PBA Real Property, Probate & Trust Law Section
NEWSLETTER

Your Other Partner

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RPPT SECTION CHAIR REPORT

So What Is It That We Do Anyway?

By Mark A. Mateya, Esq.

As lawyers, we can sometimes have an inflated perception of ourselves. We can zealously advocate for a forlorn client and bring justice to his/her doorstep. The only thing missing is a cape with a red "S." We can decipher the seemingly incomprehensible legalese of contracts and find the operative language that addresses our client's situation. Good for us! But we too frequently feel that we have the "keys to the kingdom."

Let me help bring all of us back down to earth ...

If the pipes under your kitchen sink have sprung a leak, which, when you poked it, became a gusher, you don't need a lawyer. When missionaries or UNICEF are trying to assist needy people in a foreign land, no one on their board of directors says, "We should send them some lawyers."

We have our place, but it isn't all that elevated. It is unique and it is not for the faint-of-heart, but it is not better. It is different.

Our section of the Pennsylvania Bar Association deals with two main areas of law, Real Property and Trust/Estate law. In each of these areas of law, we deal with people in the nitty-gritty of life. Like the property owner who wants to sell his late father's house, only to find that the property line actually goes through his father's dining room (no kidding). Or the estate administration that uncovers a myriad of money ... a myriad of money that is *owed* to the Atlantic City casinos (true story). "So that's why Mom enjoyed going on those bus trips," said her son. And both of those are examples from my own office alone. I am sure if I were to solicit stories, you would each have a few to share.

I hope we all understand that our mastery of Title 20 or Title 68 is our part to play. We aren't the "king of the hill" in life. We play our part. This section has certainly assisted me in being a better attorney. I have often said that I learn as much from our very active Listserv as I do from most CLE programs.

Mark A. Mateya

So I am inviting you to do two things: First, go to www.pabar.org. If you have not seen the updated PBA website, you need to take a look at it. Go to "For Lawyers" and choose "Sections" (the fifth selection). Choose the "Real Property, Probate and Trust Law" Section. From there, choose "Listserv," which is about half way down the page. You can sign up for our Listserv from there.

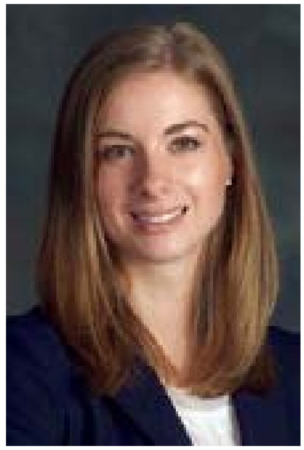
The second thing I want you to do is tell me stories of how you have helped someone in your area of law that produced a funny, tear-jerking or truly instructive story. Share it with me. I will collect them and perhaps do a brief edit. Perhaps we'll have them to share at one of our face-to-face meetings.

We can certainly do great things as attorneys. Unless it is fixing our pipes.

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. Mateya has testified as an expert witness in estate and trust litigation and is a frequent lecturer for the Pennsylvania Bar Institute. He is the chair of the PBA Real Property, Probate & Trust Law Section.

IN THIS ISSUE

The Real Property, Probate and Trust Law Section newsletter is published by the Real Property, Probate & Trust Law Section of the Pennsylvania Bar Association. Inquiries or comments may be sent to the Communications Dept., PBA, P.O. Box 186, Harrisburg, PA 17108, fax 717-238-2342, or to the editors listed above. For additional information, call the PBA at 717-238-6715 or 800-932-0311, or contact the section officers.



Melissa L. Dougherty
Executive Editor

Welcome to the Winter/Spring 2019 issue of the RPPT section newsletter! I am honored to start the new year by taking over the reins for publication of this newsletter from Marshal Granor, our long-serving executive editor. Please join me in thanking Marshal for his dedication to this incredible learning tool for our section. This newsletter provides a valuable opportunity for our section members to take a deeper dive into timely issues related to our practice, and I will do my best to continue to steward the newsletter in this role. To that end, I am excited that this issue features articles across a wide variety of interest areas, including one near to many cold hearts in the winter – sunny Florida. This issue features an in-depth look at some of the domicile and homestead issues that may arise for many of our "snowbird" clients. I hope that you find them as insightful as I did. Happy reading!

Executive Editor Melissa L. Dougherty is a director in the Pittsburgh office of Cohen & Grigsby PC and focuses her practice in estate and trust planning for high net worth individuals. Melissa can be contacted at (412) 297-4686 or melissadougherty@cohenlaw.com.

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, Melissa Dougherty at MelissaDougherty@cohenlaw.com.

The deadline to submit articles for the next issue is May 31, 2019.

Real Property Division Report

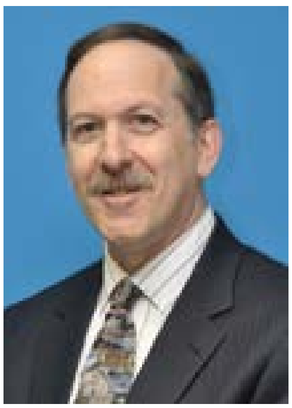
By Marshal Granor, Esq., Vice Chair, Real Property Division

Sometimes We Forget

When you do something for a long time, it's easy to forget all you didn't once know. To all our new and newer RPPT members, WELCOME! Those of us veteran RPPT Section members more or less know what a PBA section is and how we function. But maybe you don't know. I am the vice chair for the Real Property Division. Because our section is split into two interest areas with some overlaps, we separate our leadership so we can best focus on our two areas with a degree of expertise.

Our section leadership is centered on a council, which meets monthly by conference call (and a few times a year in person) to review our work. Primarily, we review legislation pending or initiated by us. We also focus on designing a meaningful annual retreat, where our members can meet and mingle both for continuing education credits and to socialize. Our wine pairing dinners have become legend – it is worth attending the retreat just for that.

In addition to our elected Council members, we have the wisdom from all our prior section chairs, who serve ex officio on our Council. We have a secretary and treasurer, as well as our chair and two vice chairs. We alternate leadership among our two practice areas. Mark Mateya, current chair, is a probate-estates practitioner. Next year, a real property attorney will be at the helm.



Marshal Granor

Have you joined our Listservs? We have them for both "dirt" and "death" and, to me, they are worth every penny of our reasonable dues. We have wonderful members who are eager to share their wisdom with you. No question is silly or unreasonable. If you don't know, chances are others don't either. Please continue to ask, and please continue to contribute solutions to assist your colleagues.

We ALWAYS look for new faces – young or older, rookie or veteran, east or west – to join our committees and subcommittees, to contribute to our newsletter, to teach retreat courses or just to submit ideas to section leadership. You get the most out of your membership by being active and vocal.

Speaking of activism, why do those of us who volunteer to lead our section do it? I can only speak for myself. In my case, it comes from my parents. While my mom and dad never said that we are put on earth to help each other, they showed my siblings and me by their actions. And I do believe actions speak louder than words.

My mother volunteered in ways big and small, as president of the Home and School Association, Cub Scout den mother, Brownie leader, or as the class mom who would go into school a few days before the kids to help the teachers put up the bulletin boards and put paste into baby food jars and into each student's desk. My dad helped to start numerous business associations and then served as the president of the local Board of Realtors® and Builders Association. He served as synagogue president and as a member of the Ben Franklin-founded Pennsylvania Prison Society. And much more. Together, my parents helped found a charity to give people a financial hand-up through interest-free loans, and they ran that organization together for 20 years.

No, my parents didn't need to say a single word about volunteering to help others. They lived it every day. I can't say I've done as good a job in my lifetime as they have in theirs, but I try. Thus, I read the RPPT Listservs daily and do my best to answer when I can contribute. I share my time with the section, serving as an elected Council member or officer, teaching at the retreat and helping encourage younger lawyers in their careers.

I share my story not to show off but only to encourage you to make our profession better by stepping up, in any way and with any time and skills you can. Not only will you be making the world a better place, but you will receive the reward of having others appreciate you. And you just might get some financial reward by having a colleague refer a client to you or hiring you as an expert.

Please let me know how the RPPT section can help you.

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 former executive editor of this newsletter. He is a member of the College of Community Association Lawyers and concentrates on condominium and homeowners association law.

REAL PROPERTY DIVISION

Act 84 of 2018: More Changes for Common Interest Communities

By Erik M. Hume, Esq.

Erik M. Hume

In the last issue, I wrote about Act 17 of 2018, which made several revisions to Pennsylvania's common interest ownership acts (sometimes referred to as "CIOC Acts") regarding dispute resolution. At the close of last year's session, the Pennsylvania Legislature passed House Bill 1499, which was signed by Gov. Tom Wolf on Oct. 19 as Act 84 of 2018. Like Act 17, Act 84 amends all three of the Pennsylvania Uniform Condominium Act, the Pennsylvania Real Estate Cooperative Act and the Pennsylvania Uniform Planned Community Act. Act 84 addresses a variety of long-standing issues affecting these communities.

One issue that has frequently bedeviled association boards is how to deal with the delinquent unit owner. Previously, boards were limited to seeking judicial relief in response to a unit owner who fails to pay assessments or honor the provisions of the governing documents. Under Act 84, associations now have the ability to suspend a unit owner's right to vote, serve on the board or a committee and use common elements, recreational facilities or amenities. This is a powerful tool for boards in communities with desirable amenities.

Another problem addressed by Act 84 is facilitating the transition of the community association from declarant to unit owner control. While all of the CIOC Acts address when the declarant is required to transfer control to the unit owners, actually calling the transition meeting and electing homeowners to take the reins from the developer only occurred when the declarant took action to make transition happen. Act 84 provides a procedure for the unit owners to hold the transition meeting and complete the transfer of control of the association to the unit owners even when the declarant delays or refuses to take action.

