2021 Bench – Bar Conference

ESTATE LAW UPDATE

William R. Blumer, Esquire
Latisha Bernard Schuenemann, Esquire

I. 2021 CASE UPDATES – *Reprinted with permission by Robert Clofine, Esquire (originally prepared and published for the Elder Law Institute, 2021).*

1. Authority of Agent/Creation of Trust. In Re: Joseph Koepfinger, an individual, No. 123 WDA 2020 (Pa.Super. Non-Precedential Decision 2/4/2021).

The issue in this case was whether an irrevocable trust created on behalf of a principal by an agent under power of attorney was valid.

Joseph was 94 years old and the father of several children. In 2016, he signed a power of attorney (POA) in favor of his daughter, Margaret. Tension developed between Joseph and Margaret when Joseph started a relationship with a lady friend. As a result of the strained relationship with Margaret, in 2017, Joseph revoked her POA and named his son as his agent. Joseph maintains that he orally informed Margaret of the revocation when it was made, but Margaret said she did not know about the revocation until May 2018.

A month before Margaret alleges she was first told that her agency was revoked, she used the 2016 POA to create an irrevocable trust on her father's behalf and transferred the bulk of his assets, including his residence, into the trust. After learning that her POA was revoked, Margaret filed a declaratory judgment action asking the Orphans' Court to declare that she had the authority to create the trust and that the trust was valid. Joseph filed a motion seeking to dismiss the action, claiming that Margaret did not have standing and that the POA was void because it was not properly executed. The Orphans' Court granted Joseph's motion and held that the POA was void *ab initio* because it was not signed in the presence of a notary. Joseph then filed a motion to terminate the trust and the Orphans' Court declared the trust "void and terminated." The court considered 20 Pa.C.S. § 5608 and found *Vine v. Commonwealth of Pennsylvania, State Employees' Retirement Board,* 9 A.3d 1150 (Pa.Super. 2010), instructive. The court cited *Vine* for the proposition that an invalid POA cannot create a valid principal and agent relationship. As such, according to the court, because actions an agent takes pursuant to an invalid POA are a legal nullity, the instant trust is void.

Margaret appealed, arguing that the lower court's reliance on 20 Pa.C.S. § 5608 was misplaced because the Pennsylvania legislature amended Section 5608 with the intention of reversing *Vine* in 2015, which was two years before Margaret created the trust. Surprisingly, the Superior Court agreed with Margaret, finding that the Orphans' Court's reliance on *Vine* to conclude that a trust instrument created by an improperly executed, but otherwise facially proper, POA is void upon creation, was in error. The Superior Court did properly recognize that 20 Pa.C.S. § 5608 was not applicable to the question of whether the trust was valid, and that § 5608 concerns whether third parties have liability for relying upon facially valid POAs. Nonetheless, the Superior Court reversed the lower court as neither the court nor Joseph pointed to anything in the law that would automatically render an irrevocable trust created pursuant to a POA void *ab initio* because the POA is ultimately found to have been improperly executed.

A Petition for Allowance of Appeal to the Pennsylvania Supreme Court has been filed at Docket No. 162 WAL 2021.

Presumably, the POA allowed Margaret to create an irrevocable trust. However, because of conflicting sections of the PEF Code, one should be cautious before having an agent create any trust on behalf of the principal. That is, even if an agent is given the power to create a trust under 20 Pa.C.S. § 5602 or any other trust, the terms of Pennsylvania's Uniform Trust Act, 20 Pa.C.S. § 7701 *et seq*. arguably prevent an agent from creating the trust. Section 7732(a)(1) says that to create a trust, the settlor must have testamentary capacity. Even if that section is interpreted to mean that the agent (rather than principal) must have testamentary capacity, you must comply with the execution requirements for a trust set forth in section 7732(a)(2) and (b.1). Those sections provide that a trust must be signed by the settlor or by mark or by another in the same manner as a power of attorney. Simply put, these very specific execution requirements do not permit execution by an agent. If they do, then an agent should be able to execute a will on the principal's behalf as similar execution requirements apply to wills. See, 20 Pa.C.S. § 2502. It seems that the statute should be amended to clarify the conflict between the sections 5601.4(a)(1) and 7732.

2. Power of Attorney/Agent's Authority to Change Beneficiary. Trembley Agent for Lasser, 10 Fiduc. Rep. 3d 229 (O.C. Div. Chester 2020). The issue in this case was whether a wife as agent under her husband's power of attorney had the authority to change the husband's IRA beneficiary from his children to herself.

