to consider a compromise, we didn’t book this 21-hour jaunt until three weeks before the trial. It wasn’t until the morning of our travels that we were certain the matter was headed for court. With my wife’s expenses fully paid, how could I not tag along?

I won’t regale you with the travel photos (happy to share the trip diary and pictures if you insist!), except to say that Australia is a magnificent country with warm and welcoming people everywhere we encountered them. They LOVE Americans, they love life, they welcome immigrants, they celebrate their many veterans, and they care deeply about one another.

It was refreshing to go to a place where the level of discord is so low that we never saw a parent scold a child, nor do we recall even one car horn. Australians seem to have their heads on straight. They spend a lot of money on public education. The government subsidizes school trips so students can experience the nation’s capital. Melbourne houses the National Museum of Immigration, recounting the history of a country now experiencing what the U.S. was perhaps 100 years ago, inviting laborers and professionals to fill growing job vacancies.

When we travel, we like to meet locals and find out what they are all about. One good way to do that is to take walking tours, often off the beaten track. We did that in both Melbourne and Sydney, with the expected results. Because the case was settled on the first scheduled day of trial (another story for a different day), we had plenty of time to return to Sydney for our flight home. We rented a car and drove up the east coast, taking a detour to visit the country’s capital, Canberra. Here we learned just how much Australia is like the U.S. The country copied our three-legged stool of government, blending American concepts into their just-freed-from-monarchy country.

Unlike the British House of Lords, Australia has a Senate. While its Congress and executive branches leak into each other a bit, the similarities are stunning. In fact, we watched a sixth-grade class sit in the seats of the Victoria state parliament building and discuss the similarities and differences between American and Australian governmental systems. (I challenge you to do the same!)

We wandered into the High Court building, which was eerily quiet. Because court was sitting elsewhere, we were able to have wonderful conversations with the guards (who were more like tour guides than most tour guides). They love talking about how their system works and occasionally fails. And they revel in asking educated questions about the U.S.

Their curiosity about the U.S. means conversations about two American phenomena. The first is President Donald Trump. We did not encounter a single Australian who understood the
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dynamics of his election. We experienced much head shaking and genuine concern for our future (and questions of why we can’t have an election for a “vote of no confidence”).

The second American curiosity is firearms. Australia has a lot of “Wild West” characteristics. There are wide swaths of dangerous territory occupied by dangerous animals. But when there were massacres in the 1980s and 1990s, the final one being the Port Arthur Massacre in 1996, the federal government established national laws. (Before I upset some readers, please understand I am a city boy. The thought of civilians with concealed weapons scares me. Watching the results of the Las Vegas shooting, I do not understand why

any individual requires rapid-fire lethal weapons. At the same time, I recognize and honor both the Second Amendment, as well as less-urban uses of firearms for recreational purposes.)

No, firearms were not stripped from law-abiding Australians, but people had to demonstrate a need for firearms to keep them. Private sales were banned. In this country almost the size of the continental U.S., but with only 8 percent of our population, here is what resulted:

In the 18 years up to and including 1996, the year of the massacre at Port Arthur, Australia experienced 13 mass shootings. In those events alone, 112 people were shot dead and at least another 52 wounded. In 10.5 years after the revised gun laws, no mass shootings occurred.

Zero.

Suicides by gun dropped immediately by a full 50 percent.

Australians love Americans. They fought side by side with us in two World Wars and most conflicts thereafter. They love our culture, our TV programs and our system of democracy. And they can’t believe we continue to allow firearms to be so ubiquitous in our country.

All we could do was shrug.

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

Interested in contributing to the next RPPT Section newsletter?

We welcome updates on committee activities or projects or on matters affecting our practice areas. We seek equality between our divisions and need commitments for material from each division. We ask our officers, council members and committee chairs to submit or recruit material or to recommend material to reprint with permission. Please email your article and a brief bio in Word format, as well as a high-resolution (300 dpi) author photo, to the executive editor, Marshal Granor at Marshal@granorprice.com.

The deadline to submit articles for the next issue is May 31, 2018.

Name this newsletter!

A number of our members question the use of the word “newsletter” in our masthead. What exactly is this publication? “Newsletter” denotes something short and summary-like. It is not a “journal,” although we receive and publish scholarly articles from many authors. We are not a newspaper or magazine.

We do update our many members about section actions, activities, education and gatherings. We promote opportunities to gather with your section colleagues. We invite you to become more active by joining committees and Council.

But what exactly are we?

Among friends, we refer to ourselves as the “Dirt and Death Section,” but that seems too lighthearted and glib.

Please suggest a new name for this publication, incorporating all we do for both sides of our practice. Send your suggestions to Marshal Granor at marshal@granorprice.com.

For now, we remain the “PBA Real Property, Probate & Trust Law Section Newsletter.”
Mark your calendars now for the 2018 Real Property Probate and Trust Section Annual Retreat! This year, the RPPT Section will be holding its Annual Retreat on Aug. 8-10 at the Wyndham Gettysburg. A full program of events is planned, including multiple track CLE courses covering timely topics of interest in both probate and trust and real property law. A highlight of the Retreat is the “Death vs. Dirt Challenge” that pits teams of “death” lawyers against teams of “dirt” lawyers in a battle of intellect, wills (no pun intended) and physical skills. Scavenger hunts, trivia contests, golf cart driving, and archery are a few examples of past challenges. The annual retreat also includes multiple dining options and plenty of free time to relax by the pool, play a game of golf or enjoy the amenities and attractions offered by the venue and surrounding area. With the location of this year's retreat in Gettysburg, there are plenty of nearby attractions and places of interests to occupy your free time.

The Annual Retreat provides a great opportunity for practitioners from across the state to meet, mingle, learn, and share ideas and experiences in their respective practice areas. It is a family-friendly event, and attendees are encouraged to bring guests. Guests have the opportunity to participate in the planned events, or they may wish to simply take advantage of the venue and its amenities. Some attendees have chosen to stay a couple extra days after the retreat ends and take advantage of the additional time for a mini family vacation.

Registration for the Annual Retreat is expected to open in late Spring. Look for the Annual Retreat brochure with complete details about the event, CLE courses, meals and recreation activities. If you have not attended before, don't wait another year to take advantage of this great event. If you have attended before, we look forward to seeing you again!
The 2017 RPPT Retreat at Nemacolin Woodlands Resort

Judge William “Chip” Mackrides, past RPPT Section chair and sitting Delaware County Common Pleas judge

RPPT members interact with the cast at the murder mystery dinner.

RPPT Section Chair Brett Solomon recognizing the hard work of outgoing Chair Jennifer Rawson.
Real Property Division Report

By Marshal Granor, Esq., Vice Chair, Real Property Division

As I said in my editor’s column, I was unable to attend the outstanding RPPT section retreat last summer. I missed seeing and meeting many of you there, and I don’t expect an unplanned trip half-way around the world again this summer. If you also missed the retreat, and especially if you enjoyed Nemacolin Woods, please mark Aug. 8–10, 2018 for this year’s RPPT Retreat at the Wyndham Hotel in Gettysburg.

We have amazingly talented and selfless people on Council – folks who care deeply about our profession and the law. When legislation is proposed which brings an imbalance to our areas of expertise, we have no lack of volunteers to help steer the matter back to where it should be. Each of our two disciplines now has a Legislative Review Committee to look into pending legislation, as well as to recommend areas where legislation is needed.

We thank the following volunteer Real Property Legislative Review Committee members: Ron Friedman, Eric Hume, Heather Harmon Kennedy, David Schwager, Brett Woodburn and Kenneth Yarsky.

I consistently hear how much you appreciate the support network we’ve created through our Listserv. The amount of time and sharing that go into this well-considered advice continues to amaze me. I have learned so much from those of you who share there. Thank you.

Please stay in touch. Let me know what your Real Property Division can do for you. And please urge your colleagues to join RPPT. We are especially anxious to continue our efforts to attract younger attorneys, those from diverse locations throughout the commonwealth, and frankly, more women and minorities. We are a welcoming group and look forward to continuing to grow.

I wish you much success and happiness in 2018.

REAL PROPERTY DIVISION

Sunoco Mariner East 2 Pipeline Project Update

By Louis M. Kodumal, Esq.*

In the case of In re Condemnation by Sunoco Pipeline, L.P., 143 A.3d 1000 (Pa. Cmwlth.), petition for allowance of appeal denied, (Pa., Nos. 571, 572, 573 MAL 2016, filed Dec. 29, 2016) (Sunoco I), the Commonwealth Court, in an en banc decision, determined that Sunoco Pipeline LP is a “public utility,” with the power of eminent domain, and concluded that property owner preliminary objections to Sunoco Pipeline Declarations of Taking were properly overruled where the preliminary objections had asserted that:

• Sunoco lacked the power or the right to condemn their land as Sunoco was not a public utility regulated by PUC for the Mariner East 2 pipeline;
• Sunoco’s corporate resolution authorized takings only for an interstate pipeline and not an intrastate pipeline;
• the declarations were barred by collateral estoppel on the basis of the York County decision;
• the Mariner East 2 pipeline was an interstate pipeline and not an intrastate pipeline;
• the declarations sought to condemn their properties for two pipelines while the agency condemnees assert has sole jurisdiction, FERC, approved only one pipeline;
• Sunoco lacked the FERC Certificate of Public Convenience and Necessity (certificate) necessary to exercise eminent domain power for the pipeline; and
• Sunoco’s proposed bond amounts were insufficient.