Providing for the long-term maintenance of stormwater management facilities has been an issue since the Pennsylvania Department of Environmental Protection revised Chapter 102 in 2010. Act 84 amends the CIOC Acts to clarify responsibility for stormwater management facilities once they are completed by the declarant. The act provides that if the community declaration specifies that the association or a unit owner is responsible for operation and maintenance of stormwater facilities, it must now also specify that upon filing a notice of termination with the Department of Environmental Protection or appropriate County Conservation District, the designated party – the unit owners or the association – becomes responsible for long-term operation and maintenance of post-construction stormwater management facilities.

Act 84 extends the statute of limitations for warranty claims by an association to six years after the warranty begins or two years after the unit owners elect an executive board, whichever is later. Previously, the statute of limitations for warranty claims was six years,

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Act 84 of 2018

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without any tolling for the period of declarant control. Without the tolling language, the statute of limitations could have run (or almost run) on warranty claims before the unit owners control the association, meaning the declarant had final say in whether legal action under declarant's warranty should be taken. The new language gives an association time to address any warranty claims after the transfer of control, without unreasonably leaving warranty issues hanging over the head of developers.

Further, Act 84 clarifies how the declaration applies to common elements that are conveyed or encumbered by providing that prior to conveying common elements to the association, the declarant is required to remove liens for real estate taxes.

Act 84 also includes provisions specific to the Pennsylvania Uniform Planned Community Act. It expands the definition of common facilities in the plats and plans or declaration to include real estate designated as "common facilities, common area or open space or other similar term." While I believe that this was always understood, a little clarity is always welcome.

Another provision specific to the Pennsylvania Uniform Planned Community Act clarifies that if the declarant reserves in the declaration the specific declarant rights to (i) subject the community to a master association; (ii) merge or consolidate the community with another community; (iii) subject the community to an easement in favor of real estate not included in the community; and (iv) the right to designate common facilities, that failure to include all of the language required by Section 5205 will not affect the enforceability of those special declarant rights.

What will be the effect of Act 84 on Pennsylvania communities? First, I believe it will ease some transition issues, both for developers and unit owners. Giving the unit owners an easier mechanism to call the transition meeting will help ensure the orderly transfer of control of the association from the declarant. Likewise, the addition of the stormwater management provisions clarifies responsibility for stormwater management maintenance and will address problems developers have had closing out NPDES permits. Finally, the change in the statute of limitations for association warranty claims is a reasonable compromise to ensure that a transitioned association has time to review and address any defects that may be discovered.

The new enforcement tools for associations dealing with delinquent unit owners should also prove beneficial. When combined with the ADR options under Act 17, both unit owners and associations have new ways to address disputes and problems in the community, while avoiding costly and time-consuming legal proceedings in front of judges who are not experts in community association matters.

The remaining changes in Act 84 provide needed clarification to the acts. As the use of these community structures continues to grow, issues that were not anticipated in the original drafting of the Acts have arisen. These new provisions and clarifications help to settle some questions, as well as provide certainty on ambiguous issues.

Act 84 of 2018 took effect on Dec. 18, 2018.

Act 84 was the only remaining significant piece of legislation affecting the CIOC Acts when the 2017-2018 legislative session ended. As such, nothing is "teed up" for the new Legislature to consider. If history is a guide, however, we can expect further clarifications and amendments to the CIOC Acts.

Erik M. Hume is a shareholder at Saxton & Stump in Harrisburg and is chair of the firm's Real Estate Group. He handles a variety of matters including commercial and residential real estate transactions, land development, commercial loan origination and counseling of clients on complex condominium and planned community matters. Erik regularly works with real estate builders and developers, financial institutions and lenders, engineers, realtors, buyers and sellers, underwriters, property owners, retailers, property managers, community associations and investors. He is also a member of the Business and Corporate Law Group. Erik can be reached at eh@saxtonstump.com

REAL PROPERTY DIVISION

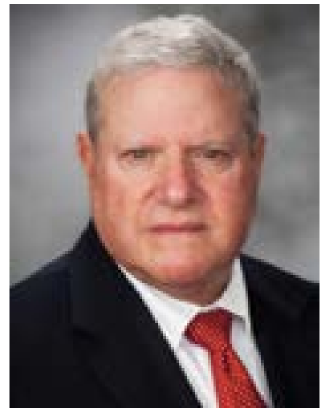
Landlord-Tenant Law: A New Interpretation of the Security Deposit Return Statute

By Ronald M. Friedman, Esq.

One of the sources of conflict between landlords and tenants involves the return of security deposits held by the landlord during the lease term. Security deposit collection, administration and return laws are found in 68 P.S. §250.511 and §205.512. Though the Landlord and Tenant Act of 1951 (68 P.S. §§ 250.101-250.602, the "Act") is more than 67 years old, some of the security deposit sections of the statute have not received judicial interpretation. There is a recent case that sheds some light on certain aspects of the statutory duties of both landlords and tenants.

The Case

The Superior Court recently decided a landlord-tenant case that may help resolve some of the issues regarding parties to a lease and their respective obligations for return of the security deposit. In *Nitardy v Chabot,* 195 A.3d 941 (Pa. Super. 2018), the parties entered into a written residential lease agreement, drafted by landlord, with a term from Sept. 5, 2013, through March 5, 2014. Prior to the end of the term, the parties agreed to extend the lease agreement. On June 19, 2014, the tenants vacated the premises. Subsequently, a dispute arose regarding alleged damages to the property and whether the tenants owed additional rent. After the landlord refused to return the tenants' security deposit, the tenants filed a complaint against the landlord claiming a violation of § 250.512 of the Act and a breach of the lease agreement by failing to return their security deposit. The tenants sought a judgment against landlord for double their security deposit, plus costs, post-judgment interest and attorneys' fees (the lease agreement allows the prevailing party to recover fees). The landlord filed an answer



Ronald M. Friedman

with new matter and a counterclaim, alleging that he was entitled to retain the security deposit because the costs to repair the damage the tenants caused to the premises were in excess of the deposit and that the tenants failed to provide him with a new address as required by 68 P.S. §250.512(e) (hereafter referred to as the return statute).

At issue was whether the landlord complied with the return statute by providing a sufficient "list of damages" and whether the tenants complied with their obligation to provide a forwarding address at surrender and acceptance of the leased premises. Also at issue in the case was whether the tenants owed more rent or if the lease agreement was terminated pursuant to an oral modification of the lease term.

The common pleas court entered a verdict in the form of an Opinion and Order on Dec. 7, 2016. That verdict awarded the tenants $6,800 in damages plus $9,392.50 in counsel fees, and it awarded landlord $400 due to countertop damage that the tenants admitted was their responsibility. The landlord filed a motion for post-trial

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Security Deposit Return Statute

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relief, which the trial court denied. The appeal followed.

The Appeal

On appeal, the Superior Court took up various issues regarding the oral modification of the lease and its transformation into a month-to-month lease. The tenants alleged that the lease agreement terminated mid-month pursuant to an oral amendment, while the landlord disputed this claim. The court noted that the law is well-settled that parties may modify a written lease agreement by a subsequent oral agreement, and this modification may be shown by words or conduct (citing *Bonczek v. Pasco Equipment Company*, 450 A.2d 77 (Pa. Super. 1982)). The court noted that for an oral modification to be valid, it must be based upon consideration and proved by evidence that is "clear, precise, and convincing" which was so in this case. The appellate court affirmed the judgment insomuch as the trial court properly declined to award back rent and a late fee to the landlord on account of the oral amendment.

Turning to the issue of landlord's list of damages, the court noted that the Landlord and Tenant Act specifically provides that a landlord shall "within thirty days of termination of a lease ... provide a tenant with a written list of any damages to the leasehold premises for which the landlord claims the tenant is liable." When the landlord delivers the "written list of any damages," the landlord shall return the security deposit less "*the actual amount of damages to the leasehold premises caused by the tenant.*" (emphasis added by the court). If the landlord fails to

pay the difference between the security deposit and the "actual damages to the leasehold premises," the landlord shall be liable for double the amount of the security deposit less any actual damages to the leasehold premises. (§512(c) of the return statute).

There followed the court's reasoning regard the "list of damages." The list provided by landlord merely listed categories of items, without specificity as to what was damaged and only included values for some line items. The court held that the landlord is required to return the security deposit less the "actual damages" to the property, and the "written list of any damages" must be specific enough so that the landlord can value the "actual damages" and notify the tenant of the basis for deducting amounts from the security deposit. The trial court found the "written list of any damages" that the landlord provided to the tenants was too vague to constitute an appropriate "written list of any damages." In particular, the trial court found that a "vague list, without accompanying values as to each item, will not suffice."

As a sub-text of this case, it should be noted that one of the factors that may have motivated the trial court was the fact that as the dispute between landlord and tenants escalated, so did landlord's claim for damages, which were substantially higher than those originally claimed prior to the start of litigation.

The Superior Court agreed with the trial court's determination that the list of damages was insufficient, noting that there was no adequate definition in the statute that would indicate the scope of what the "list" should include. The tenants and landlord exchanged various emails about the so-called list of damages. During this exchange, the landlord increased the list of damages as well as the amount claimed above retention of the security deposit. Ultimately, the Superior Court agreed with the trial court that the landlord had failed to provide the tenants with "actual damages" within 30 days of vacating the premises. Therefore, the appellate court noted, the trial court correctly found that the landlord failed to comply with the return statute and

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properly awarded tenants double the amount of their security deposit less any actual expenses.