Scott Lasser had 3 children to his second wife, and when that marriage ended in 2001 he entered into a property settlement agreement (PSA) in which he agreed to pay for his children's college education. At the time, the children were ages 6, 5 and 2. In 2009, he married his third wife, Jan Trembley. Jan and Scott entered into a prenuptial agreement which recited that Scott had an obligation to pay for his children's college education and because of that prior obligation, he would have limited ability to contribute to household expenses. The agreement went on to say that it was Scott's intention to designate Jan as the beneficiary on his $60,000 employer retirement account, even though the account was Scott's sole asset and would be the only way for him to pay for his children's education. Scott later rolled the funds from the employer plan to an IRA, and by the time of the instant litigation, the IRA value had increased to $210,000.

All of Scott's children attended college and he paid some of their tuition expenses, but all of them had some level of college debt. Scott developed ALS, and he and Jan met with Attorney Hall to prepare wills and powers of attorney. Scott's Will included a provision stating that his children were intentionally omitted from the Will because he had named them as beneficiary on his $210,000 IRA. Scott's power of attorney named Jan as his agent and the power of attorney apparently gave her the authority to change beneficiary designations.

The IRA was held at Vanguard, and when Jan attempted to change the beneficiary, Vanguard would not process her request. Jan then moved the IRA to Schwab and Schwab agreed to process the beneficiary change. When Scott died, Jan claimed the $210,000 IRA, depositing $130,000 in her own account to reimburse herself for the expenses of Scott's care and final illness. The remaining funds were used to pay income taxes, funeral expenses, and attorney fees for handling the estate.

Scott's children then filed an action challenging the validity of the will and power of attorney, as well as Jan's authority as agent to change the beneficiary designation.

With respect to the capacity to execute a power of attorney, the court reiterated the standard it articulated in *DeHaas Est.,* 1 Fiduc. Rep. 3d (O.C. Div. Chester). *DeHaas* says that in order "[t]o show that the individual is incapacitated on the day the power of attorney was signed, an objectant must prove by clear and convincing evidence that the decedent did not have the mental capacity to execute the power of attorney. At a minimum, this means that the individual had to understand the nature of the authority he was giving under a power of attorney to his agent, essentially what assets he owned that would be subject to that power and what the plain meaning of the notice meant." The court found that both the will and power of attorney were valid as there was no credible evidence that Scott had a weakened intellect until after the documents were signed. This is despite the children's contention that Scott was insentient at the time.

With respect to the agent's authority to change the beneficiary designation, the court reviewed the changes to PEF Code Chapter 56 effective for powers of attorney executed after January 1, 2015. Specifically, §5603(q) now says that the power to "engage in retirement plan transactions" does not include the authority to change beneficiaries unless authorized in accordance with §5601.4, which states that an agent can change beneficiaries "only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject."

While the opinion does not specifically say, the power of attorney must have expressly authorized beneficiary designation changes because the court focused on whether the exercise of the authority was "not otherwise prohibited by another agreement or instrument to which the authority or property is subject" as required by §5601.4. The court found that Scott's PSA, which obligated him to pay for his children's college tuition, was such an agreement and it therefore held the IRA beneficiary change to be invalid.

The court's analysis seems questionable as the PSA did not require Scott to name his children as beneficiaries on his IRA. If it did, then the beneficiary change would have clearly been prohibited by another agreement within the meaning of §5601.4.

The case has been appealed to the Superior Court at Docket No. 1690 EDA 2020. The Superior Court in a non-precedential decision affirms the decision even through the PSA did not require Scott to name his children as IRA beneficiaries.

3. Agent under POA/Accounting. ***In Re: Estate of Capobianco, a Power of Attorney,*** No. 3148 EDA 2019 (Pa.Super. Non-Precedential Decision 7/21/2020).

An agent under a power of attorney filed an Account. This case is an appeal from the Adjudication entered by the Philadelphia Orphans' Court, overruling Objections to the Account and ordering the objectant to pay the agent's counsel fees.

On September 5, 2003, Gloria G. Capobianco executed a power of attorney naming her son, Nicholas, as her agent. Nicholas signed the agent's acknowledgment when Gloria signed the POA. Gloria later revoked the POA to Nicholas when she executed a second power of attorney on November 1, 2005 naming her son, Otto, as her agent. Gloria died on June 3, 2016, and on May 16, 2018, her daughter, Geraldine, filed a *pro se* petition to compel an accounting by Nicholas. The court ordered the accounting, and Nicholas complied by filing an Account showing that he had taken no action on his mother's behalf. Geraldine filed objections to the Account maintaining that Nicholas failed to provide bank statements to prove he did not act as agent; and that he failed to account for certain items of personal property including various coins, diamond earrings, a Lionel train set, an engraved gold watch, and a Native American print.