Since that decision, Commonwealth Court has affirmed other trial courts’ decisions overruling similar preliminary objections, largely based upon its holding in Sunoco I. See, e.g., In re Condemnation by Sunoco Pipeline Continued on page 8
In an unreported panel decision issued on June 29, 2017, *In Re: Condemnation By Sunoco Pipeline LP* (Pa. Cmwlth. No. 2030 C.D. 2016) (*Appeal of Patricia and Thomas Perkins*), the Commonwealth Court rejected the appellants’ contention that the application of the Pennsylvania Property Rights Protection Act (PRPA), 26 Pa. C.S. §§ 201-207, barred the pipeline condemnation in question. The decision acknowledged that while Section 204(a) of the PRPA prohibits the use of eminent domain for private enterprise, 26 Pa. C.S. § 204(a), the prohibition is subject to a number of exceptions found in subsection (b) of Section 204, which provides, in pertinent part:

(b) Exception. Subsection (a) does not apply if any of the following apply:

(2) The property is taken by, to the extent the party has the power of eminent domain, transferred or leased to any of the following:

(i) A public utility or railroad as defined in [Section 102 of the Public Utility Code (Code),] 66 Pa. C.S. § 102 (relating to definitions). 26 Pa. C.S. § 204(b) (emphasis added).

The Commonwealth Court having concluded in *Sunoco I* that Sunoco Pipeline LP is a “public utility,” and because the stipulated record before the lower court was similar to the records developed in *Sunoco I* and the other related cases, it reached the same conclusion that the PRPA-related preliminary objections were properly dismissed and upheld the lower court’s order.

**Update, as of November 2017**

On Oct. 18, 2017, an en banc panel of the Commonwealth Court heard arguments in the cases of *Megan Flynn et al. v. Sunoco Pipeline LP*, case number 942 CD 2017 and *Delaware Riverkeeper Network et al. v. Sunoco Pipeline LP*, case number 952 CD 2017. Residents in Middletown Township, Delaware County, the Delaware Riverkeeper Network and residents in West Goshen Township in Chester County seek reversal of two lower court rulings relating to pipeline routing. Sunoco Pipeline contends that the Commonwealth’s Public Utility Code specifically preempts local ordinances relating to pipeline siting and that the Public Utilities Commission’s authority to adopt regulations controls.

On Oct. 26, 2017, the Pennsylvania Public Utility Commission voted unanimously to uphold an administrative law judge’s ruling that prevented Sunoco from building a valve and associated equipment for its Mariner East 2 pipeline on private land on the basis that the construction breached a settlement agreement between West Goshen Township and Sunoco regarding the proposed construction and operation of the Boot Road Pump Station and associated Vapor Combustion Unit.

On Nov. 6, 2017, the zoning hearing board of Thornbury Township voted to deny an appeal by the Andover Homeowners Association regarding a grading permit issued by the township to perform grading in the area of an easement in the open space area owned by the association as servient tenant. The permit would allow construction of a pipeline within 100 feet of the curtilage of a residential property and within 75 feet of a building, which the association asserted would be in violation of Thornbury Township Subdivision and Land Development Ordinance Section 22-605 and would reduce the appellant’s open space below the required 40 percent on a property as required by Thornbury Township Zoning Ordinance Sections 27-1204 and Section 27-1205.

Louis M. Kodumal, Esq. is a past RPPT section chair and is a current member of the RPPT Section and the PBA Shale Energy Committee. Portions of this article were originally included in materials presented as part of the CLE program, “Annual Update in PA Real Estate Law,” for the Real Property, Probate & Trust Section’s 2017 Annual Retreat.
REAL PROPERTY DIVISION

PCSM BMPs for the Dirt Lawyer
By Erik Hume, Esq.

For attorneys representing developers, the National Pollutant Discharge Elimination System (NPDES) permit is one of those items traditionally handled by the engineer for the project. Changes enacted by the Pennsylvania Department of Environmental Protection (DEP) in 2010 added significant new requirements for notice and ongoing maintenance of post-construction stormwater management (PCSM) best management practices (BMPs). The failure to comply with these requirements can significantly impact the project.

Over the last 40 years, environmental law has evolved to include the regulation of stormwater runoff. In 2010, DEP enacted significant amendments to Chapter 102 of Title 25 of the Pennsylvania Code, imposing requirements to manage the net increase in both the peak rate of stormwater and the volume of stormwater runoff (or demonstrate that there will be no adverse impact to water quality). These requirements apply to permits issued after Nov. 19, 2010, as well as renewals of existing permits after Jan. 1, 2013.

In order to meet the new volume/water quality management requirements, various BMPs are being utilized. These BMPs include traditional stormwater management facilities, such as swales, piping and retention basins. In order to meet current standards for stormwater, however, many developers have turned to other BMPs that are more maintenance-intensive than traditional facilities. Commonly seen among this new breed of BMPs are amended soils, which are soil mixtures that encourage the retention of stormwater instead of runoff; raingardens, which are areas planted with vegetation designed to retain and filter stormwater; infiltration pits, which are small pits designed to collect and encourage the seepage of stormwater into the aquifer; and bioretention basins, which are larger basins with plantings designed to filter and infiltrate stormwater.

All PCSM BMPs, whether simple, traditional detention basins or newer varieties, have ongoing maintenance and inspection requirements. With the 2010 amendments, DEP sought to provide notice and clarity for what is required and who is responsible for that maintenance. In 25 Pa. Code § 102.8(m), DEP imposed specific requirements related to the long-term maintenance of PCSM BMPs. These requirements include: (1) a presumption that the NPDES permittee (the developer) will be responsible for long-term operation and maintenance unless a new responsible party is identified in the Notice of Termination for the NPDES permit (NOT); and (2) a requirement that an instrument be recorded to put parties on notice of the PCSM BMPs. 25 Pa. Code §102.8(m) (2) further provides that the PCSM instrument is a document that “will assure disclosure of the PCSM BMP and the related obligations in the ordinary course of a title search of the subject property. The recorded instrument must identify the PCSM BMP, provide for necessary access related to long-term operation and maintenance for PCSM BMPs and provide notice that the responsibility for long-term operation and maintenance of the PCSM BMP is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees.”

DEP has also been imposing additional PCSM BMP disclosure requirements in the conditions attached to NPDES permits. For example, standard permit conditions require that the instrument containing the PCSM disclosures be recorded within 45 days of issuance of the permit, whether or not

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Not any lots are sold.

The net effect is that DEP is requiring developers to provide several levels of notice to purchasers of lands with PCSM BMPs. These disclosures include general notice of PCSM BMP obligations through recorded instruments and deed disclosures and property-specific disclosures for the BMPs located on the property. If a developer fails to discharge these obligations, the developer could be responsible for the ongoing maintenance of the PCSM BMPs in perpetuity.

Unfortunately, significant confusion about the disclosure requirements has resulted in faulty compliance. To make matters worse, many developers do not learn they are out of compliance until they attempt to file the NOT for the project. While some conservation districts have been notifying developers of compliance issues while the project is active, others do not address the issue until the NOT form is being reviewed. At that point, satisfying the notice requirements can be difficult, if not impossible.

What, then, should practitioners representing developers do to ensure that their clients satisfy the PCSM BMP notice obligations? For a new project, the simple answer is to ensure that the notice and recording requirements set forth in the regulations and permit conditions are satisfied. Implementing the notice and disclosure requirements early in the development process will pay dividends when the development is closed out. At a minimum, placing the required deed notice on the project and lots early in the process ensures that it will be discovered in any title insurance inquiry.

For existing projects, there is hope. DEP will provide official guidance of how notice deficiencies should be addressed. Until such guidance is provided, the best course of action is to “stop the bleeding” by having the appropriate notices prepared and recorded. After that, the focus should be on demonstrating that the notice requirements were effectively satisfied through other means or, in the worst case, going back to lot owners and asking for signoff on the BMPs and long-term operation and maintenance.