The remaining major issue was whether the tenants complied with the return statute's requirement of providing a written forwarding address at the time of surrender and acceptance of the premises by the landlord. The landlord argued that because the tenants did not provide him with a forwarding address upon termination of the lease agreement or their departure from the property, he was entitled to keep the tenants' security deposit and claim additional damages. Although there was no evidence that the tenants had actually complied with the statutory requirement, the trial court chose not to apply this provision. The trial court decision was based on its findings that (1) the parties remained in email contact; (2) the tenants provided the landlord with a forwarding address late; and (3) the landlord had the mailing information needed to comply with the security deposit provisions of the return statute in ample time to do so. Therefore, there was no need for strict adherence to the provision requiring a written forwarding address "upon surrender and acceptance." The Superior Court affirmed the decision of the trial court.

This train of thought follows closely the Superior Court's reasoning in *Adamsky v. Picknick,* 603 A.2d 1069 (Pa. Super. 1992). In that case, it was held sufficient compliance existed where the future return address was written on the upper left corner of an envelope containing a letter sent by the tenant to the landlord. According to the tenant in *Adamsky*, the tenant's forwarding address was listed on the envelope containing the prior month's rent check sent by mail. Obviously, this is a more expansive interpretation of the statutory wording of "forwarding address at the time of surrender and acceptance." Acceptance of this line of thinking begs the question of whether any tenant in history, in order to comply with the requirement of providing a forwarding address, has placed a future return address on an envelope mailed more than a month before that address was to be occupied.

In its opinion, the Superior Court also addressed the issue of what might be included in "damages." The court, in reliance upon its decision in *Wallace v. Pastore*, 742 A.2d 1090 (Pa. Super. 1999), deferred to the trial court on the issue of damages. The *Wallace* case involved the application of the consumer protection laws to landlord conduct in not returning the security deposit.

A concurring and dissenting opinion was filed with this decision. The dissent argues that the return statute does not define or further describe the term "written list of damages" referred to in §250.512(a) and that there are no reported decisions by the Superior Court or Supreme Court interpreting this term. Accordingly, when the landlord emailed a list to the tenants, the dissent argues that there was compliance with the "list of damages" obligation on the landlord.

Conclusion and Comment

This case seems to indicate that strict compliance with the requirements of the return statute is not necessary regarding delivery of a forwarding address, the failure of which bars the tenant from claiming the penal provision of the statute. Furthermore, although the requirement of a "list of damages" was not specifically set out in the decision, it seems that the list must be very specific and account for all charges for damages against the tenant's security deposit. The two cases cited by the court in this decision both involved overreaching and likely unreasonable behavior on the part of the landlords involved in those cases. It seems that in some cases when one party to a lawsuit is viewed by the court as unreasonable, the decision rendered reflects a judicial attempt to reverse the unfairness presented by the facts. This is so in this case. Both the trial court and the appellate court not holding closely to the statutory requirements set forth in the return statute seems to be another example of hard cases making bad law. That said, tenants should be advised to provide a return address at the time of surrender and acceptance of the leased premise and not to rely upon this case as an absolute precedent that communication with the landlord by email is sufficient to comply with §512(c). Likewise, landlords should be advised to be very specific about listing damages, including the actual dollar amount of each repair.

Ronald M. Friedman is author of the legal treatises Pennsylvania Landlord-Tenant Law and Practice *and* Ladner Pennsylvania Real Estate Law. *He lives in Boalsburg, Pa.*

PROBATE & TRUST DIVISION

Probate & Trust Division Report

By Alison T. Smith, Esq., Vice Chair, Probate & Trust Division

Alison T. Smith

The first six months of my tenure as vice chair of the Probate and Trust Division of the Real Property Probate and Trust Law Section have been busy and productive, beginning with the section's annual retreat in Gettysburg in August and leading up to the PBA Committee/Section Day in Harrisburg in November. While in Harrisburg, I had the privilege of representing the RPPT Section at a meeting of the PBA Board of Governors to report on and make a recommendation for the establishment of the new RPPT Section Trailblazer Award. The recommendation was approved by the Board of Governors, and the first RPPT Section Trailblazer Award will be presented in 2019 to a young lawyer practicing in the area of probate and trust law.

The purpose of the Trailblazer Award is to encourage and promote the practice of real property law and probate and trust law among young lawyers. The award will alternate each year between real property and probate/trust. To be eligible for the award, a person must be a "young lawyer" as defined by the YLD, practice primarily in the area of real property law or probate and trust law, be a PBA member in good standing and demonstrate:

- Excellence in the practice of law and the highest ethical standards;
- Professionalism through participation in the bar association or similar professional activities; and
- A commitment to pro bono legal services.

The establishment of the Trailblazer Award will enable the section to recognize young lawyers who have achieved success in their fields of practice and will further support the outreach to and recruitment and retention of young lawyers as engaged members of the section and the PBA.

At Committee/Section Day, I was also fortunate to attend the PBA Chair Roundtable Breakfast and learn about the activities and initiatives of other sections and committees, including the Minority Bar Committee, the Military and Veterans' Affairs Committee and the Membership Development Committee, to name a few. This event and other PBA-sponsored activities continue to provide excellent opportunities to interact with colleagues across the commonwealth and also get to know the PBA leadership and section or committee chairs. This interaction enables the RPPT Section to partner with other PBA groups and work together to achieve results beneficial to our members and the public at large.

One example of partnership among the PBA membership is the ongoing relationship between the RPPT Section and the Young Lawyers Division (YLD). The relationship began with the appointment by the YLD of two liaisons to the RPPT Section – one representing the interests of the Probate/Trust Division and one representing the Real Property Division. The liaisons, Heather Harmon Kennedy and Justin Brown, have made significant contributions to our section by providing valuable insight into the issues that come before the Section Council and being active members of the section committees. These efforts have afforded the section the opportunity to develop a collaborative relationship with the Young Lawyers Division and benefit from the diversity of thought, insight and perspective of a younger generation of lawyers. The Trailblazer Award is a tangible result of those efforts.

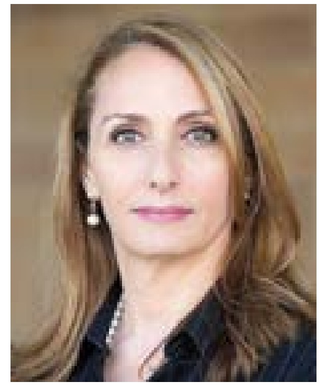
I look forward to the RRPT Section embarking on additional initiatives involving other sections and committees. Collaboration among representative groups of the PBA will foster diverse thought and opinions and will assist in promoting the practice of real property and probate/trust law by more diverse lawyers. In addition, the substantive focus of some sections or committees has significant overlap with the practice areas of the RPPT Section. Establishing relationships with those sections or committees will provide additional opportunities for joint and collaborative CLE programs, perhaps as part of the RPPT Section annual retreat. Look for more news about the retreat in the coming months.

An active and engaged section membership makes our section more productive and beneficial to its members. One way to become more involved in section activities is to volunteer for one of the section committees. The Legislative Committee, in particular, is a great way to learn more about the section, the PBA and the legislative process in general. There are many other ways to become more active within the section and the PBA. So, I encourage you to take advantage of the many opportunities that PBA membership affords you to make an impact in your profession and in your community.

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.

Florida's Homestead Laws in a Nutshell

By Lorna A. McGeorge, J.D., LL.M.



Lorna A. McGeorge

Florida's homestead laws are notoriously confusing. This article provides an overview of Florida homestead laws for Pennsylvania lawyers with clients domiciled in, or planning to become domiciliaries of, Florida and who own, or are considering purchasing, personal use Florida residential property.

While the word "homestead" is often thought to have singular meaning or importance under Florida law, the term actually apples in three separate contexts: (1) ad valorem taxation; (2) exemption from forced sale/protection from creditors; and (3) limitation on inter vivos alienation and testamentary devise and descent, each of which is discussed below.

1. Taxation

A Florida domiciliary who holds the legal or equitable title to Florida real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, is entitled to two real estate tax breaks: (1) the ad valorem tax exemption under Article VII, § 6 of the Florida Constitution, and (2) the "Save our Homes" limit on annual assessment increases under Article VII, § 4 of the Florida Constitution. Homeowners must take affirmative steps to inform the local property appraiser of the fact that her residential property is her "homestead." That notification is made with an application provided by the property appraiser's office and supporting data (i.e., evidence of Florida residency – driver's license, voter registration card, etc. – and evidence of property utilization, e.g., utility bills).

In Florida, real estate is assessed for ad valorem taxation on Jan. 1. In order for a property to be accorded homestead status as of Jan. 1, the application and related materials must be provided by the following March 1;[1] if those materials demonstrate that the property was owned by the applicant on Jan. 1 of that year, and Florida residency was established prior to that date, then the property will achieve homestead status as of the Jan. 1 assessment date. (Applications filed later than March 1 will be treated as applicable to the following year.) Once homestead status is established, it is not necessary to again file an application as long as the property remains the owner's permanent residence.

All Florida real property is subject to taxation based on the applicable millage rate of the taxing district in which the property is located, multiplied by the assessed value of the property. The initial benefit in having property characterized as one's "homestead" is that the first $25,000 of the assessed value is exempt from such taxation, and an additional $25,000 of the assessed value between $50,000 and $75,000 is also exempt from tax levies other than those of school districts.[2] These real estate tax benefits generally translate into a tax savings of several hundred dollars.

The second tax benefit afforded homestead property relates to the "Save our Homes" limitation on the annual increase in assessed values. For homestead property, the annual increase in assessed values is capped at the lesser of 3 percent or the percentage change in the Consumer Price Index from the prior year. This cap goes into effect beginning the year after a homestead exemption is first granted, and, over time, can provide significant tax savings, particularly when real estate values are escalating rapidly.