On August 13, 2019, the Orphans' Court held a hearing on the objections. Geraldine represented herself at the hearing. The Orphans' Court overruled the objections, confirmed the Account, and ordered Geraldine to pay Nicholas' counsel fees. Geraldine then appealed, *pro se*, to the Superior Court.

Before the Superior Court, Geraldine claimed the Orphans' Court erred in limiting her cross-examination of Nicholas to actions he took during the accounting term. Geraldine claimed that Nicholas, acting as agent, gifted himself property after the accounting term, and because he was unaware that he was no longer agent after November 1, 2005, she argued that his actions after his POA was revoked were relevant to his service as agent. This claim lacked merit, however, because the Orphans' Court did permit Geraldine to question Nicholas regarding actions taken outside of the accounting term.

Additionally, Geraldine claimed that Nicholas failed to prove that he had not disposed of any property pursuant to his role as agent. According to Geraldine, Nicholas' testimony was insufficient to meet his burden, and she had presented two witnesses who proved that Nicholas had disposed of assets in his role as agent. The Superior Court reviewed Nicholas' testimony on the issues and he flatly claimed that he took no action on his mother's behalf. Since the lower court found Nicholas' testimony to be credible, this claim also lacked merit.

Finally, Geraldine claimed that it was an error to order her to pay Nicholas' counsel fees. Under 42 Pa.C.S.A. § 2503(7), counsel fees can be awarded where a party's conduct in the matter is "dilatory, obdurate or vexatious." The Superior Court affirmed the award of counsel fees, finding that the Orphans' Court did not abuse its discretion.

The Orphans' Court explained that an award of counsel fees was appropriate because Geraldine's overall performance suggested little in the way of preparation, organization, or understanding of either the rules of procedure, evidence, or decorum. Time and again she was cautioned to narrow her focus, ask concise and probing questions, and refrain from outbursts, and she consistently defied these warnings. Both the outbursts themselves and the court stopping the proceeding to address them, turned what should have been a straightforward hearing on two objections into a grueling, drawn-out farce. The court noted that Geraldine's theatrics and hyperbole were no substitute for persuasive evidence and sound reasoning; nevertheless, she regularly launched into lengthy harangues covering several topics, including what is morally right and wrong. Later, having exhausted the English language, she resorted to pantomime as she threw her arms in the air and held them there as a sign of her frustration, lowering them only after a reprimand by the court.

More importantly, she completely abandoned several of her objections during her closing argument. She stated "As for the diamond earrings, even though that was a big, whatever, I really don't think he has them. So I'm just going to let them go. I really don't think he has them." And she admitted she had no proof that Nicholas did any banking activity. The court acknowledged that her subpar performance could be due to her status as a *pro se* litigant, but that alone did not explain her bizarre conduct. The court concluded that "If ever a case warranted sanctions under Section 2503, this is it. Given the totality of the circumstances—her persistent disregard of the court's instructions as well as her obstreperous behavior, scattershot presentation, and final abandonment of her objections—the court finds her conduct to be dilatory, obdurate, and vexatious."

Another case involving this family was the subject of an opinion of the Philadelphia Orphans' Court at 8 Fid. Rep. 3d 201. In that case, the court found that son Otto violated his power of attorney when he created an irrevocable trust for his mother which disinherited some of her children, including Nicholas.

4. Power of Attorney/Breach of Duty. ***In Re: Estate of Eric S. Waite***, No. 157 WDA 2019 (Pa.Super. Non-Precedential Decision 2/24/2020, opinion withdrawn and panel reconsideration granted 5/4/2020).

The decedent, Eric Waite, lived on a farm with his wife, Ladonna. They had one daughter, Whitney, and two sons, Jesse and James. James was married to Lisa. James and Lisa had a history of marital problems, and because of those marital issues, Eric and Ladonna became somewhat estranged from James and Lisa.

After Ladonna died, Eric suffered a few mini-strokes in the summer of 2012, and he moved from the farm to Whitney's house. On July 19, 2012, Eric signed a POA naming Whitney as his agent. He also made a Will leaving $1.00 to Jesse, a $1,000 to James and the residue of the estate to Whitney. Whitney was also named as beneficiary on his bank accounts.

Eric regained his health in 2013, and moved back to his farm and resumed contact with James and Lisa. On January 6, 2014, he signed a new Will leaving Jesse $1.00 and the rest of the estate in three equal shares to James, Lisa and Whitney. A few weeks later, Eric was admitted to the hospital suffering from acute delirium occasioned by severe dehydration, but he had sufficient capacity to sign a new POA granting power to Lisa on February 14, 2014.