An important thing to consider when addressing PCSM BMP notice issues is that the process remain fluid. For example, in August 2017, DEP revised the NOT form and the accompanying instructions. Prior to the revision, the NOT form required that every party responsible for ongoing maintenance of a BMP sign the NOT form. For a development containing hundreds of units, obtaining all of those signatures would be extremely difficult. The August 2017 revisions removed that requirement. Furthermore, the accompanying instructions to the NOT provide that a planned community declaration can, in and of itself, satisfy the disclosure requirements provided the requisite information is included. It is reasonable to expect DEP will continue to revise procedures as a result of operational experience.

One unintended consequence of the 2010 changes is that the case for submitting new residential developments to planned community form of ownership is strengthened. The Pennsylvania Uniform Planned Community Act allows a declarant to designate portions of a community as “controlled facilities,” which include portions of the community not owned by the owners association, but maintained by it. A developer can designate all of the PCSM BMPs in a community as a controlled facility and name the association as the party responsible for BMP maintenance. This is a win-win situation; many associations are professionally managed and will be better positioned to complete PCSM BMP maintenance, and DEP prefers to have one party responsible for PCSM maintenance. Alternatively, the declaration can require lot owners to perform day-to-day maintenance on any designated stormwater BMPs, with the association having the ultimate responsibility should the individual owners fail to perform their duties.

The case for the planned community is further strengthened by 25 Pa. Code § 102.8(m)(4), which allows a developer to enter into an agreement with a nonprofit organization for the discharge of the maintenance obligations. While the intent may have been to allow for watershed groups and other environmental organizations to manage certain natural BMPs, an agreement with the homeowners association, properly disclosed and recorded early in the development, would nevertheless qualify as such an agreement. Use of the planned community regime can simplify the developer’s disclosure and maintenance obligations.

Advanced stormwater management techniques will continue to grow in importance for residential and commercial projects, and with that, real estate attorneys need to pay close attention to the regulatory requirements. Proactive management of the disclosure and established maintenance agreements will save much angst for developers as they complete their projects.

Erik Hume is a member at Smigel, Anderson & Sacks in Harrisburg, where he advises clients in all aspects of real estate transactions and development. He represents landowners and developers in the sale, acquisition, leasing, financing and development of commercial and residential real estate, as well as in the creation, development and administration of commercial and residential condominiums and planned communities. He can be reached at ehume@sasilp.com.
For our colleagues practicing on the dirt side of the section and in the more rural areas of Pennsylvania, a familiarity with the Private Road Act (PRA) (36 P.S. §2731 et seq.) is a must. This law permits private owners of landlocked properties to file what amounts to a private condemnation seeking an access road over others’ lands to provide ingress and egress from their property to a public road. The PRA sets forth the procedure for implementing the landlocked owner’s remedy.

Existing Case Law

Over the last several years, there has been much litigation concerning the PRA by which its viability as a remedy has been severely limited. The landmark case is In Re Opening Private Road for the Benefit of O’Reilly 607 PA 280, 5 A.3d 286 (Pa., 2010), which reviewed In Re Opening a Private Road (O’Reilly), 954 A.2d 57 (Pa. Commonwealth, 2008) and was discussed in previous articles in this publication. The main point of the Supreme Court decision was that any private condemnation under the PRA had to be “necessary” and had to have a primary and paramount public purpose. The private condemnation of an access road that benefited only the petitioners, rather than the public at large, violated U.S.C. Const. Amend. 5. The Supreme Court did not declare the PRA unconstitutional, but rather, the court clarified that the opening of a private road under the PRA is subject to the same constitutional restrictions that govern a taking under eminent domain.

The O’Reilly case was remanded to the trial court to determine if there was a primary and paramount public purpose underlying the relief sought. Based upon the test set out by the Pennsylvania Supreme Court, the trial court and, on appeal, the Commonwealth Court (at 100 A.3d 689) in 2014 decided that there was no primary and paramount public purpose for the petitioner’s claim under the PRA. Therefore, the petition for access in O’Reilly was dismissed. This decision overturned a century of cases involving the PRA where a primary and paramount public purpose was not required before relief could be obtained.

We country real property attorneys puzzled over whether the PRA, which stood the test of time since the early 1800’s as a remedy for landlocked parcel owners, was dead. It seemed the Supreme Court finally had noticed that the implementation of the remedy specified under the PRA in favor of a landlocked landowner could be a violation of the 5th Amendment of the U.S. Constitution since opening a private road did not serve the public at large. We asked ourselves how one might conjure up a primary and paramount public purpose for a private condemnation as a remedy for a landlocked

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owner, thereby meeting the Supreme Court’s test.

The New Case

Apparently, a primary and paramount public purpose can be established by an individual petitioner under the PRA, albeit under limited scenarios. This is precisely what occurred in Petition of Adams, 170 A3d 584 (Pa. Commonwealth, 2017). In this case, the property owners filed a petition under the PRA seeking access to a stretch of existing roadway across the respondent’s property that was built, maintained and used regularly by a natural-gas drilling company. Presumably, the gas company had an easement that allowed it to cross the respondent-neighbor’s property to its well field. The relief sought under the PRA was for the court to impose upon the respondent’s property an access for petitioner over the existing road. In effect, this would expand the use of the roadway, previously limited to the gas company, to include the petitioner. In a typical PRA proceeding, there is no road in existence. The board of view is charged with laying out a road across the respondent’s property and assessing damages after the board finds the element of necessity.

The trial judge overruled the neighbor’s exceptions to, and accepted, the board of view’s report concluding that petitioners should be granted access across the existing roadway under the PRA. The trial judge ruled, and the Commonwealth Court concurred, that the public was the primary and paramount beneficiary of the opening of the road for the benefit of the petitioner so as to be consistent with state and federal constitutional prohibitions on taking of private property for private purpose.

Here, the petitioner argued successfully that the primary and paramount beneficiary of the roadway is the public because it allows the gas company to supply natural gas to the public. Additionally, the petitioner argued the roadway will be used by hunters to access the petitioner’s 231-acre parcel, which also serves the public. The petitioner claimed to have entered into an agreement with the Pennsylvania Game Commission that hunters could have access to the petitioner’s property. (This agreement was made after the common pleas case was decided). At trial, the petitioner did concede that their use of the roadway would allow them to construct a seasonal home. However, the trial court held, and the majority of the Commonwealth Court agreed, that the fact the petitioner could then build a seasonal dwelling upon the landlocked property did not vitiate the overriding public purpose of the existing roadway. Thus, petitioner should be entitled to use it along with the gas company.

Analysis of the Case

This writer believes that the decision in Petition of Adams, 170 A3d 584 (Pa. Commonwealth, 2017) is seriously flawed. The case’s dissenting opinion states what would have been the proper interpretation of a primary and public purpose. The fact that the gas company already had access across the respondent’s property does not make the petitioner’s claim any more valid since serving the petitioner’s interest in also having access is not a public purpose but a private one. The appellate court concluded that the gas company’s use of the roadway is a public purpose in supplying gas to the general public. Then, the court must have reasoned that it must logically follow that there is no harm in allowing the petitioner’s private purpose to piggyback on to the gas company’s rights and its public purpose. The ruling holds that under the PRA, the petitioner’s use of the roadway is a primary and paramount public purpose because the gas company has a primary and paramount public purpose. This is tortured reasoning, and it does serious harm to the principles set forth by the Supreme Court in O’Reilly.

The Take-Away from This Case

The message to practitioners is that the PRA offers a remedy to a landlocked landowner if there is an existing road on the neighboring property that has a primary and paramount public purpose. Assuming that the requirement of necessity under the PRA is met, according to the ruling in Adams it is only necessary to show a public purpose for the existing access. Then, the landlocked landowner can seek relief under the PRA and take advantage of an existing public purpose roadway without having to establish that landowner’s own primary and paramount public purpose. Obviously, there has to be an existing roadway that provides the public with a primary and paramount benefit. For now, the PRA is not dead and appears to be available in limited factual circumstances.

Editor’s note: House Bill 1773 (General Road Law Repeal Legislation) is now pending in our Legislature and is under review by the section’s new Real Property Legislative Review Committee. It was introduced in September 2017 and “laid on the table” on Dec. 12, 2017. If you want to comment on the pending legislation, please contact the committee promptly. See: http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=1773.

REAL PROPERTY DIVISION

Real Estate Case Law Update
Compiled by Frank Kosir Jr., Esq.


Is a school district’s practice of exclusively appealing the real estate tax assessments of high value commercial properties constitutional?

Here, the school district hired a consultant to identify under-assessed commercial properties, which assessments the district would then appeal. The Montgomery County Board of Assessment Appeals denied every appeal.

Property owners argued the district’s practice of systematically selecting the real estate tax assessments of high value commercial properties for appeal while not appealing any residential assessments violated the Uniformity Clause set forth in Article 8, Section 1 of the Pennsylvania Constitution.

The Commonwealth Court agreed the Uniformity Clause requires that all taxes be “... uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax ...” However, Section 8855 of the Consolidated County Assessment Law (53 Pa.C.S. § 8855) provides that a taxing body shall have the same rights as a property owner to appeal a real estate tax assessment.