The annual real property tax savings from the "Save our Homes" cap became extremely significant for many homeowners who could not afford to (or simply didn't want to) sell their homes and start with new "fair market value" assessments for replacement homes. As a result, Florida voters

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Florida's Homestead Laws in a Nutshell

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subsequently approved a constitutional amendment allowing homestead property owners to "port," or transfer, their accumulated difference between assessed value and the market value (up to a limit of $500,000) from an existing homestead to a new homestead property within Florida.[3]

2. Asset Protection

The second and perhaps best known context in which homestead has significance relates to asset protection. Article X, § 4(a) of the Florida Constitution provides that homestead property is exempt from forced sale and "no judgment, decree or execution shall be a lien thereon ... " Exceptions exist for obligations arising from (1) taxes and assessments on the homestead; (2) the purchase, improvement or repair of the homestead; and (3) labor performed on the subject property (i.e., construction liens). The property covered by this protection extends to the residence and up to half of an acre of contiguous land if located within a municipality, or up to 160 contiguous acres of land and improvements thereon if located outside a municipality. Unlike the tax benefits afforded homestead property, the protection from creditors' claims is self-executing; no application or declaration is required to entitle one's "homestead" to this exemption from creditor claims.[4]

Under Article X, Section 4(a) of the Florida Constitution, to qualify as homestead, a residence must be owned by a "natural person" (i.e., not a business entity or an estate) and must serve as the permanent residence of the owner or her family. An individual claiming homestead status must have an actual ownership interest in the subject property but need not hold fee simple title to qualify — the protective status can attach to an undivided interest, a beneficial interest, an equitable interest, a life estate or a lease in some cases. The interest must, however, include the present right of possession. Thus, an undivided interest as tenant in common of only 20 percent ownership is entitled to homestead status if that 20 percent owner actually uses the property as her primary residence and satisfies the other homestead requirements. Homestead protections are only available on an individual's primary home — they do not apply to rental property, second homes or homes of owners who do not claim Florida as their state of domicile.

When the owner of homestead property dies, the property's homestead status also ceases to exist. The property is not the homestead property of the decedent's probate estate (particularly since the property must be owned by a "natural person" to be entitled to creditor protection), and that observation might lead one to think that the decedent's creditors could reach the property by making a claim in the probate proceedings.

Under Florida law, title to real property passes at the instant of death,[5] and Section 4(b) of Article X of the Florida Constitution provides that the exemptions from creditor's claims "inure to the surviving spouse or heirs of the owner." Thus, while the property is no longer the homestead of the decedent or her estate, so long as the property passes by testamentary direction (if permitted – see Part 3, below) or by intestacy, to her surviving spouse or heirs, the exemption from the *decedent's* creditors' claims remains in effect and inures to the recipient spouse or heir(s). (In these circumstances, the subject property is referred to in the Florida Probate Code as "Protected Homestead.")

Note, however, that "Protected Homestead" will not be protected from the claims of the creditors of the recipient of the real property unless the recipient establishes that such property is her permanent residence (i.e., her "homestead").

To assist in the conceptual understanding of this aspect of homestead, homestead status has been compared to marital status, which is another legal status created during lifetime:

> [Each] is a status voluntarily created during lifetime by meeting certain conditions. [Each] gives to the spouse/homesteader certain lifetime rights. The particular benefits of each status end at the instant of death, however, certain rights attach at death from the ended marriage/homestead in favor of the surviving spouse/heirs. The surviving spouse may subsequently marry/become a homesteader but that marriage/homestead has nothing to do with the prior marriage/homestead. It is totally independent. Also, it has nothing to do with the survivor's rights which accrued/inured from the marriage/homestead (such as elective share, family allowance, right to preference as personal representative/exemption from forced sale by decedent's creditors). Following the death, we are no longer concerned with the marriage/homestead, but only with the rights which flow from it.[6]

3. Inter Vivos Alienation and Testamentary Descent and Devise

The final context in which homestead is significant relates to alienation of homestead property during the owner's lifetime and its devise and descent upon the owner's death. As with a property's exemption from creditor

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claims, the limitations on disposition of homestead during life or at death exist without action on the part of the owner.

Article X, § 4(c) of the Florida Constitution permits homestead owners, "joined by the spouse if married," to alienate homestead "by mortgage, sale or gift." This section protects spouses during their lifetimes by requiring that the spouse of a married person join in any *inter vivos* conveyance of homestead property. This joinder requirement extends to transfers to the title holder's or the spouse's revocable trust, regardless of whether such trust provides the other spouse with a life estate or greater interest at the owner's death. If the spouse does not join in the conveyance, the attempt to convey is void. This concept has confounded even experienced Florida practitioners. Notably, the joinder requirement does not apply to non-homestead real property.

Perhaps the most mystifying aspect of homestead property pertains to the restrictions on its owner's freedom to devise such property at death. Most practitioners in Florida and Pennsylvania are well aware that, subject to certain and limited spousal rights of election, property owners are free to make testamentary disposition of their assets as they wish. This is not necessarily so with homestead property.

The Florida Constitution and related Florida statutes expressly restrict how homestead may be devised upon the owner's death, and the Florida statutes reform an improper transfer of such property. The *devise* (by testamentary instrument) of homestead is limited by Article X, § 4(c) of the Florida Constitution[7] and Florida Statutes § 732.4015, but its *descent* (by intestacy) is controlled by Florida statutes §§732.101-732.106, §732.108 and §732.401.

Article X, Section 4(c) of the Florida Constitution and Florida Statutes §732.4015 forbid a devise by testamentary instrument of real property if the owner is survived by a spouse or *minor* child. However, if there is no minor child, the homestead may be devised to the owner's surviving spouse.[8] For purposes of this provision, the term "owner" includes the grantor of a revocable trust.[9] Stated differently, if the homestead owner (either directly or indirectly via a revocable trust) dies leaving either a spouse or a minor child, she is not permitted to dispose of the homestead via last will and testament; if there is no minor child, she may devise the homestead to her surviving spouse.

The obvious question, of course, is what happens to the homestead property if it is simply not permitted to be devised or if it is permitted to be devised to a surviving spouse but the last will and testament (or revocable trust agreement) provides for a different treatment? Florida Statutes Section 732.401 directs that, in such cases, the homestead shall descend in the same manner as other intestate property. However, if there is a surviving spouse and at least one other heir, the spouse takes a life estate[10] and the remainder interest vests in the other intestate heir(s) (including minor and adult children, if applicable). If the homestead owner has no surviving spouse and no minor child, she is free to dispose of the homestead property without restriction and irrespective of whether she is survived by adult children.

These rules limiting the freedom of devise are not applicable to property held by the decedent and her spouse as tenants by the entireties or as joint tenants with rights of survivorship.[11] For these purposes only, and having no bearing on issues pertaining to real

estate taxation or creditor protection, property owned by spouses as tenants by the entireties or jointly with right of survivorship is not treated as "homestead." Under those circumstances, the constitutional limit on devise is not needed to protect the sanctity of the home because title vests in the survivor by virtue of the nature of the estate.

It is hoped that the foregoing information provides Pennsylvania attorneys with a starting point for reviewing issues related to Florida homestead laws.

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Endnotes

1 See FLA. STAT. § 196.031(1); § 193.155.

2 Art. VII, § 6, Fla. Const.; FLA. STAT. § 196.031.

3 Art. VII, § 4, Fla. Const.; FLA. STAT. § 193.155.

4 However, Florida Statutes § 222.01 provides a procedure to expressly invoke constitutional homestead protection and includes a form to claim homestead status which notifies lienholders that they have 45 days to file an action for a declaratory judgment to determine the homestead status of the subject property. If the lienholder does not file a declaratory judgment action in time, the lien " ... shall be deemed as not attaching to the property ... "

5 FLA. STAT. § 732.514.

6 Rohan Kelley, Homestead Made Easy Part I: Understanding the Basics, FL Bar J. 18 (March 1991).

7 Article X, § 4(c) provides that the homestead "shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child."

8 FLA. STAT. § 732.4015(1).

9 FLA. STAT. § 732.4015(2)(a).

10 In lieu of a life estate, the surviving spouse may elect to take a 50 percent interest as a tenant in common with the other intestate heirs.

11 FLA. STAT. § 732.401(5).

Domicile Selection and Qualification

By John D. Maida, Esq.

Within the Various States of the United States

Residency generally is in the state in which a person is "domiciled." However, the state wherein a citizen or legal alien maintains or intends to maintain her permanent home and to which she intends to return when absent, is a person's "domicile." Only one state at any given time can be an individual's domicile until another domicile is established.

To change domicile, a person must: 1) abandon a prior domicile, 2) physically move to and reside in the new state, and 3) intend to permanently or indefinitely remain in the new state. Therefore, regardless for how long a person moves to another state intending to only stay there for a limited duration, their domicile will not change.

"Domicile is not dependent on citizenship." Therefore, a U.S. citizen going to a foreign country will be deemed domiciled in the foreign country if it is established that such individual intended to permanently remain there.

Outside the United States

U.S. citizens living abroad are considered to be U.S. domiciled if they are employed by designated U.S.-related entities, among which are the following: U.S. government; U.S. research institutions; public international organizations in which the U.S. legally participates; U.S.-owned companies engaged in the development of foreign trade and commerce for the U.S.; and, religious denomination or interdenominational organizations with an official presence in the U.S. where the employee is a priest, minister or missionary.