At Eric's direction, Lisa next took him to Priority First Federal Credit Union, where he asked the teller to remove Whitney and add Lisa as his agent under POA. He also designated

Lisa as the new beneficiary on his checking and savings accounts. Lisa did not join the discussion until after the account change card was completed. As they were driving home from the credit union, Eric told Lisa that she was his designated beneficiary and would automatically become sole owner of the credit union accounts after he died.

After living with James and Lisa for a few weeks, Eric moved to a personal care home. Once it became clear that he would be unable to return home, he agreed to sell his farm and personal property at auction in October of 2014. The auction proceeds were roughly $165,000. At Eric's direction, Lisa deposited the proceeds into Eric's savings account at the credit union.

While Lisa paid Eric's bills, Eric continued to keep track of his financial affairs directing her to bring his statements to the personal care home so he could review them each month.

In 2016, James and Lisa separated, and they divorced in October of 2016. Lisa did not inform Eric of the divorce. James did not object to Lisa continuing as Eric's POA after the divorce, as he believed she was still doing a good job.

When Eric died, he had $558,000 in his credit union accounts and those funds passed to Lisa as the designated beneficiary. Whitney and James both filed actions requesting that the credit union accounts be turned over to the estate arguing that Lisa engaged in unfair dealing, exerted undue influence over Eric, and violated her duties under the POA.

The trial court found that Lisa did not unduly influence Eric when he signed the POA or designated Lisa as the beneficiary of the credit union accounts. However, the trial court concluded that Lisa abused her power and authority as the decedent's POA, and she was ordered to turn over Eric's checking and savings accounts to estate for distribution.

In support of its decision to have Appellant restore the credit union accounts to the decedent's estate, the trial court noted that Lisa signed the agent's acknowledgment stating that she would "exercise the powers for the benefit of the principal" and "keep the assets of the principal separate from [her] assets." The court said that those statements corresponded with the duties enumerated in 20 Pa.C.S.§ 5601.3(b) which obligate an agent to "act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest" and "to attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is actually in the principal's best interest based on all relevant factors." The trial court concluded that by acquiescing to Eric's decision to name her as his designated beneficiary, Lisa violated each of those duties. Curiously, the court concluded that although she was not depositing her own funds into Eric's accounts or transferring any of his money into her account, her status as his designated beneficiary meant, in effect, that his money was her money. The trial court thus considered this to be an impermissible comingling of their assets. In the trial court's view, since Lisa knew that her status as beneficiary conflicted with the Will that left the estate in three equal shares, it was improper for her to remain silent, and not caution Eric about how it would affect his estate plan.

On appeal, the Superior Court affirmed. The Superior Court concluded that the record supported the trial court's finding that Lisa acted in a manner as to create a conflict of interest within the meaning of 20 Pa.C.S. § 5601.3(b)(2), and they found no abuse of discretion or error in the trial court's determination that Lisa ultimately placed her own self-interests ahead of those of the decedent. Thus, they found no basis to disturb the trial court's decision to direct Lisa to restore the credit union accounts to the decedent's estate for distribution as a surcharge for the conflict of interest.

While the agent under a POA does have a default duty to preserve the principal's estate plan, this case highlights the difficulty facing an agent where the principal has named beneficiaries on certain assets that are different than the beneficiaries named in the principal's will.

On May 4, 2020, the opinion was withdrawn and panel reconsideration was granted. On July 13, 2021, the Superior Court entered a non-precedential decision affirming the lower court even though it was dad who created the ITF accounts and requested that the funds from the sale of the farm be deposited to those accounts.

5. Nursing Home Medicaid/Level of Care Requirement. ***Paul v. Department of Human Services***, No. 303 C.D. 2020 (Opinion Not Reported Pa. Cmwlth. 1/11/2021, Reargument Denied 2/23/2021 at 247 A.3d 1185 (2021). This case deals with whether or not a nursing home resident was nursing facility clinically eligible (NFCE).

Paul, age 78, was admitted to a nursing home in 2018. At the time, he suffered from chronic obstructive pulmonary disease (COPD), hypertension, and mild to moderate dementia. He was ambulatory with use of a wheelchair. A Medicaid application was filed on February 21, 2018. The Wayne County Assistance Office found Paul financially eligible; however, the initial level of care assessment by the Area Agency on Aging (AAA) on April 18, 2018 concluded that he was "nursing facility ineligible" (NFI). Another assessment done by the same assessor on July 2, 2018 came to the same conclusion. A third assessment was performed on November 6, 2018 which determined Paul to be "nursing facility clinically eligible" (NFCE) and Medicaid benefits were then approved. The nursing home, however, appealed the first level of care assessment arguing that Paul was NFCE throughout his entire stay and Medicaid benefits should have therefore been approved with an earlier eligibility date.