The Supreme Court granted allocatory on the issue of whether the Uniformity Clause of the Pennsylvania Constitution permits a taxing authority to selectively appeal only the assessments of commercial properties, such as apartment complexes, while choosing not to appeal the assessments of other types of property — most notably, single-family residential homes — many of which are under-assessed by a greater percentage.

The Supreme Court found that, for purposes of real estate tax assessment, all properties situated in a particular taxing district constitute a “single class” under the Uniformity Clause, and local taxing authorities are not permitted to treat different types of properties in divergent manners. Furthermore, these restrictions apply to all actions of a taxing body, whether intentional or unintentional, and whether systematic or not. Here, commercial and residential properties were treated differently, thereby running afoul of the Uniformity Clause.


May a private enforcement action be brought under the Pennsylvania Municipalities Planning Code for violations of a local subdivision and land development ordinance?

Smiths commenced an equitable action against Ivy Lee, seeking injunctive relief for alleged “land development” under the township’s Subdivision and Land Development Ordinance (SALDO) without first submitting a land development plan.

The trial court denied the Smiths’ requests finding they did not have standing under the SALDO, pursuant to Section 617 of the Pennsylvania Municipalities Planning Code (MPC) (53 P.S. § 10617). Rather, since Section 617 is included in the subchapter of the MPC pertaining to “zoning,” only a governing body, or enforcement branch thereof, may bring an enforcement action under the SALDO.

Commonwealth Court reversed and remanded, holding Section 617 pertains to alleged violations of any ordinance enacted under the MPC, not just issues of zoning.

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across the cul de sac, and the developer had no authority to convey title to the streets to the association. Since the association did not hold title to the cul de sac, and the uses that the association was making of it interfered with the property owners' rights of ingress and egress, the plaintiffs were entitled to an injunction.


This timely matter addressed a municipality's ban on transient, short-term room rentals in an “A” Single-Family Residential zone. The zoning officer's violation notice was upheld by the township's zoning hearing board. The Monroe County Court of Common Pleas affirmed, concluding the zoning ordinance did not allow transient rentals in the single-family residential district and that transient residences have a negative impact on public safety.

On appeal, the Commonwealth Court reversed, finding that the ordinance failed to define the terms “single-family,” “transient tenancies” or “transient lodging.” As such, the ordinance was “ambiguous” and must be interpreted in favor of the property owner. Furthermore, the record lacked evidence that transient residential use had a negative impact on public safety.


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

Wife had bad credit, so did not take title to the residence, nor did she execute a mortgage or note. After filing for divorce, husband moved out and ceased making mortgage payments.

Lender named only husband on the foreclosure complaint, although wife was served as the occupant. A year after the bank took a default judgment, both spouses sued to open or strike the default judgment or intervene in the foreclosure action, positing that wife held equitable title in the property due to the pending divorce.

The trial court denied the petition and the Superior Court affirmed, noting that R.C.P. 1144(a) (3) requires the lender must name as defendants “... the real owner of the property, or if the real owner is unknown, the grantee in the last recorded deed.” Since only husband was named in the deed, wife was not a “real owner” and her possessing an equitable interest in the property by virtue of the divorce proceeding was irrelevant.


This case upheld prior decisions where a note endorsed in blank was used in the foreclosure action. The foreclosing bank held the original note with blank endorsement. The homeowners claimed the note had been subject to prior assignment, and thus the subsequent assignment to the foreclosing bank was void.

The Superior Court affirmed the trial court stating a note secured by a mortgage is a negotiable instrument and that the right to enforce the debt evidenced by the note is vested in any party possessing the note. Thus, the history of assignments of a note endorsed in blank is irrelevant.


Can an equitable lien be imposed upon a party’s ownership interest in tenants in common property? Finkel and Altieri purchased a property, taking title as tenants in common. Altieri paid cash for his half share, and Finkel gave a mortgage against her interest. While both Finkel and Altieri were grantees on the deed, only Finkel executed the mortgage and note. Finkel and Altieri subsequently married.

When the loan went into default, the lender commenced an action to reform the mortgage to name Altieri as a mortgagee or, in the alternative, to impose an equitable lien on Altieri’s interest.

The bank asserted that a mutual mistake occurred, but Altieri said there was no mistake, since he paid cash for his share. The trial court entered partial summary judgment for the bank and imposed an equitable lien on Altieri’s interest.

On appeal, the Superior Court reversed and remanded, finding the mere borrowing of money is insufficient to create an equitable lien. Rather, there must be clear evidence that the parties intended for that party’s interest to be encumbered. Finkel and Altieri asserted the bank purposely did not include Altieri on the mortgage and note due to his lackluster credit rating.


Is a title insurance company liable to its insured where the metes-and-bounds description of the deeded land was consistent with that set forth in the title insurance commitment, but
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Inconsistent with the description in the agreement of sale?

Seller’s predecessor in title owned Lots A and B, purchased separately. They entered into a contract to sell Lots A & B to Judith Stock. However, Stock apparently only took title to Lot A.

When Stock later attempted to sell her property to the buyer, the contract referred to Lots A & B. Once the buyer discovered Stock did not own both Lots A & B, he sued for return of the deposit and refund of all development costs previously incurred. Stock, in turn, submitted a claim to her title insurance company, which claim Commonwealth denied. Stock then filed a complaint joining the title company as a defendant claiming their failure to include Lot B in the deed constituted a breach of its contractual obligations. In response, the title company asserted that it had no duty to defend or indemnify Stock since the title commitment only referenced Lot A and made no mention of Lot B.

After the trial court entered summary judgment for the title company, the Superior Court reversed and remanded. The court found Stock had sought a title insurance commitment for her purchase of both parcels. For reasons unknown, the title company failed to complete the necessary title work to discover that Sellers had taken title to Lot B in a separate transaction and that the metes-and-bounds description of the property had to be updated to account for this additional acreage. As such, the erroneous metes-and-bounds description in the insured deed were arguably the result of title company’s negligence.


May a municipality assess fines against a property owner for a zoning violation while the violation notice is under appeal?

Here, a building permit was issued for a detached one-story garage, but owners built a two-story garage. A stop-work order was issued in 1999, which advised the owners they were subject to daily fines if the work continued. The owners appealed to the zoning hearing board, which issued a decision in 2004 denying the appeal. Common Pleas Court affirmed, as did Commonwealth Court, so the owners removed the garage in 2008.

During the Commonwealth Court appeal, the borough assessed a daily fine of $300 until the garage was removed because the trial court had required removal. The borough filed a declaratory judgment, to which the owners responded they had no obligation to remove the garage while their appeal was pending. The trial court entered judgment for the borough.

On appeal, the Commonwealth Court reversed, relying on Section 617.2(a) of the Municipalities Planning Code (MPC) (53 P.S. §10617.2(a)), which specifically states that the ability to levy fines is conditioned upon the property owner’s failure to file a timely appeal from the violation notice. In this matter, there was no question the owners had timely appealed the violation notice or that their appeal was pending. Therefore, the borough lacked authority to commence the enforcement action, and the fines had to be stricken.

Frank Kosir Jr. is counsel to Meyer, Unkovic & Scott LLP in Pittsburgh and is a member of the firm’s Real Estate and Lending, Litigation and Dispute Resolution and Construction Law Groups. He can be reached at fk@muslaw.com.
PROBATE & TRUST DIVISION REPORT

Why Committees?

By Mark A. Mateya, Esq., Vice Chair, Probate & Trust Division

As you have seen elsewhere in this publication, read on the Listserv and heard during the Real Property, Probate and Trust Law Section monthly meetings, we are focusing on creating committees to move our section forward. I want to explain why this matters to you and how this can weave into your daily practice of law.

First, no attorney stands alone in practice. Even the strongest solo practitioner among us depends on someone to assist him or her from time to time. Extend that thought to the work of the RPPT Section. If one person cannot keep up to date on everything he or she needs to know, then neither can one (or two) RPPT Council members direct all of the work of the section.

The RPPT Section’s mission statement includes the following:

- the development and practical working of the law relating to real property in all its aspects and to decedents’ and trust estates and guardianships.

and

Through our highly praised newsletters, Listservs, seminars, legislative alerts and information sharing, we help to keep our section members advised and alerted to the latest practice skills, legislation and court decisions.

Keeping up on the “practical working of the law” in either area of the law (what we charmingly refer to as the “death” or “dirt” sides of our section) is an interesting, broad topic. How does a person tackle this objective?

Keeping our section members advised and alerted to the “latest practice skills, legislation and court decisions” could be a full-time job. Just ask Fred Cabell! If you don’t know who Fred is, you missed his session at this year’s retreat. As the PBA director of legislative affairs, Fred is our lifeline to the legislature. He helps guide our Council regarding how to take positions for and against pending legislation.