In addition, a U.S. citizen living abroad will be considered U.S. domiciled if she left the U.S. only for a limited period of time (however extended such period may be) with the intent (at the time of departure) to maintain her domicile in the U.S., and if she has also kept intended ties to the U.S. following her departure.

Determining Intent

Intent is a state of mind, therefore taxing authorities and courts must look to a person's actions to determine intent. Factors considered are time spent in one location versus another; where a spouse and children reside; locale of principal residence; where driver's license was issued; where vehicles are registered; where professional licenses are from; where an individual is registered to vote; where bank accounts are maintained; where an individual's doctors, dentists, accountants and attorneys are located; location of real property and investments; and social ties.

How the States Catch You

States do not typically track activities of each taxpayer; however, a domicile/residency issue usually arises when the taxpayer begins filing income tax returns as a nonresident while continuing to have income sourced from that state or when a person ceases all tax filings in a state, and then at some point in the future again files tax returns as a resident of the same state.

If the state tax authorities identify a person with a gap in tax filings, and they believe that that person retained her domicile in that state, then they will require the filing of state income tax returns for the intervening years. Statutes of limitations for tax returns generally begin to run on the date a tax return is filed. If no tax returns have been filed for the intervening years, then the statute of limitations for those years remains open indefinitely.

States, including Pennsylvania, do not typically allow foreign taxes paid as credits against state income taxes. Furthermore, states, including Pennsylvania, may not conform to the federal rules that allow certain foreign earned income to be excluded from taxable income. As a result, persons temporarily residing overseas will often owe significant state income taxes, even though they may not be present in the state at all during the year.

Pennsylvania Residency*

All income of a Pennsylvania resident is taxable, regardless of the state in which it was earned. In some situa-

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tions, income earned in one state is also taxable to another state; however Pennsylvania grants a credit for taxes paid to other selected states with which it has tax treaties. And, in other instances, Pennsylvania has reciprocal agreements whereby other states will not tax the wages of a Pennsylvania resident.

If your client is a Pennsylvania resident, nonresident or a part-year resident, even if taxes will not be payable, a Pennsylvania tax return must be filed, regardless of the individual's age, if the individual received total Pennsylvania gross taxable income in excess of $33; and/or the individual incurred a loss from any transaction as an individual, sole proprietor, partner in a partnership or Pennsylvania S corporation shareholder.

The 183-days-of-residence rule is followed by Pennsylvania unless the taxpayer has no residence in Pennsylvania.

* See: https://www.revenue.pa.gov/FormsandPublications/FormsforIndividuals/PIT/Documents/rev-611.pdf

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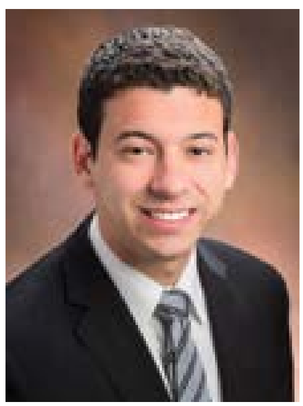
The New §199A Deduction for Qualified Business Income and its Application to Trusts and Estates

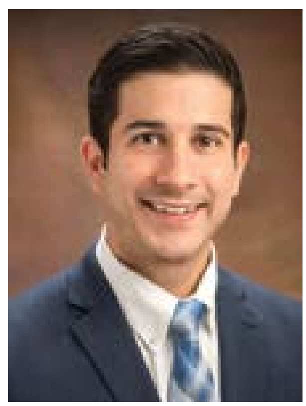
By Michael A. Breslow, Esq. and Patrick A. Russo, Esq.

I. Introduction

The 2017 Tax Act[1] introduced §199A to the Internal Revenue Code of 1986, as amended (Code). In general, §199A grants taxpayers a deduction of up to 20 percent of the qualified business income of pass-through businesses for tax years beginning after Dec. 31, 2017 and before Dec. 31, 2025. The §199A deduction is available to all non-corporate taxpayers, including trusts and estates, who are owners of a sole proprietorship, partners in a partnership, members of an LLC or shareholders in an S Corporation.



Michael A. Breslow



Patrick A. Russo

For taxpayers whose income exceeds a certain threshold, the §199A deduction is subject to a number of limitations. Of specific interest to this article are those based on the taxpayer's share of the entity's W-2 wages and the unadjusted basis immediately after acquisition of all qualified property (referred to as "UBIA"). In the case of trusts and estates, the fiduciary income tax structure adds some complexity not experienced by individual taxpayers.

The general conduit fiduciary income tax system should be familiar to most practitioners. Income earned by a trust can be taxable to the trust, to the beneficiaries of the trust, or can be split between the two. The taxable income from an entity is therefore shared between the trust and the beneficiaries. Generally speaking, income retained by a trust is taxable to the trust, and income distributed to a beneficiary is taxable to the beneficiary. Because the availability of the §199A deduction depends on the taxpayer's share of W-2 wages and UBIA, it is necessary that these tax attributes also be shared between trust and trust beneficiaries to apply the §199A deduction against the taxable income of the ultimate taxpayer—either the trust if the income is retained or the beneficiary if the income is distributed.

The Code provides that the rules governing the allocation of W-2 wages and UBIA between the trust and the trust beneficiaries for §199A purposes will apply to trusts and estates in the same way that the deduction under former §199 (for domestic production activities) applied to trusts and estates.[2] On Jan. 18, 2019, the Internal Revenue Service issued final regulations under §199A, which largely follow those under former §199 as to the application to trusts and es-

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tates, and also resolve some important issues left open by Congress.[3]

Part II of this article will briefly summarize the §199A deduction and the pertinent limitations on taxpayers' eligibility to claim the deduction, and Part III of this article will summarize the application of the regulations under §199A to several types of trusts that own pass-through entities (grantor trusts, non-grantor trusts and estates and for S corporations, QSSTs and ESBTs) for purposes of applying the W-2 wages and UBIA limitations.

II. Brief Summary of Section 199A

All taxpayers, except C corporations, are entitled to the deduction under §199A. As noted above, this includes trusts and estates. Section 199A(a) sets forth the deduction and the rest of §199A contains important definitions and limitations, some of which are summarized below.

Section 199A Deduction

Section 199A(a) provides a deduction equal to the lesser of (i) the taxpayer's "combined qualified business income amount" and (ii) 20 percent of the taxpayer's taxable income, calculated without regard to net capital gain and without regard to the §199A deduction.

For the most part, §199A(a) sets forth a number of limitations that should be familiar or easily accessible to most practitioners. The new defined term is "combined qualified income amount," which is the term that does much of the "heavy lifting" for purposes of the §199A deduction.

Combined Qualified Income Amount

A taxpayer's "combined qualified income amount" is defined in §199A(b) as the sum of 20 percent of the taxpayer's "qualified business income" (QBI)

for each "qualified trade or business," plus 20 percent of qualified REIT dividends and qualified publicly traded partnership income. The calculation of QBI is the key component of a taxpayer's combined qualified business income amount.

Qualified Business Income

A taxpayer's QBI is defined in §199A(c) as the net amount of qualified items of income, gain, deduction and loss effectively connected with the conduct of a qualified trade or business within the United States and included or allowed in determining taxable income for the taxable year. QBI does not include short-term or long-term capital gain or loss, dividend income, interest income not related to trade or business, reasonable compensation paid to the taxpayer for services rendered with respect to the business, guaranteed payments to a partner for services rendered to the trade or business, and REIT dividends, qualified cooperative dividends or qualified publicly traded partnership income (which are taken into account in separate inclusion/deduction provisions).

The Code makes clear that a taxpayer's QBI must be "with respect to" a "qualified trade or business" in order to be eligible for the §199A deduction. What constitutes a "qualified trade or business," however, can change depending on the amount of taxable income of the taxpayer.

Qualified Trade or Business

A "qualified trade or business" is defined in §199A(d) as any trade or business other than (1) a specified service trade or business[4] or (2) the trade or business of performing services as an employee.

Note, however, that the definition of a "qualified trade or business" can change based on the taxpayer's taxable income.[5] For taxpayers with taxable incomes below a certain threshold amount,[6] a trade or business will be a "qualified trade or business" even if it is a specified service trade or business. For taxpayers with taxable incomes above the threshold amount but below a phase-in amount, the limitation is phased in ratably.[7] Once the upper limit phase-in amount is reached, QBI from a specified service trade or business is fully excluded from the definition of QBI. In all events, however, every taxpayer remains subject to the rule that the trade or business of performing services as an employee is not a "qualified trade or business."

Deductible Amounts

For taxpayers with taxable income below the threshold amount, such taxpayers can simply multiply QBI by 20 percent to determine the deductible amount. No additional limitations are imposed.

For taxpayers with taxable income above the threshold amount, the combined qualified income amount is essentially the sum of the *deductible amounts* from *each* qualified trade or business of the taxpayer. The "deductible amount" for each trade or business is the lesser of:

(a) 20 percent of the QBI with respect to the trade or business, or
(b) the greater of (i) 50 percent of the taxpayer's share of W-2 wages from the qualified business, or (ii) the sum of 25 percent of the taxpayer's allocable share of

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> W-2 wages plus 2.5 percent of unadjusted basis of all qualified property.[8]

W-2 Wages and Share of UBIA Limitations

Similar to the treatment of specified service trades or businesses for purposes of the QBI definition, the limitations pertaining to the taxpayer's share of W-2 wages and UBIA are phased in based on the taxpayer's taxable income. The regulations provide that the individual or relevant pass-through entity[9] that directly conducts a qualified trade or business must determine and report each taxpayer's share of W-2 wages and basis of qualified property with respect to such qualified trade or business.[10] With respect to trusts and estates, Congress provided that the taxpayer's share of W-2 wages and the taxpayer's share of UBIA are to be allocated between the trust and the beneficiary, pursuant to "[r]ules similar to the rules under section 199(d)(1)(B)(i) (as in effect on Dec. 1, 2017)."[11]

Section 199 related to the deduction for domestic production activities and was subject to limitations at the taxpayer level with respect to the taxpayer's share of W-2 wages of the entity, similar to the rules under new §199A described above. With respect to trusts and estates, Congress mandated in §199(d)(1)(B)(i) that the Treasury promulgate regulations for allocating such items between the trust/estate and the beneficiary. As noted above, the IRS issued regulations that clarified some key points not addressed in the regulations under former §199.