Before the ALJ, the nursing home presented the testimony of its medical director. The medical director was board certified in geriatrics and had performed thousands of care assessments over his 30-year career. He had monthly appointments with Paul and saw him almost daily, so he was familiar with Paul's condition, particularly his cognitive deficits and impaired judgment. He confirmed that Paul had mild to moderate dementia, but that he was able to disguise his impairment so that during brief interactions he appears to be high-functioning. However, the medical director admitted on cross-examination that Paul could be cared for in a personal care home, with 24-hour supervision.

The AAA assessor also testified. Her assessment showed that Paul independently completed certain daily living skills, including bathing, toileting, dressing, telephone usage, transportation, and shopping. She also confirmed that Paul was capable of meal preparation, housework, and laundry had he not been residing in a nursing facility. Based on the testimony of the AAA assessor, the ALJ found Paul NFI, and this was affirmed by the Bureau of Hearings and Appeals. On appeal, the Commonwealth Court affirmed.

Paul argued that the ALJ erred in not crediting the medical director's testimony more than the AAA assessor's testimony. He also argued that the ALJ did not make specific credibility determinations or adequately explain her evaluation of the medical director's testimony, and therefore did not fully perform her fact-finding function. Paul's arguments failed because the ALJ's decision contained 24 findings of fact and summarized the witnesses' testimony she relied upon. In addition, the Commonwealth Court has previously declined to adopt the so-called "treating physician rule" employed in social security disability cases that gives greater weight to a treating physician (like the medical director) than to another medical expert based on the doctor-patient relationship. Thus, pursuant to case law, the medical director's testimony was not entitled to greater weight based on his status as Paul's treating physician. Accordingly, the court found that the ALJ did not err.

6. Medicaid/Imposition of Penalty Period. ***Brenckman v. Department of Human Services*****,** 219 A.3d 715 (Pa. Cmwlth. 2019). This case involves an appeal of a denial of an undue hardship waiver for a transfer penalty.

Mary Lou Brenckman suffered a fall in May of 2014, and shortly thereafter was transferred to hospice care at a local CCRC. In July 2015, she was removed from hospice and went to the CCRC's nursing facility. She paid for her care privately from July 2014 until November 2016, when her funds were exhausted. Her son, Allan, then applied for Medicaid benefits. Unfortunately, between April 2012 and August 2016, Allan had used $159,394.02 of his mother's savings to pay his own living expenses. It was then that Allan realized "the huge error he committed in 'borrowing' his mother's funds." Unsurprisingly, the Lancaster County Assistance Office denied the application and imposed a penalty for the transfers for less than fair consideration.

Allan appealed the denial and also requested an undue hardship waiver. Consistent with federal law, DHS regulations state that despite the transfer penalty one can be eligible for MA if the denial of eligibility would work an undue hardship. Specifically, Pennsylvania regulations state that undue hardship exists only when the application of the transfer of assets penalty provision would deprive the individual of one of the following: 1) Medical care so that the individual's health or life would be endangered, or 2) Food, clothing, shelter or other necessities of life" 55 Pa. Code § 178.2 and 55 Pa. Code § 178.104(a). Against this standard, the request for an undue hardship was denied and affirmed by the Commonwealth Court.

The Commonwealth Court noted that in *Colonial Park Care Ctr., LLC v. Dep't of Pub. Welfare,* 123 A.3d 1094, 1097 (Pa. Cmwlth. 2015) it previously ruled that "the applicant in the undue hardship waiver appeal must offer evidence pertinent to the circumstances surrounding the transfer of assets during the look-back." Apparently, the court was referring to the statement in *Colonial Park* that in order to establish an undue hardship, you needed evidence of a "serious events of a sudden and/or unexpected nature." However, in the instant case, many of the transfers occurred well after Mary Lou health declined.

The evidence showed that Allan either as agent under his mother's POA or as joint owner of her bank accounts was the one who made the impermissible transfers. Even though it was not Mary Lou who made the transfers, her innocent behavior was not sufficient to show an undue hardship as the nursing home was continuing to provide her necessary care. As such, she was not at risk of being deprived of necessary medical care, food, clothing or shelter, and therefore did not suffer an undue hardship.

The court recognized that the nursing home has a dilemma in such cases. That is, even though they are permitted to discharge a resident for nonpayment after making a reasonable effort to collect the debt, they can only discharge if "appropriate arrangements are made for a safe and orderly transfer and that the resident is transferred to an appropriate place that is capable of meeting the resident's needs." 28 Pa. Code § 201.29(g). This means that they would need to find another nursing home that would be willing to accept the resident even though there is no source of payment. The court noted that the nursing home's apparent answer to this dilemma was to file a filial support action against Allan.