We have created four new committees to help your leadership address the points raised in our mission statement. The committees are Real Property Legislation, Probate and Trust Law Legislation, Programs, and Publications. The two legislation committees will address pending or soon-to-hit-the-floor legislation, as well as prompting discussion on needed legislation.

The Publications Committee will work to enhance our vibrant newsletter — and perhaps more. The possibility of a RPPT blog or other online presence to augment the Listserv is one possibility. Topics from both the death and dirt sides are necessary. For that reason, we will have a co-chair from each discipline.

Serving on a committee is one way to ease into prominence and possible leadership within the RPPT Section. But the best way to become known?

Write.

Write about your passion or interest within your area of law. If you have read my regular column, you will note that it is often short on statutory references and long on personal connection to the practice of law. That’s who I am. Use your strengths and interests within your death or dirt practice.

In the past, the Programs Committee has worked primarily on our annual retreat. There are many details that come together to create an event like we have had the past several years. This committee can also create programs for our death and dirt sides that do not fit neatly into a meeting in one location. Cyber meetings, online access to materials, coordinating with PBI to create a program to address our unique needs … all of these are possibilities for the future. Much like drafting estate plans, we are only limited by our creativity within the law.

I hope you are as excited about the future of the RPPT Section as we are. These four committees, along with our Membership Committee, may be just the beginning. We have already discussed the likely need for subcommittees for specific issues or legislation. Please consider helping us if you are tapped on the shoulder. Contact me if you have any questions. My email is mam@mateyalaw.com.

Mark A. Mateya practices law in his own practice, Mateya Law Firm, PC. His practice focuses on estate planning, estate administration and accompanying elder law issues. Attorney Mateya has testified as an expert witness in estate and trust litigation. He is a frequent lecturer for the Pennsylvania Bar Institute and is the vice chair of the Probate & Trust Law Division of the RPPT Law Section.
Meet New RPPT Council Member
Christian DeDiana

By Alison T. Smith, Esq., assistant editor

Christian “Chris” DeDiana credits a law school class for sparking his interest in trusts and estates law. “I had a course on estate planning while in law school at Cornell taught by an attorney from a New York City firm. I found it very interesting.”

Chris’ desire to help build the profession led to his involvement on the RPPT Council. He sees the RPPT Listserv as an “incredible tool” and a valuable resource for estate and trust lawyers, especially young lawyers.

A certified public accountant, Chris believes his public accounting background also played a role in pursuing a trusts and estates practice, although his work in public accounting didn’t last as long as he anticipated. “I was linear in planning to go to law school. The plan was to take two years to work in public accounting and then go to law school. After one year, I decided to shorten my stay in public accounting.” In spite of his carefully laid plans, Chris acknowledges there’s an element of chance, too, in how he came to focus on estates and trusts. “The areas you practice in are the areas where you start to have clients. Your practice evolves over time. As we get more clients, we develop an expertise and earn a reputation in that area.”

Today, Chris is a solo practitioner in Greensburg, just a few miles from where he grew up and attended Jeannette High School. He landed in Greensburg after practicing in Pittsburgh for about a year. Five years ago, Chris made the decision to become a solo practitioner, which he finds incredibly satisfying and which he says is still more the rule than the exception in Westmoreland County. Chris focuses on estates and trusts and elder law, but he also practices business and nonprofit law. He enjoys the opportunities that these areas provide to join both the legal and business aspects of his practice. “I always strive to add value and help my clients with the economic benefits of the decision they are considering.”

In his spare time, Chris enjoys teaching other lawyers. He is a prolific teacher, having taught 65 continuing legal education (CLE) courses for the Pennsylvania Bar Institute (PBI), mostly in Pittsburgh and Greensburg, but also in Philadelphia, Williamsport, State College and in Mechanicsburg for online courses. The accountant in Chris clearly comes through as he describes his favorite classes on how to prepare fiduciary income tax returns and the Pennsylvania Inheritance Tax Return. Another favorite is an all-day course on estate planning and drafting that provides instruction on drafting a complete estate planning package, including wills, powers of attorney and advance health care directives.

Chris’ desire to help build the profession led to his involvement in various professional associations, including his current role on the RPPT Council. “I think it’s important that we all try to add to the profession and build it.” He also views the Council as an opportunity to connect with younger lawyers and develop their interest in estates and trusts. “There are fewer young lawyers going into this practice area. Young lawyers have difficulty finding clients. Until that situation is changed, there is missed opportunity to build the practice.” Chris points to the RPPT Listserv as a valuable resource for estate and trust lawyers and encourages all lawyers, especially young lawyers, to use it. “It’s an incredible tool.”

In addition to serving on the RPPT Council, Chris is a fellow of the American College of Trust and Estate Counsel (ACTEC) and is very active in the bar at the county level. He is the long-time treasurer of the Westmoreland County Bar Association and is also the chair of the County’s Orphan’s Court/Elder Law Committee.

In his spare time, Chris enjoys traveling, including visiting his children and grandchildren, hiking, reading, skiing and home brewing.

The RPPT Council welcomes Chris DeDiana and his dedication to enhancing the legal profession.

Alison T. Smith is senior counsel at PNC Bank NA. She provides internal legal support to trust accounts administered in the Pittsburgh wealth management market and to charitable trusts administered throughout the PNC footprint.
Supreme Court Denies Trust Modification to Replace Trustee
The Supreme Court has held that that 20 Pa.C.S. § 7766 is the exclusive method for removing a trustee and that a trust cannot be modified under § 7740.1 to allow the beneficiaries to remove and replace the trustee. Trust under Agreement of Edward Winslow Taylor, 164 A.3d 1147, 15 EAP 2016 (Pa. 7/19/2017), rev’g 124 A.3d 334, 2015 PA Super 199, (9/18/2015).

Orphans’ Court Approval Needed for Sale of Park Land
Property purchased by township through the Project 70 Land Acquisition and Borrowing Act, 72 P.S. §§ 3946.1 et seq., and dedicated to public use as a park, cannot be sold by the township to private developers, and the township cannot grant easements to private developers, without approval of the Orphans’ Court in accordance with the Donated or Dedicated Property Act, 53 P.S. §§ 3381–3386, even after the deed restrictions imposed on the property in accordance with the Project 70 act had been removed by the legislature. In re: Petition of Borough of Downingtown, 12 MAP 2016 (Pa. 6/20/2017).

Surcharge Payments Enforceable by Civil Contempt
The Orphans’ Court has the power to enforce through civil contempt an order requiring a former fiduciary to pay a surcharge in installments and may order incarceration for the former fiduciary when he contumaciously fails to make the required payments, the restrictions of 42 Pa.C.S. §§ 4132 and 4133 only applying to summary punishments for criminal contempt. In re: Estate of Helen J. DiSabato, 2017 PA Super 185 (6/13/2017).

No Filial Support Obligation for NJ Parents
Pennsylvania’s filial support law (23 Pa.C.S. § 4603) did not apply to the New Jersey parents of an adult indigent son who was provided care in Pennsylvania. Melmark, Inc. v. Schutt, 2017 PA Super 272 (8/21/2017).

Child Born Before Execution of Will Not “Omitted Child”
A child born before the execution of will and not provided for by the will is not entitled to an intestate share of the estate under 20 Pa.C.S. § 2507(4), and preliminary objections to the child’s petition for declaratory judgment were properly granted. Estate of Sidney Rothberg, 2017 PA Super 198 (6/23/2017), aff’g No. 673 AP of 2009 (Philadelphia O.C. 9/8/2016).

Successor Agent Could Not Bind Principal
The successor agent did not have the power to bind the principal to an arbitration agreement when there was no showing that the initial agent named in the power of attorney was “unwilling or unable to act” as attorney-in-fact for the principal, as required by the power of attorney. Petersen v. Kindred Healthcare Inc., 2017 PA Super 26 (2/1/2017).

Citation Refused when Foreclosed by Family Agreement
A trust may not be distributed in a manner that is inconsistent with a family settlement agreement approved by a decree of the Orphans’ Court more than five years before, so the court may deny the issuance of a citation, which is “tantamount to the grant of a demurrer.” Edward Winslow Taylor Inter Vivos Trust, 2017 PA Super 275 (8/23/2017).

Photocopy of Will Not Probated
The proponent of a photocopy of a will failed to prove that the contents of the photocopy were substantially the same as the missing original. In re: Estate of John Brumbaugh, 2017 PA Super 287 (9/6/2017).