The following part will summarize how W-2 wages and UBIA are allocated between a trust or estate and the beneficiaries under these regulations.

III. Section 199A Applied to Trusts and Estates

There are several types of trusts that can own interests in pass-through entities such as partnerships and S Corporations, including grantor trusts, Qualified Subchapter S Trusts (QSSTs), Electing Small Business Trusts (ESBTs), and non-grantor trusts/estates.

Grantor Trusts/Qualified Subchapter S Trusts

For grantor trusts and qualified subchapter S trusts (QSSTs) for which the beneficiary is treated as the owner under §678,[12] the regulations create a fairly simple rule. The person treated as the owner of the pass-through business owned by the trust, whether a grantor or another person, computes its §199A deduction as if he or she conducted the activity of the trust directly, with respect to the portion of the trust that such person is considered to own.[13]

Therefore, pursuant to the old §199 regulations and the regulations under §199A, the grantor of a grantor trust, or the QSST beneficiary with respect to a QSST, is treated as the owner of the pass-through entity interest that is owned by the trust. Accordingly, there is no need to allocate the tax items between the trust and the beneficiary for these types of trusts. The share of W-2 wages and UBIA are all fully allocated to the grantor/QSST beneficiary.

Electing Small Business Trusts

An Electing Small Business Trust (ESBT) is a permissible shareholder of an S Corporation.[14] An ESBT is taxed pursuant to rules set forth in §641(c). These rules provide that any portion of an ESBT that consists of stock of an S corporation is treated as a separate trust from the portion of the trust that owns other assets. Section 641(c)(2)(C) provides that "[t]he only items of income, loss, deduction, or credit to be taken into account are . . . [t]he items required to be taken into account under section 1366," which are the income items passed-through from the S corporation to the shareholder and reported to the shareholder on the shareholder's K-1.

Section 199 and the regulations thereunder did not specifically address ESBTs. Prior to the issuance of the proposed and now final regulations under §199A, it was not entirely clear whether the §199A deduction would be available to an ESBT. The regulations removed these lingering doubts, however, by providing that an ESBT is entitled to the §199A deduction.[15] The availability of the deduction to ESBTs is important, as the income tax on the S corporation portion of an ESBT is imposed at the highest marginal income tax rate applicable to trusts and estates (currently 37 percent).[16] If the ESBT qualifies for the §199A deduction, the effective income tax rate may be reduced to 29.6 percent.

The regulations provide that the S corporation portion of the ESBT must take into account the QBI and other items from any S corporation owned by the ESBT and that the ESBT portion of a trust would be attributed all W-2 wages and UBIA of the S corporation.[17] The regulations also provide that the grantor portion of the ESBT must take into account the QBI and other items from any assets treated as owned by a grantor or another person (owned portion) of a trust under §§671-679, and the non-S corporation portion of the ESBT must take into account any QBI and other items from any other entities or assets owned by the ESBT.[18] Therefore, the grantor would be attributed any W-2 wages and UBIA treated as owned by the grantor (as discussed above), and the non-S corporation portion of the trust would allocate W-2 wages and UBIA among the trust and beneficiary in the same manner as a non-grantor trust, as described below.

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Non-Grantor Trusts and Estates

The application of §199A will be more complicated for non-grantor trusts and estates that own interests in pass-through entities. As a starting point, the §199A deduction is calculated at the entity level, and is then allocated between the trust and beneficiaries.[19] The §199 regulations and regulations under §199A provide, generally, that the key metric for allocating W-2 wages between the trust/estate and the beneficiaries is the trust/estate's distributable net income (DNI), as determined under §643, that is distributed or required to be distributed to the beneficiaries during the taxable year. The regulations under §199A set forth the following rule, which is substantially identical to rule described in the 199 regulations:

> The … W-2 wages [and share of UBIA] … of a trust or estate are allocated to each beneficiary and to the trust or estate based on the relative proportion of the trust's or estate's distributable net income (DNI), as defined by section 643(a), for the taxable year that is distributed or required to be distributed to the beneficiary or is retained by the trust or estate. For this purpose, the trust's or estate's DNI is determined with regard to the separate share rule of section 663(c), but without regard to section 199A …[20]

The above-quoted regulation clarifies three important points regarding the application of the §199A deduction to trusts/estates:

1. The W-2 wages and the taxpayer's share of UBIA reported to the trust/estate from the pass-through entity will be allocated between the trust/estate and the beneficiary based on the distributable net income "distributed or required to be distributed to the beneficiary." In other words, these tax attributes will be allocated between the beneficiaries and the trust/estate on a pro-rata basis based on the DNI distributed to the beneficiaries. Further, it is immaterial whether the trust/estate's income from the pass-through entity is included in the amount distributed to the beneficiaries. The ultimate calculation of DNI and the allocation between the trust/estate and the beneficiaries is the key consideration.

For trusts/estates, there is often a disconnect between fiduciary accounting income required to be distributed to the beneficiaries and the taxable income from pass-through entities. Under the principal and income laws of most states, only amounts distributed to the estate/trust from the pass-through entity will be included in the estate/trust's fiduciary accounting income; however, the taxable income of the estate/trust is calculated based on the estate/trust's proportionate share of the pass-through entity's taxable income. If an entity passes through taxable income to a trust or estate, but does not distribute cash to the trust or estate, the trust/estate will have taxable income but will not have fiduciary accounting income. All of the DNI might be allocated to the beneficiary, but the DNI is not composed of the business income. The trust or estate would be responsible for paying the income tax on the pass-through entity income. Therefore, the W-2 wages and UBIA might be allocated to the beneficiary, and the estate/trust might have its §199A deduction reduced or eliminated as a result.

2. The estate or trust's DNI will be calculated without regard to the §199A deduction for purposes of determining the allocation of §199A tax items to the trust and the estate.

3. If the estate or trust has no DNI in a given year, then the W-2 wages and the taxpayer's share of UBIA will all be allocated to the trust/estate. Relying upon DNI for the allocation of tax attributes for purposes of the §199A deduction could lead to problematic results, particularly because DNI can be zero in certain circumstances (e.g., as a result of a charitable distribution deduction). In that scenario, the regulations provide that the share of W-2 wages and UBIA will be allocated to the trust/estate. However, a beneficiary could be required to include QBI in his or her gross income from the trust/estate as a result of a distribution from the entity that is included in fiduciary accounting income, but the beneficiary's §199A deduction could be limited or eliminated altogether because the beneficiary would receive no benefit of the estate/trust's share of the W-2 wages or UBIA. Ideally, this aspect of §199A will be addressed by additional guidance.

Estates with Fiscal Year Ending in 2018

As noted above, estates and trusts are obligated to report a beneficiary's share of QBI, W-2 wages and UBIA on a Schedule K-1 to the extent it passes out these items to the beneficiary (that is, a trust or estate becomes a "relevant pass-through entity" to the extent these items pass-through). Because estates can elect a fiscal year, this can lead to interesting reporting requirements and considerations for an executor.

For instance, assume a decedent dies in 2017 owning an interest in a qualified trade or business that has a Dec. 31 year end. The estate elects a first fiscal year ending sometime in 2018. The estate receives a K-1 from the qualified trade or business for its taxable year ending on Dec. 31, 2017 that will be reported on the estate's fiscal year return ending in 2018.

Understandably, the K-1 from the pass-through business does not report

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any QBI or related items, since §199A and its reporting requirements did not apply to the business in 2017. In fact, if the estate does not distribute income, the estate would not be able to take any §199A deduction because its taxable year began prior to the effective date of the 2017 Tax Act.

However, the regulations provide that any income earned and reported to the beneficiary of the estate in 2018 qualifies for the deduction, since the beneficiary will be receiving and reporting such income on his or her 2018 income tax return.[21] Since the estate will be distributing income that qualifies as QBI, the §199A regulations seemingly impose on the executor an obligation to report the QBI amount (as well as the beneficiary's share of W-2 wages and UBIA) to the beneficiary. In other words, the estate may be required to report certain information to the beneficiaries that was not required to be reported to the estate.

If the executor is not involved in the business, this information may not be readily available. Given the lack of guidance with this issue, the executor should work with the business's tax and accounting professionals and use a reasonable method to determine the estate's and beneficiary's share of §199A items.

Anti-Abuse Rules for Trusts

As noted above, the §199A deduction is subject to various limitations if the taxable income of the taxpayer exceeds a certain threshold. To prevent taxpayers from creating multiple trusts with taxable income below the threshold amounts (so the limitations would not apply), the regulations provide anti-abuse rules under §199A as well as under §643(f). The regulations under §199A provide that multiple trusts "formed or funded with a significant purpose of receiving a deduction under section §199A will not be respected for purposes of section 199A."[22] These provisions apply to taxable years ending after Dec. 22, 2017.[23]

The regulations under §643(f) provide that "two or more trusts will be aggregated and treated as a single trust if such trusts have substantially the same grantor or grantors and substantially the same primary beneficiary or beneficiaries, and if a principal purpose for establishing such trusts or for contributing additional cash or other property to such trusts is the avoidance of Federal income tax."[24] The regulations go on to provide that if a significant income tax benefit results from the creation of multiple trusts, income tax avoidance will be presumed unless there is a significant non-tax purposes for creating this trusts. These provisions apply to taxable years ending after Aug. 16, 2018.[25]

IV. Conclusion

Practitioners' and planners' understanding of the deduction for pass-through business income under §199A is certain to evolve as they begin to understand its implications in 2018 and in coming years. The regulations under §199A have been useful in illuminating certain aspects of §199A; however, it is likely that the application of the §199A deduction to trusts and estates will be a particularly challenging area of focus for some time.