Because those already in a nursing home are receiving necessary medical care, food, clothing and shelter, the court's standard makes it essentially impossible to establish an undue hardship once one is admitted to a nursing home. Because of this, Allan argued that the undue hardship should be evaluated as of the date one enters a facility. That is, if the nursing home knew that a transfer penalty would be assessed, would they admit the person and provide services. The court rejected that argument, but noted that in the case at bar, even if they assessed Mary Lou's qualification for the undue hardship waiver as of the date she entered the facility, she would not meet the waiver requirements at that time as she still had sufficient funds remaining to pay for the for the first 2½ years of her nursing home stay.

7. Attorney Negligence/Failure to Warn About Tax Consequences. *Klein v. Silverman*, No. 330 EDA 2019 (Pa.Super. Non-Precedential Decision 2/10/2020).

The executors of the estate of Edgar Waite appealed from the trial court's grant of summary judgment in favor of Alan D. Silverman and his law firm in this legal malpractice case. After review, the Superior Court reversed the order granting summary judgment.

For over 40 years, Attorney Silverman provided advice to Waite in his business matters and estate planning, although his last in-person contact with Waite was in the late 1990's. Waite first wife died and on his remarriage, he executed a Will leaving his estate in a discretionary trust for the benefit of his second wife, with remainder to his children from his first marriage.

In 2006, Waite was diagnosed with Alzheimer's disease. Attorney Silverman drafted a durable power of attorney (POA) where Waite appointed his wife as his agent and his daughter as the alternative agent. The POA did not comply with statutory requirements as it lacked the required notice. As the Alzheimer's progressed, Mrs. Waite needed assistance caring for her husband and eventually 24-hour care was necessary. In early 2012, Mrs. Waite contacted Silverman to see if she could sell two income-producing commercial properties owned by her husband. One of the properties was leased to a Midas Muffler and the other to a 7-Eleven Store.

Attorney Silverman advised her that it was possible to sell the properties and Mrs. Waite decided to sell them. The trial court said that she did not seek financial or tax advice from Attorney Silverman, and there was no evidence that Silverman provided any such financial advice. Because the POA that Silverman prepared did not have the required notice, the title company requested a new POA. Attorney Silverman did not inquire as to Edgar's mental capacity, but simply emailed Mrs. Waite a new POA for her husband to sign. The new POA was signed and settlement was completed with the properties bringing a net sales price of $1.6 million. The sale generated a significant taxable gain, and as a result, the Waites paid capital gains taxes of $414,791. Two months after the sale, Mr. Waite died, and his wife died eight months thereafter.

Upon Waite's death, his daughters as Executors of his estate filed a complaint against Silverman alleging that they suffered damages in the amount of $939,932.24, the difference between the net proceeds of sale and the funds that were deposited into the trust for Mrs. Waite following Waite's death. Alternatively, they alleged they were entitled to the present value of $130,491 annual loss of net income suffered by the sale of properties calculated for a number of years determined by the trier of fact, plus punitive damages.

While the trial court determined that Attorney Silverman owed a duty to Waite and his estate, and that he failed to exercise ordinary skill, knowledge and diligence possessed by attorneys, Silverman was nonetheless entitled to summary judgment because his actions were not the proximate cause of any damage. The trial court reasoned that since Waite's estate was to pass into a discretionary trust for the benefit of his wife, he only wanted his daughters to receive what was left upon the death of his wife, and that is exactly what they received.

On appeal, Waite's daughter argued that Silverman advised Mrs. Waite to sell the two properties; but he made no inquiry into the facts of Waite's finances. He did not know what income the commercial properties produced; he did not know the extent of the household expenses; and he did not review the Waites' tax returns. He did not review medical costs associated with Waite's care; and he did not ascertain Waite's condition, and he did not consider the tax consequences of a lifetime sale of real estate. He was unaware that Waite had $188,000 cash sitting in a brokerage account earning pennies of interest that could have easily met the Waites' 2012 financial needs. He did not know that Waite also owned three unused cars worth a combined $46,500. In sum, she argued that it was a financial catastrophe to sell the properties worth $1.8 million dollars, incur a $414,701 tax, and give up $130,000+ in annual income, to pay bills totaling less than $200,000.

The Superior Court agreed with the daughters and reversed the grant of summary judgment. Viewing the evidence in the light most favorable to Waite's estate, the Superior Court found that there were genuine issues of material fact as to what Attorney Silverman was obligated to do, and what he did do: (1) to review his client's finances; and (2) to inform his client about the tax implications before advising the client whether it would be prudent to sell the properties.