Grounds for Divorce Not Established by Stale Affidavit
The surviving spouse’s attempt to discontinue a divorce action following the death of the decedent was ineffective under new Pa.R.C.P. 1920.17, but grounds for divorce were not established within the meaning of 23 Pa.C.S. § 3323(g) when the decedent’s affidavit of consent to the divorce was filed more than 30 days after it was executed, in violation of Pa.R.C.P. 1920.42, and so the decedent’s designation of his wife as beneficiary of his life insurance was not modified by 20 Pa.C.S. § 6111.2. The execution of a post-nuptial agreement as part of the divorce proceedings was an effective waiver of the right of the surviving spouse to a joint-and-survivor annuity, and that waiver can be enforced against the surviving spouse despite failure to comply with federal law, notably the Employee Retirement Income Security Act of 1974 (ERISA), which otherwise preempted state law, because ERISA does not bar an estate from recovering pension funds distributed to an ex-spouse who had executed a waiver of rights to those funds. Easterday Estate, 2017 PA Super 315 (10/3/17), aff’g, on other grounds, 6 Fid.Rep.3d 178 (O.C. Montgomery Co. 3/22/2016).

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Evidence Sufficient to Overcome Presumption of Lost Will Revocation
Evidence that decedent believed he had provided for his daughters during his lifetime, that decedent did not contact his attorney about preparing a new will or speak to any other attorney about a new will, and that the decedent had a “convoluted” filing system which could have caused the family to overlook the will when cleaning out his house, was sufficient to overcome the presumption that the missing will was destroyed by the decedent with the intention of revoking it, and so the probate of a copy of the missing will was affirmed. Estate of Charles F. Maddi, 2017 PA Super 246 (7/25/2017).

Trust Not Voided for Fraud in the Inducement
Failure to list property addresses in the schedule to an irrevocable trust was not sufficient evidence of fraud in the inducement to void the trust when the corporate owners of the properties were listed and were accurately valued, so no false statements were made and no injury can be shown. Pasarelli Family Trust, 2017 PA Super 366 (11/16/2017), rev’d 7 Fid.Rep.3d 63 (O.C. Chester Co. 2016).

Trustee Deadlock on Charitable Distributions
In a dispute between individual trustees and the corporate trustee over discretionary distributions from a charitable trust, the individual trustees have standing to appeal an adverse decision because it affects the rights of unascertained beneficiaries. The Orphans’ Court erred in approving the charitable beneficiaries selected by the corporate trustee without first taking evidence needed to determine the intent of the settlors of the trust. In re: John E. Jackson and Sue M. Jackson Charitable Trust, 2017 PA Super 350 (11/7/2017).

“Death Bed” Transfer on Death Designation Valid
Orphans’ Court properly denied motion for summary judgment claiming that a transfer on death beneficiary designation signed by decedent and delivered to her bank shortly before her death was invalid because it was not accepted by the bank during the decedent’s lifetime, was filled in by her agent and not by the decedent, and failed to designate a contingent beneficiary, but the court’s finding that the account was not a testamentary asset was vacated and the case remanded so that the court could address the claim that the beneficiary designation was the result of undue influence by the agent. In re: Estate of Anna S. Wierzbicki, 2017 PA Super 346 (11/6/2017).

Petition for Disinterment Properly Disallowed
The Orphans’ Court did not abuse its discretion in denying a petition to disinter the remains of the petitioner’s mother for the purpose of conducting an autopsy to determine if the death was not natural when the petition was filed more than three years after death and the petitioner’s own expert testified that the most likely cause of death was a natural one. In re: Estate of Marcella Marie Marsh, 2017 PA Super 373 (11/22/2017).

Rights of Beneficiaries of Revocable Trust
Although remainder beneficiaries of the decedent’s revocable trust may have standing to object to the trustee’s account of transactions during the settlor’s lifetime, their objections have no merit because under 20 Pa.C.S. 7753(a) the trustee owed duties exclusively to the settlor. Dixon Estate, 7 Fid. Rep.3d 221 (Cumberland Co. O.C. 2014).

Deaths of Two Joint Account Owners
When a parent sets up a bank account in the names of herself and her two children, the surviving child becomes the sole owner of the account following the death of the parent and (four days later) the death of one of the children, the conflicting provisions of the parent’s will not being clear and convincing evidence of a different intent. Orenak Estate, 7 Fid.Rep.3d 102 (O.C. Indiana Co. 2016), aff’d 1830 WDS 2015 (Pa. Super. 12/22/2016) (non-precedential).

Federal Law Does Not Bar Access to Decedent’s Online Accounts (Mass.)
The Supreme Judicial Court of Massachusetts has held that the federal Stored Communications Act (18 U.S.C. §§ 2701 et. seq.) does not prohibit internet service providers from providing access to the digital assets of a decedent to the personal representatives of the decedent’s estate. Ajemian v. YAHOO!, 478 Mass. 169 (2017), No. SJC-12237 (Mass. 10/16/2017).

Agent Had No Duty to Elect Against Will
An agent under of a power of attorney did not have a duty to claim an elective share of the estate of a deceased spouse when the surviving spouse was entitled to a gift in trust equal to the elective share, even though the gift in trust was not an “available resource” because it would not be part of the surviving spouse’s estate for purposes of the Estate Recovery Program and the Department of Human Services would be unable to recover medical assistance provided to the surviving spouse. Bond

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Administrator of Settlor’s Estate Has Standing in Action for Temporary Trustee
The administrator of the deceased settlor’s estate has standing to request the appointment of a temporary trustee when the trust was for the settlor’s benefit during his lifetime, the estate may have assets within the real properties held in the trust, and the settlor had been contesting the validity of the trust, but the request for a temporary fiduciary was denied when the trustee has engaged counsel and a property manager in order to properly manage the properties. Altemose Trust, 7 Fid. Rep.3d 99 (O.C. Monroe Co. 2016).

Personal Property, But Not Real Property, Was Part of Estate
When decedent deeded property to one of his four children, and there was no credible evidence of any promise or expectation that the property would be reconveyed to the decedent, the property was not subject to a constructive trust in favor of the estate even though the decedent continued to occupy the property and pay the expenses of maintaining the property, but the “appurtenance clause” in the deed did not transfer ownership of the personal property located on the realty, which remained the property of the decedent. Gilbert Estate, 7 Fid.Rep.3d 225 (Chester Co. O.C. 2017)

Judgment for “Necessaries” Denied
Judgment will not be entered against surviving spouse for “necessaries” when the creditor did not bring suit against the contracting spouse, did not attempt to obtain letters of administration for the estate of the deceased contracting spouse and did file any claim against the estate, and so cannot show that the estate is insolvent, as required by 23 Pa.C.S. § 4102. Ridge MD Leasing Co. LLC v. Whittington, 7 Fid.Rep.3d 151 (Franklin Co. C.P. 2017).

Accounting from Date of Death, and for Non-Estate Assets
Executor’s account should state assets as of date of death, and include receipts and disbursements beginning with date of death, and not from date of executor’s appointment. Executor also has duty to investigate the amounts and distributions of assets passing outside of the estate, for both accounting and inheritance tax purposes, and to account for what inheritance tax was paid on what transfers. Other objections to the account were dismissed, except for property expenses which the will directed should be paid by beneficiaries. Klingel Estate, 7 Fid.Rep.3d 157 (Monroe Co. O.C. 2017).

Stipulated Confidentiality Order Denied
Petition for approval of stipulated order regarding confidential information to be exchanged by the parties was denied without prejudice when the court was not asked to determine whether documents were confidential and there was no compelling reason to approve the agreement of the parties, the court summarizing the standards for filing documents under seal. Bauer Trust, John Middleton Inc. Trust, Frances S. Middleton Trust, 7 Fid.Rep.3d 168 (Montgomery Co. O.C. 2017).

Agent Surcharged and Ownership of Homeowner’s Insurance Proceeds Determined
When the principal and agent shared a home that was in the joint names of the principal and agent, and had agreed to divide living and maintenance expenses, the agent was not surcharged for installing new windows when there was no evidence the principal did not agree to pay for the improvements, but was surcharged for unexplained payments from petty cash, for monies paid by check to the agent without explanation, for half of the real estate taxes and homeowner’s insurance which the agent failed to pay, for dividend checks and Agency on Aging checks that were cashed but not deposited into the principal’s account, for half of the cost of a roof replacement, and for missing rent payments received. The agent was only entitled to half of the insurance proceeds for a fire that destroyed the jointly owned property before the decedent’s death. Miscella Estate (No. 2), 7 Fid.Rep.3d 206 (Monroe Co. O.C. 2017).

De Minimus Legatee Lacked Standing
An intestate heir who was entitled to a gift of $5 under a prior will did not have standing to object to the probate of a later will, and the appeal from probate was properly dismissed as untimely when it was filed more than one year after probate without any specific allegation of any fraud upon the Register. Gordon Estate, 7 Fid.Rep.3d 233, No. 955 AP of 2014 (Philadelphia O.C. 3/20/2017), aff’d, 1175 EDA 2017 (Pa. Super. 11/15/2017) (non-precedential).