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Endnotes

1 P.L. 115-97, an Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.
2 §199A(f)(1)(B).
3 Treas. Reg. § 1.199A-1, *et. seq*.
4 A specified service trade or business means (A) any trade or business involving the performance of services in the fields of (a) health, (b) law, (c) accounting, (d) actuarial science, (e) performing arts, (f) consulting, (g) athletics, (h) financial services, (i) brokerage service or (j) any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners, or (B) Any trade or business involving the performance of service that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities. §199A(d)(2).
5 For purposes of §199A, "taxable income" means adjusted gross income reduced by the taxpayer's standard deduction or itemized deductions, but without regard to the §199A deduction. §199A(e)(1).
6 For 2018, the threshold amount is $157,500, or $315,000 in the case of a joint return. §199A(e)(2)(A). The threshold amount will be adjusted annually for inflation. §199A(e)(2)(B).
7 The phase-in amount is defined as the threshold amount plus $50,000 (or $100,000 in the case of a joint return). §199A(b)(3)(B). Accordingly, for 2018, the phase-in amount is $207,500, or $415,000 in the case of a joint return.
8 Section 199A(b)(6) provides that the term qualified property will typically mean business property subject to depreciation.
9 The regulations define the term "relevant pass-through entity" to include partnerships and S corporations that are directly or indirectly owned by at least one individual, trust, or estate. A trust or estate also can be a relevant pass-through entity to the extent that it passes through QBI to beneficiaries. Treas. Reg. §1.199A-1(b)(10).
10 Treas. Reg. §1.199A-2(a)(2).
11 §199A(f)(1)(B).
12 §1362(d)(1)(B).
13 Treas. Reg. §1.199-5(d); Treas. Reg. §1.199A-6(d)(2).
14 §1361(c)(2)(A)(v).
15 Treas. Reg. §1.199A-6(d)(3)(vi).
16 §641(c)(2)(A).
17 Treas. Reg. §1.199A-6(d)(3)(vi).
18 *Id.*
19 Treas. Reg. §1.199A-6(d)(3)(i).
20 Treas. Reg. §1.199A-6(d)(3)(ii). See also Treas. Reg. §1.199-5(e)(2)(i).
21 Treas. Reg. §1.199A-6(e)(2)(ii).
22 Treas. Reg. §1.199A-6(d)(3)(v).
23 Treas. Reg. §1.199A-6(e)(2)(i).
24 Treas. Reg. §1.643(f)-1(a).
25 Treas. Reg. §1.643(f)-1(b).

LISTSERV

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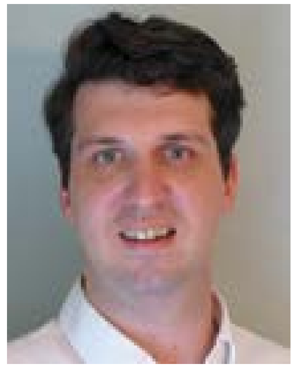
Collected and edited by Griffin B. Evans, Esq.



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Transferring Mobile Homes?

A question for the "dirt" folks:

I have an estate with a mobile home in it, which is going to be sold. I have the title, and it is a mobile home. I understand there will be a transfer tax. Can anyone point me to where I can learn about the process, and at what rate the tax is to be paid, etc.? The estate does not own the real estate. -BF

- This sounds like personal property. Therefore, no transfer tax; but instead, sales tax, to be paid using the BMV transfer forms. -TW
- Please note that PennDOT has issued a September 2017 "Fact Sheet" on mobile home titling and tax certification issues (I don't know if this has been subsequently modified or superseded, which you should look into): http://www.dot.state.pa.us/public/dvspubsforms/BMV/BMV%20Fact%20Sheets/fs-tmhmh.pdf -LK
- Because mobile homes are treated as vehicles, I recommend calling a local auto tag company like Wiggins. They will be able to give you at least a ballpark number for the fees. - JS

Guardianship and Service of Process?

We have a situation where we are seeking guardianship over an individual adult who is in a group home out of county after a stay in a mental ward of a hospital. As to service of process, do we really have to have the sheriff (of the county where he is to be serve) serve him with the papers.

While we believe he is incapacitated there has been no ruling that he is.

We did not ask for an emergency appointment, but I was wondering if we had done that could the emergency guardian accept service?

It is a bit of a process to have a sheriff of another county be deputized to serve papers in a civil matter like this and time is of the essence.

Any suggestions for a good shortcut? -RB

- I have only done one guardianship, so I'm no authority, but you need to look at 20 Pa.C.S. 5511(a).

  The person making service on the alleged incapacitated person needs to explain the petition "to the maximum extent possible in language and terms the individual is most likely to understand," and I do not see how a sheriff is qualified to do that. -DE
- Section 5511 requires "personal service", which is not defined in the statute but implies service sufficient to obtain personal jurisdiction. Section 5511 does not specifically require use of a citation procedure, but O.C. Rule 3.5(a)(2) requires sheriff service to establish personal jurisdiction. Starting with an emergency guardianship still requires personal service on the incapacitated person. Since the court will likely appoint counsel for the incapacitated person, the concern about adequate explanation is not likely to be significant. If it is a concern, perhaps you could write up a script for the deputy to read at the time of service. The OC citation form language should be enough. -TW
- I think if you look at PA OC Rule 3.5 you will find that citations are used in guardianship proceedings to obtain personal jurisdiction and service may be by any adult.

  Several questions arise from your post
  – what is the domicile and county of residence
  – is there a source for a qualified person to opine re incapacity
  – for an emergency there has to be an emergent situation; irreparable harm would ensue if emergency guardian not appointed

  I have done many guardianships, permanent and emergency, and would be happy to discuss. -JL

Combining Parcels into One Deed?

My client is selling 17 parcels to one buyer; some are immediately contiguous, some are around the corner or back to back. Each has its own block and lot number. May all parcels be included in one deed? -CR

- No reason for the seller not to put them on one deed.

  But I just had a closing where the lender would not allow the borrower to mortgage parcels that did not adjoin the house parcel. So we had to do 2 deeds—one for the house and the parcels that adjoined each other. Another deed for the other parcels. -RM

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- Agreed there is no problem doing this, contiguous or not.
  Prior to electronic recording, there were problems if you crossed county lines, since the deed had to be presented in person for recording (and would disappear for months).
  So, barring weird circumstances like two counties for recording, it makes sense to me. - MG
- I just happened to be on the phone with Allegheny County Recorder of Deeds Office for another matter, and I asked your question and they replied that there is no limit on the number of parcels, but after 30 parcels you will pay an additional $10 per parcel. - GB

Joint Trust?

I have been asked to draft a Joint Living Trust. When looking at the requirements of who may draft a trust, I find, the definition of a Settlor in Section 7703 begins "A person, including a testator, who creates or contributes … " Section 7731 "Creation of Trust" refers to the Settlor or the owner of property. Section 7732 "Requirements for creation" refers to the Settlor, as defined in 7703.

Nowhere is there a prohibition of more than one Settlor, but neither is there reference to a Settlor as anything other than singular. Can someone shed light on this for me? I feel that I am missing something basic. - MM

- See section 7752(b):
  "(b) More than one settlor.--If a revocable trust is created or funded by more than one settlor:
  "(1) to the extent the trust consists of community property, either spouse alone who notifies the other spouse may revoke the trust, but the trust may be amended only by joint action of both spouses;
  "(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with respect to the portion of the trust property attributable to that settlor's contribution upon notice to each other settlor; and
  "(3) upon the revocation or amendment of the trust by fewer than all the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment."
  This shows the advantage of having statutes (and other resources) in electronic form. A search of Chapter 77 for "settlors" turned this up immediately. -DE
- I have never drafted a joint trust and my only experiences have been with "trust mill" documents that have gone terribly awry (i.e. failing to fund the exemption trust).
  So, what is the advantage of the joint trusts (funded with property other than community property) other than the requirement that the other settlor be notified of the amendment? What are the chances that the trustee (assuming he/she is also one of the settlors) actually notifies the other settlor? I would assume you can only amend the document as it pertains to your assets or the devolution of your assets and not those of the other settlor. Also I assume the document can override the statute.
  I fail to see the utility. What am I missing? - SK
- I use joint trusts all the time for couples with young children. If both parents die, this vehicle is an efficient way to combine the two estates for the benefit of the children without a mess. While living, both parents are co-trustees, if either becomes incapacitated the other serves alone, and they appoint a backup. That probably-otherwise-empty box sits there (in the hope that it will never be needed), although with minor children, that box can be the contingent beneficiary of life insurance, since carriers will not accept a testamentary trust as a contingent beneficiary. Since it is typically empty unless there has been a disaster, the only ones who are even aware of it are the parties, the drafter, and the carrier - if it has been used, a contingent beneficiary. Once the children are no longer minors, the grantors/settlors remain free to change the contingent beneficiaries of the life insurance policies to the children themselves (although the trust can still sit there and do its job if needs be) and to change their wills to direct their estates directly to their children. - RB
- I set up one joint trust, years ago, for federal transfer tax purposes (to make sure that the first to die had some assets to use the credit exclusion), and I found it to be extremely difficult to draft. (And it all turned out to be a wasted effort. Both clients are still alive, their estates are no longer large enough to require federal estate tax planning, and the property that was held in the trust was sold without my knowing it.)
  For tax planning, a simpler approach (in my experience) is to set up a one-settlor trust in which the non-settlor spouse has a general testamentary power of appointment if that spouse predeceases the settlor spouse. (There are private rulings approving this technique.) The tax effects are the same, but the drafting is much simpler.
  Except that now we have portability of the exclusion amount, so we do not need to go through those kinds of gyrations to fund the credit shelter trust at the first death.
  And simply having assets held as tenants by the entireties seems to be better for protecting assets from creditors. (I know there is a court decision saying that entireties property in a trust retains its quality as entireties property, but I think that the opinion is flakey and might not be followed by other courts, so I would not want to rely on it.)
  So my experience is that joint trusts seem to be as useful as joint wills, meaning that they save some paper but create complications. I do not think it is worth it. - DE