8. Medicaid/Attorney Fees/Filial Support. ***Coates v. Salmon***, No. 2-18-16878, Montgomery County Court of Common Pleas, on appeal to the Superior Court at 365 EDA 2021.

Attorney William Salmon, Jr. filed a Medicaid application seeking benefits for his father's nursing home expenses. In reviewing the application, the Bucks County Assistance Office determined that there had been $86,786 in gifts made during the 60-month lookback. Salmon responded that the transfers represented loan repayments and payments for legal services that Salmon had provided to his father. The CAO did not accept that explanation and imposed a 296-day penalty.

After the penalty was assessed, the nursing home encouraged Salmon to seek counsel from an experienced Medicaid attorney, and they suggested Attorney Andrew A. Coates. Salmon met with Coates on October 16, 2015 and engaged him to pursue an appeal from the penalty. During the meeting, Coates explained that if the penalty was upheld, Salmon could be held personally liable to the nursing home for the shortfall pursuant to Pennsylvania's filial support law, 23 Pa. C.S. § 4603. Coates also advised Salmon to obtain a letter from his father's physician stating that at the time of the transfers his father was in reasonably good health, and it was not foreseeable that he would require nursing home care. Coates had Salmon signed a Limited Power of Attorney and Authorization, which Salmon executed as agent under power of attorney for his father. Salmon wrote a check from his personal account to pay Coates his $500 consultation fee.

Coates did not, either at the initial meeting or thereafter, provide Salmon with a written fee agreement or otherwise state the basis or rate of fees he would charge. Coates acknowledged that he was required to provide such a statement, but testified that he neglected to do so, in view of Salmon's status as a lawyer and the imminence of the deadline for filing the appeal.

On the same day as their initial meeting, Coates completed and filed the required appeal with the CAO listing Salmon as the appealing party. After receiving the requested physician letter, Coates entered into extensive negotiations with the CAO. Coates and Salmon remained in touch, to provide Coates with additional information and to discuss a potential settlement. There was no direct contact between Coates and Salmon's father. With Salmon's approval, a settlement was reached with the CAO to reduce the penalty from $86,786 to $18,380, thus achieving a savings of $68,406. Coates drafted the necessary stipulations to confirm the settlement and submitted them to the ALJ to close the appeal.

All parties were satisfied with this settlement, including the nursing home. If the appeal had been unsuccessful, counsel for the nursing home testified that it would have been her usual practice to consult with her client about pursuing a payment from Salmon under the filial support statute. However, in view of the 79% reduction in the penalty achieved by Coates and the small amount of penalty remaining, the nursing home elected to not pursue the matter further.

On May 4, 2016, Coates sent Salmon a bill for fees in the amount of $7,605.00, reflecting an hourly rate of $325, together with costs in the amount of $1.64, for a total of $7,606.64. This amount, together with the $500 consulting fee, was less than 12% of the $68,406 in savings obtained by Coates. The bill then applied a 15% discount on the fees as a "Professional Courtesy," leaving a balance due of $6,465.89. Salmon responded by letter dated May 6, 2016, refusing to pay the amount billed and asserting that Coates had never advised him of his hourly rate, that the rate of $325 was excessive, and that Coates's services had been defective in certain respects. The letter concluded: "I must request that you reconsider your request and modify it to something much more reasonable."

When Salmon refused to pay, Coates filed an action before the Magisterial District Judge. From an adverse judgment there, Salmon appealed to the Montgomery County Court of Common Pleas, and the court entered a decision in favor of Coates in the amount of $7,606.64 based on quantum meruit. Salmon appealed to Superior Court, prompting the Court of Common Pleas to issue an opinion to support its decision.

Salmon made a number of arguments in an attempt to wiggle out of paying Coates' fee, but it is clear that the court found Salmon's approach unreasonable. His first argument was that the failure to provide a written fee agreement barred Coates from collecting any fee. In support, he argued that the failure to provide a fee agreement is a violation of Rule 1.5(b) of the Pennsylvania Rules of Professional Conduct, which provides: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." The court said that the ethical violation does not preclude the recovery of reasonable fees otherwise due for legal services provided.

The court did not recognize that Coates' claim for breach of contract failed since there was no written contract. However, the court referenced Pennsylvania Supreme Court opinions that recognize an action based on quantum meruit where one contracts for the services of another and receives and accepts those services, but without a contract specifying what the compensation shall be. Salmon argued that if Coates had a claim based on quantum meruit, it was against his father, not him. Salmon reasoned that his father was the one liable to the nursing home for any services not reimbursed by Medicaid, and therefore his father was the sole beneficiary of the substantial reduction in the penalty. The court said it is true that to establish a claim in quantum meruit against Salmon, Coates had to show that Salmon, and not his father, benefited from Coates's services. The court concluded that Salmon did benefit from Coates' services as he would have been potentially liable to the nursing home based on filial responsibility if the penalty had not been significantly reduced.