Spouse by Foreign Marriage Entitled to Elective Share
Foreign marriage was found to be valid, and surviving spouse entitled to elect against the decedent’s will, where there was documentary evidence of a valid marriage in Nepal and there was no evidence of any insanity or mental disorder rendering either party incapable of consenting to the marriage, despite...
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claims that the marriage was entered into to evade federal immigration law. Affidavits of relatives were found to be inadmissible hearsay. Rosmarin Estate, 7 Fid.Rep.3d 264 (Bucks Co. O.C. 2017), on appeal, 1132 EDA 2017 (Pa. Super.).

Parent Forfeited Intestate Share of Wrongful Death Proceeds
Father who failed to provide financial support and failed to visit his minor child had forfeited his intestate rights and was not entitled to a share of the wrongful death proceeds. Turner v. Cambridge Beauty Supply, 7 Fid.Rep.3d 256 (Philadelphia O.C. 2016), on appeal, 490 EDA 2017 (Pa. Super.).

Extraordinary Compensation for Guardian
Guardian compensation of more than $50,000, and legal fees of more than $15,000, approved out of an incapacitated person's estate of approximately $1,300,000 for extraordinary services over a ten month period, including two medical procedures, maintenance and sale of the incapacitated person's residence after litigation over a cloud on the title, and relocating the incapacitated person to a different residence. Dardiarian, an Incapacitated Person, 7 Fid.Rep.3d 249 (Chester Co. O.C. 2017).

Fees Incurred by Insolvent Estate to Defend Decedent against Surcharge
Executor commissions and legal fees paid by insolvent estate to the son of the decedent will be reduced when the legal fees were in great measure incurred to defend the estate from a claim of surcharge against the decedent who was the executor and attorney for another estate (Blackmore Estate, 6 Fid.Rep.3d 170 and 6 Fid.Rep.3d 250). Durkin Estate, 7 Fid.Rep.3d 320 (Lackawanna Co. O.C. 2017).

Joint Account with Wife not Product of Undue Influence
The transfer of more than $6 million to a joint account with the decedent's wife six years before the decedent's death was not invalid due to lack of testamentary capacity and was not the product of undue influence, notwithstanding that the wife had a power of attorney and the decedent was suffering from dementia. Hill Estate, 7 Fid.Rep.3d 289 (Montgomery Co. O.C. 2017).

PBA Plain English Committee Requests Nominees for the 2018 Clarity Award

The PBA Plain English Committee, which promotes the use of clear legal communications, is seeking nominations for the 2018 Clarity Award. Individuals who exemplify the best in concise, clear legal writing — both inside and outside the legal profession — are eligible to be nominated for the award. The committee will present the award at the next PBA Annual Meeting on May 10, 2018 at the Hershey Lodge. If you know of an individual whose writing exemplifies the best in clear communication about the law, please nominate him/her for the award. The award nomination form is available on the PBA website at http://www.pabar.org/public/committees/PLA01/awards/Clarity-Nomination-2018.pdf.

Please submit nominations by March 29, 2018 to:

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The Plain English Committee rewards and encourages efforts to improve access to the law by de-mystifying its language and removing the barriers of legalese to enable lawyers to better counsel clients and increase respect for the legal profession.
LISTSERVS

List Threads of Interest

Compiled by Griffin B. Evans, Esq.

Register of Wills Filings, Orphans’ Court Filings, and Confidential Information

We are preparing to file a triennial account for a cemetery’s perpetual care trust. The account prepared by the bank lists an account number. The rest is just the usual information you see in an account and we have filed these routinely over the years. Is an account filed with the Orphans’ Court through the Register of Wills a document that needs to be protected with either a Confidential Information Form or with the account number redacted?

- When we asked the Register of Wills about requirements, the recommendation was to do it the way we always did it, but in reading about the new law and watching the state’s video, I am not sure how to handle the certification. -RB

- If it’s destined for the Orphans’ Court, I’m reasonably certain it needs to comply with the new public access policy. Two recent developments:
  1. Our Supreme Court adopted new Pa.O.C. Rule 1.99, which implements the public access policy for OC filings. See http://resources.evans-legal.com/?p=5346

The easiest thing to do with the bank account numbers is to truncate all but the last four digits. And there’s a sample form of certification at http://www.pacourts.us/assets/files/page-1089/file-6361.pdf

- It should be good enough to redact the bank account number (leaving just the last four digits), then add-

Correcting Obvious Errors in Deed

Estate is conveying “123 M Street.” Prior deed incorrectly refers to property as “321” M Street”—which all agree is a typo. Does the deed for the current conveyance have to address or refer to the typo in the prior deed? -ES

If I find a typo in a prior deed, I usually refer to same, so as to avoid any confusion for future parties. It is one less question a seller needs to answer ten years from now. I presume the deed included a proper legal description. Postal addresses (and tax maps) change over time, so no one should ever rely on street address. -GW

I would refer to it in an explanatory note, so title searchers in the future don’t raise it as an objection. I often correct obvious spelling errors and the like on prior deeds in the chain of title, but with the numerical address, I would explain it. -KD

I prefer to have the grantor file a corrective deed first. Then, the deed from grantor to your grantee-client will be clean. Check with the Recorder first to make certain that that correction will be accepted. I had a property a few years ago for which the descriptions for that property and its neighbor had been switched going back several transfers; all parties agreed that the error existed. The Recorder would not accept the pair of corrective deeds without a court order. -RB

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- If the only error is the address (and the legal description and tax ID numbers were correct in the prior deed), I do not see the need for a corrective deed. -AF
- When I catch a mistake like that, I always correct it, and call attention to the correction, e.g., “123 M Street, erroneously referred to as 321 M Street in a prior deed.” -BD

IT Deductions: Pet Food?
The executor sent me a list of out-of-pocket expenses she wants as deductions from inheritance tax and reimbursement from the estate. I assume costs for pet food, supplies, and vet bill are not deductible. Am I correct or am I just being a Grinch? -RW
- I have successfully deducted the cost of caring for a dog, medical treatment for a dog bite to the pet caregiver, and the final veterinarian bill as costs of administration. -HH
- I have routinely taken the position any expenses incurred in dealing with the decedent’s estate (including pet care) are deductible. I have never received blow-back about it. -RB
- I have not personally included a pet as an asset, but I have seen it done, where the animal was some sort of trained, pure-bred show dog.
- I, too, have successfully deducted for pet care and boarding costs, even when there is not a specific bequest of the pet. -TD
- I have taken deductions for the care of pets on the REV-1500 as costs of administration on this basis: pets are personal property. If the will disposes of personal property, it is probate property, so care and maintenance seem to be a reasonable expense until the property is transferred. -KD
- I have taken deductions for the care of pets on the REV-1500 as costs of administration on this basis: pets are personal property. If the will disposes of personal property, it is probate property, so care and maintenance seem to be a reasonable expense until the property is transferred. -KD
- If this is the decedent’s pet, reasonable costs until such time as you can move the pet to its final destination are fine. I do not know of any proscription on reasonable expenses. -MM
- If the only error is the address (and the legal description and tax ID numbers were correct in the prior deed), I do not see the need for a corrective deed. -AF
- When I catch a mistake like that, I always correct it, and call attention to the correction, e.g., “123 M Street, erroneously referred to as 321 M Street in a prior deed.” -BD

LLC Seller of Real Property Requirements?
I am representing the buyer of real estate from a LLC. From a corporate entity, I would require a proper resolution, certificate of good standing, incumbency certificate and clearance certificates that all corporate taxes have been paid to date. I am interested in others’ practice in situations where a LLC is the seller. -CM
- In the old days before LLCs, it was a corporation selling. I would obtain the corporate tax certificate, and if the corporation did not file returns for certain years, DOR would issue an $1100 per year charge until the returns were filed. In addition to the corporation income tax, there was also an issue or capital stock tax. LLCs do not have that tax. I wonder if there is any reason to get the tax certificate. My title company says to get it, but I suspect they have no idea how the LLC tax issue works. I see no reason to get it if nothing could ever show up on it.
- I am in a small town so almost all of my LLC sellers are single member LLCs who do not file any income tax returns other than their personal return. They elect to be treated as a sole proprietorship for tax purposes and attach a Schedule C. So if I do order a corporate tax certificate, it says nothing. -RM
- If you do not feel the need to insure the animal’s value insured, it’s an asset. If you do not feel the need to insure the animal’s value while you are alive, then it is not an asset when you are dead. I have had wine collections that had to be valued and included as assets. -RB
- I have successfully deducted the cost of caring for a dog, medical treatment for a dog bite to the pet caregiver, and the final veterinarian bill as costs of administration. -HH
- LLCs are functionally partnerships, so I require that all partners/members/sign an authorization. I require the sort of corporate documentation you describe that the LLC has elected as an S-corporation, but not otherwise, because the partners/members/owners are liable anyway. -RB

Per Capita?
Husband and wife wrote reciprocal wills in 1983, appointing each other as executor, and eldest son as alternate. All was bequeathed by husband and wife to each other, and ultimately to “my issue in equal shares per capita.” Son was killed in an MVA, and will not updated. Husband died unexpectedly in 2014, and widow died in 2016. In administering widow’s estate a question has arisen of the interests of surviving heirs of eldest son in view of the “per capita” designation. The scrivener of the will has no recall of the reason for the “per capita” designation. My initial determination was no claim because of the per capita designation, but a claim is being made on behalf of the non-included grandchildren. Am I off base? -WS
- I do not quite understand the facts, but I do not believe that the “per capita” wording disinherit anyone. Quite the opposite, in fact. Let’s assume the testator had two children, each child had two children, and the older child is deceased. That means that there are one surviving child and four grandchildren. Under the literal meaning of “per capita” there are five beneficiaries and five equal shares, so the surviving child gets one fifth and each grandchild gets one fifth.
- I suppose you could take a kind of hybrid approach, and say that the two grandchildren by the surviving child are not beneficiaries, but then the surviving child would get one third and each of the grandchildren

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by the deceased child would get one third.