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- I have had a few situations where one spouse is in the early stages of dementia and there is a desire expressed by the competent spouse to protect the joint estate if the competent spouse is the first to die. These estates have been sizable, but not large enough to involve federal estate taxes. In each case, the competent spouse also wanted to maintain flexibility and control while alive. So, I drafted joint revocable trusts that became irrevocable if the disabled spouse was the survivor (or the competent spouse became incompetent). Not easy drafting, for sure. And a delicate discussion with the disabled spouse. Joint revocable trusts have their place, but they need to be individually crafted to meet the circumstances. -SK
- Thank you. This trust is being drafted for neither tax reasons nor protection from creditors. I appreciate your input, and I agree if this were a traditional 'marital trust' situation or 'credit shelter trust' situation, would not waste the effort and would find an easier route, especially with portability. -MM
- Sorry, but I now remember creating one other joint revocable trust, and it was for non-tax reasons.
  There were annuities and insurance contracts of both spouses that they wanted divided and held in trust in certain ways, and it seemed best to create a revocable trust as the beneficiary. Because the trust could be funded if either died, the survivor was supposed to have control, and both would eventually be contributing, I decided it was easiest to do it as an unfunded joint trust, with pour-over wills for both of them.
  Which means I agree with the comment below that it is a question of the circumstances. -DE

Paper Street vs. Vacation?

Before I begin my research, I wonder if anyone knows the answer.

1. If a street is not accepted by the municipality within 21 years, title reverts to the property owners on each side. But the ownership is subject to a private right of way in favor of every property owner in the plan to use the paper street
2. If a municipality vacates a street that has already been accepted, title again reverts to the owners on each side. But do the other property owners in the plan have a private right of way—just as they do when it is a paper street that was never accepted? -RM

- Yes, the private rights remain notwithstanding the vacation. I do not have it in front of me, but there are several decisions on the subject. -EH
- Once the reversion has occurred (and/or the municipality has passed and recorded the vacation ordinance), some jurisdictions will provide a quitclaim deed and some will not, depends on the solicitor. Because of the private rights, I typically quiet title, including notice to all owners in the plan. The challenge will be a larger phased plan, where you have a gigantic number of owners. I recall making the argument that the street was only to benefit the phase in which the street was transferred or dedicated, since every other owner had an alternative path. That was a couple of decades ago, so I do not remember the citation. Also, be careful to make certain that the deeds are to the center of the street. There is some case law (which I cannot cite off the top of my head), that the reversion is to the original underlying owner (the developer?) if the deeds are only to the edge of the road. -RB
- Fantastic. I will check that out.
  I have a lot of research on the effect of the non-acceptance of a street which then becomes a paper street. But I never had to research the issue of the vacation of an already accepted street.
  Some municipal solicitors do not even know this. I have seen many municipalities "vacate" a paper street which has never been used. -RM
- In my opinion, if the municipality never accepts the offer of dedication, then title to the roadbed remains in the party that created the subdivision since there was no passage of title. If the municipality accepts the dedication and subsequently vacates the road, then title passes to each owner on either side of the road. In either case, title reverts or passes subject to the implied easement in favor of all lot owners in the subdivision. - FK
- So far, everyone that responded agrees that in both cases, while title to the "street" passes to the owners on each side, that ownership is subject to a private right of way in favor of other owners in the plan.
  Someone mentioned that the right to use it is only for other owners in the plan and that is correct. I have a citation to a case where an owner that lived in the next plan wanted to use it and the Court ruled that because their property is not in the plan of the paper street, that person has no right to use it. - RM
- I would be very interested in citations to the cases that you have.
  In my situation, there is a 10' wide private alley appearing of record on deeds of adjoining property owners going back to 1892. There is no subdivision or other plan. The municipality has no records, never accepted it, never vacated it. There are utility lines and poles in the alley. One property owner built a garage and blocked it, probably 30-40 years ago, but there are no records and no building permits were issued by the municipality. Do the seven adjoining property owners, four whose back yards are landlocked without the alley, have rights to use the alley for access? I expect that the garage owner will argue adverse possession. Any guidance or case cites will be much appreciated. - KD
- Is not there case law that precludes adverse possession against a governmental entity? Seems so. -SS
- Yes. I do not recall the Latin offhand, but time does not run against the king. In an interesting twist on my facts below, about five minutes ago, I learned

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that the municipality issued two building permits for the garage additions (in the private alley). It seems to me that (a) the permits were issued in error, and (b) adverse possession is a hostile act, not a permissive act. In other words, you do not ask permission, you just do it (open, hostile, etc.). -KD

- Lands of the Federal and State governments are exempt from adverse possession claims. Lands of local municipalities are exempt only if they are used for a public purpose. -FK

Service Issue in Orphans Court?

Client is a beneficiary under a Will. There are some disputes, and we are not getting some answers we like. We want the executor to file an accounting. We are in Philadelphia.

We filed a Petition for an Accounting. Judge signs the Decree and the Orphans Court (OC) entered a Citation. We have it and ready for service. I am a bit confused on service.

The Decree says serve in accordance with PA OC 3.5(a) and file proof of service. As I read the Rules and 3.5(a), the method of service depends on whether personal jurisdiction is required. Because this is the first filing, I think I need personal jurisdiction over the Executor and therefore, read this as personal service. We filed the citation to get someone to act. It is the first filing in OC, so we need to get personal jurisdiction over the Executor. I see 3.5(a)(2) requiring me to get original service over the individual under Pa.R.C.P. 402. Alternatively, if we do not need jurisdiction, then service by certified mail is ok, 3.5(a)(3).

However, I spoke with someone at OC who has been very friendly and nice. She tells me to look at the back of the Citation which I had already reviewed. On the back of the Citation is the Proof of Service which is a form and provides for service multiple ways including Certified Mail. She tells me these are all acceptable and/or alternative ways to serve. And, she tells me certified mail is an acceptable method.

I know that service in Philadelphia by a process server is simple, and one of the beneficiaries is there. However, the Executor is upstate. So, if I need to serve by personal service, I would need to get the Philadelphia Sheriff to deputize the upstate county's sheriff.

So, I really have two questions:

1. Is this citation something I can simply mail by certified mail, or do I need to personally serve; and
2. This one is less important for the specific issue, but will help me understand it better – is the real underlying issue that I do not need to obtain personal jurisdiction over the Executor, because I already have it. -MF

- FYI, under relatively new PEF Code Section 3163, you no longer need a citation to compel an accounting by a personal representative (PR). By accepting appointment, the PR has submitted to the jurisdiction of the court. However, a request for Citation never hurts, because the PR cannot be held in contempt without the prior issuance of a Citation. In every county I have practiced in, service of Citation is generally by certified mail, return receipt requested, but I do not know what current practice is in Philadelphia County. -ES
- If I understand correctly, the executor is already appointed. So, by accepting the appointment as executor, personal jurisdiction over the executor was conferred by statute. 20 Pa.C.S. 3163. So, looks like 3.5 (b) controls. -DM
- I was looking at this recently, because I am probably going to have to petition to compel an accounting from an out-of-state executor who was appointed before the effective date of the (relatively) new section 3163, which became effective 1/1/2017.

  My understanding is that there are two issues relating to personal jurisdiction:

  1. Does the person being sued/served have a sufficient connection to the state to satisfy due process concerns? (I think of this as the "International Shoe" issue, because I think that was the Supreme Court decision we read in law school.)
  2. The manner in which service of process is made.

  One would think that someone having accepted the office of personal representative in Pennsylvania would have a sufficient connection (or nexus) to be subject to the jurisdiction of the Pennsylvania courts, and one would be right. This question was addressed before the enactment of section 3163 by 42 Pa.C.S. 5322(a)(7)(i), which states that a person who has accepted an appointment under the authority of this Commonwealth as the personal representative of the estate of a decedent is subject to the personal jurisdiction of the courts of Pennsylvania for actions or other matters arising from that appointment. So that answers the first issue.

  Section 3163 really addresses the second issue, because it says that an action to compel an accounting may be commenced by notice to the personal representative instead of a citation. But, as I said, it became effective on 1/1/2017, which I think means that it does not apply to letters granted before that date.

  If section 3163 does not apply, and you need a citation, then I believe that Pa.O.C. Rule 3.5(a)(1) applies, because you want personal jurisdiction over the personal representative. The cross-reference is to Pa.R.Civ.P. 402 through 404 (et al.), but Rule 402 seems to be the only one relevant to a personal representative located in Pennsylvania. It does not require service by the Sheriff, and I believe that service can be made by any adult, but the Sheriff's office might be the easiest route, because they should know what to do. -DE

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