A third approach is to treat “issue” as meaning children and not grandchildren. Since there is no survivorship condition and so no “contrary intent,” the “anti-lapse” provisions of section PEF 2514 would give the deceased child’s share to his children.

I think that the third approach is probably most likely to be the testator’s intent. -DE

How about this scenario for two sons (S1 and S2)?

S1 (living): 3 children
S2 (deceased): 8 children

Could “per capita” mean that S1 gets 50%, and the 8 children of S2 share S2’s 50% (thus 6.25% each)? -VL

- I believe Per Capita, in absence of writing to the contrary, would give us 12 equal shares in your scenario. There are 12 living beneficiaries. -MM

- Of course, this would be the difference:
  - Per capita (“by the head”): I agree with MM that it would be 12 shares (S1, S1’s 3 kids, S2’s 8 kids)
  - Per stirpes (“by the roots”: as I outlined (50% to S1, and 6.25% to each of S2’s eight children) https://www.czepigalaw.com/blog/2015/04/10/what-is-per-stirpes/

But this can get trickier. Let’s assume that some of the kids have their own kids, so S1 and/or S2 have grandkids. The fact pattern specifies “my issue in equal shares per capita.” Since “issue” does not stop at children or even grandchildren, it seems that you would have to count every issue (at whatever downstream generation) living at the time of widow’s death in 2016. -VL

- The will does not say my “then-living” issue, per capita. It just says “my issue … per capita.” Maybe the deceased son’s estate gets his share. -WD

- But I don’t think you would include after-born issue in the distribution, because theoretically it would never end! -VL

- I read this in the opposite manner. Everything about an estate’s administration and estate’s distribution points back to the date of death—unless there is a statutory exception (e.g., valuing an asset at the date of death vs. 6 months thereafter). “Per capita” is no different, absent writing to the contrary. -MM

- I know. I am not saying that after-born issue should be included. I am just saying maybe the pre-deceased son is included, since the will doesn’t say “then-living” issue. If I say “to my son and his two children in equal shares” (with the intent that there are three equal shares), and my son predeceases me, does his third go through his estate (say to his second wife to whom he left everything), or would you think that his two children take it all in equal shares? I am just thinking that the original question’s pre-deceased son’s estate might take his “per capita” share, because the will doesn’t say “then-living.” -WP

As I pointed out in an earlier message, if the predeceased son would otherwise be included in a gift to a class, then in the absence of a contrary intent expressed in the will, the issue of the deceased child will take that share under the “anti-lapse” provisions of 20 Pa.C.S. 2514(9). So a gift to “my children per capita” will result in a gift to the issue of a deceased child. -DE

- If a child dies before the Testator, does it make a difference if the Will says “to my children” or “to my children, per capita.” There is no question that “to my children” results in a per stirpes distribution. But when you say “to my children, per capita” does that result in a per-stirpes distribution? -OS

- I believe the provision should probably be legally interpreted to mean that the testator wanted all his issue who were living at the time of his death (whether children, grandchildren, great grandchildren, etc.) to share the residuary estate equally regardless of the degree of separation. Predeceased issue and their issue at any level were not to inherit. “Per capita” was probably used to avoid the anti-lapse statute and a “per stirpes” interpretation; or else there would not be a need to use “per capita.” The testator used “per capita” so you would presume that he knew what it meant, the number of heads actually living at the time of his death share equally and deceased heads and their descendants are out of luck.

Because of all the different possible interpretations from within the “four corners” of the instrument, you will probably need to resort to extrinsic evidence. -RB

- Back to S1, living with 3 children and S2, deceased with 8 children. Gift to my issue per capita. Would not S2’s issue share their deceased father’s 1/13 share due to the anti-lapse statute? S2’s issue would also each receive their own 1/13, no? -WP

- It might be an open question as to whether a gift to “my children per capita” would result in the issue of a deceased child getting a share. See Estate of Harper, 975 A.2d 1155 (Pa. Super. 2009). -RC

- I think from reading Estate of Harper that the Court would have held the anti-lapse statute was avoided by the use of “per capita” and would have held in our case

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The question arose, because I was recently looking for a citation showing how lawyers can get confused about who are the real parties in interest in Orphans’ Court litigation. The O.C. reduced the compensation of both the executor and the lawyer for the executor, ordering them to return the excess fees. There were also surcharges against the executor for some other transactions. The kicker was that the lawyer filed the appeal in the name of “the estate” (and got the name of the decedent wrong in the process). The Superior Court pointed out that the estate was not a party “aggrieved” by the decision of the lower court, because it was increased, not decreased. The parties who should have appealed were the people who were surcharged, meaning the executor and the lawyer, so the appeal was quashed. See http://www.pacourts.us/assets/opinions/Superior/out/26978836.pdf -DE

Do Estates Exist as Entities in PA?

There is a funny recent opinion from the Superior Court (non-precedential) showing how lawyers can get confused about who are the real parties in interest in Orphans’ Court litigation. The O.C. reduced the compensation of both the executor and the lawyer for the executor, ordering them to return the excess fees. There were also surcharges against the executor for some other transactions. The kicker was that the lawyer filed the appeal in the name of “the estate” (and got the name of the decedent wrong in the process). The Superior Court pointed out that the estate was not a party “aggrieved” by the decision of the lower court, because it was increased, not decreased. The parties who should have appealed were the people who were surcharged, meaning the executor and the lawyer, so the appeal was quashed. See http://www.pacourts.us/assets/opinions/Superior/out/26978836.pdf -DE

Death of Tenant

Client is a landlord of a small apartment building. One of the tenants died, no apparent family. While not a direct probate issue, does anyone know the rights/obligations of the landlord to secure and dispose of the tenant’s personal property? The landlord-tenant statutes speak only to possession of the premises and terminating the lease. -JK

• Of course, in Pennsylvania there is no legal entity known as the “Estate of…” -KU
• I was recently looking for a citation of authority to show that there was no such thing as an “estate” separate from the personal representative and could not find one, although I know I have seen them. The question arose, because I was asked to give an opinion about the liability of a lawyer in a malpractice case, and in response to written interrogatories, the lawyer-defendant admitted having been engaged to advise the executor but denied being the attorney for the estate. It was a minor point, but I wanted to show that the distinction the defendant was trying to draw did not exist. -DE
• Interesting side note: in the litigation brought by the executor of the Joe Paterno estate against Penn State and the NCAA, the common pleas court judge ordered the caption on the complaint to be amended to read Estate of Joseph V. Paterno as plaintiff. -BW

See PEF Code, Title 20, Section 301. (Title to real and personal estate of a decedent) “[Landlord] may have to open the estate and get court guidance. Also there must be an heir somewhere. You may need to do an heir search. Was there an obituary? That can contain information or the funeral home” -LK

• The problem is that a lot of tenants have no estate. Many of them have no will, and an estate is never opened. The only asset they may have is a bank account, and that might be joint with another person. The landlord is stuck with the junk and needs to clean out the apartment to be able to rent it and cut his losses. If I tell my landlord client to take all of these steps which may take months, the client will just throw the stuff away and take his chances. -RM
• That is exactly the situation that my client faces. We are not talking a high-end rental here and no known family. But there are personal papers in the apartment that must be examined, and the landlord/tenant does not feel right in doing this himself. -JK
• If all else fails, the landlord could apply for letters of administration himself, but I would want to go through the personal papers first to see if there is a will or relatives to be considered. -DE
• Could the client pack the personal papers into an archive box and keep it for a while? If the client wants to be conscientious about the decedent’s privacy, he could hire someone of limited literacy to do this. (Some document disposal services do this, I am told.) -NC

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Save the date and watch for more information!