The court also mentioned that the imposition of liability on Salmon was consistent with the principles of equity, and that the evidence showed that Salmon clearly understood his obligation to pay for those services. The court saw his arguments as just *post hoc* excuses for his unwillingness to pay, and for that reason, the court entered judgment for Coates' entire fee without giving Salmon the benefit of the 15% professional courtesy discount initially offered by Coates.

II. SECURE ACT

The enactment of the Setting Every Community Up for Retirement Security Act, more commonly known as the SECURE Act, on January 1, 2020 represented a significant change in tax treatment of IRAs and other qualified retirement plans. Effectively, the SECURE Act produced a tax increase, but not by changing the tax rates under which retirement assets are taxed, but rather by accelerating the timing for the recognition of income from qualified retirement savings by beneficiaries inheriting such assets.

By this time most attorneys are familiar with the Act's most notable provisions. The provisions that attracted the most attention are listed here:

1. The mandatory age for required minimum distributions increased from 70 ½ to 72.

2. The prohibition on making IRA contributions after 70 ½ was repealed such that taxpayers of any age can contribute to their IRA if they have earned income in the year of contribution.

3. The rule allowing taxpayers age 70 ½ or older to make up to $100,000 direct charitable contributions from their IRAs to charitable organizations was made permanent, provided that contribution is reduced dollar for dollar for any contributions made to the IRA after age 70 ½.

4. The stretch IRA distribution rules were largely repealed and replaced with a rule that requires beneficiaries of inherited IRAs to complete the withdrawal of the IRA proceeds within ten (10) years of the original account owner's death. This new 10 year rule applies to both traditional and Roth inherited IRAs.

For estate planners, however, it is the demise of the stretch IRA that has garnered the most discussion and created the most anxiety, especially when trusts are named as IRA beneficiaries. The intersection of fiduciary income tax rules and IRA distribution rules has always been fraught with peril. After all, the IRA distribution rules hinge on the concept of life expectancy, and trusts and estates do not have life expectancies. Thus, allowing for IRA distributions to estates and trusts in something other than a lump sum distribution after the account owner's death has always been complex.

The basic concept that developed under the tax law was something called the "designated beneficiary." A singularly unhelpful phrase, one might reasonably conclude that any beneficiary intentionally selected by an account owner is a designated beneficiary. It is not. Rather, a designated beneficiary is really a beneficiary with an ascertainable life expectancy. In the context of trusts (which can't have a life expectancy), two exceptions were created to permit certain trusts to be considered designated beneficiaries. The regulations to the Internal Revenue Code call these two trust exceptions conduit trusts and accumulation trusts.

Importantly, the SECURE Act did not eliminate or alter the concept of a conduit trust or an accumulation trust. Rather, the SECURE Act created a new phrase – "eligible designated beneficiary." It went on the say that only five people or trusts meet the definition of an eligible designated beneficiary:

1. The account owner's surviving spouse;

2. A child of the account owner who has not attained the age of majority under applicable state law (for most people this means age 18);

3. A disabled individual;

4. A chronically ill individual; and

5. A beneficiary who is not more than ten (10) years younger than the deceased account owner.

It is significant to be an eligible designated beneficiary because only these individuals (with one notable exception) can still receive annual required minimum distributions from an inherited IRA based on their life expectancy. The child of a deceased account owner is the notable exception. If an IRA beneficiary is a child under 18 when the account owner dies, that child's annual required minimum distributions are based on the child's life expectancy determined as of the year the account owner died. However, when the child turns 18, annual RMDs are no longer calculated using the life expectancy method. Instead, the ten (10) year rule created by the SECURE Act applies. In all other situations involving an eligible designated beneficiary, the life expectancy method applies.

In the immediate aftermath of the SECURE Act's enactment, the impact of the eligible designated beneficiary rules on estate planning with trusts was unclear to say the least. However, during the ensuing 18 months a few basic rules have emerged that estate planners should understand.

First, if you plan to designate a trust benefitting a surviving spouse as an IRA beneficiary, the trust must meet the definition of a "conduit trust" in order to be considered an eligible designated beneficiary. In other words, the trust must expressly require the trustee to (1) receive annual RMDs calculated with reference to the surviving spouse's life expectancy and (2) distribute those RMD payments in the same tax year they are received directly to the surviving spouse free from further trust or other restriction. Although an accumulation trust still exists as a concept under the SECURE Act, and remains a "designated beneficiary" under the tax law, an accumulation trust for a surviving spouse will not be considered an eligible designated beneficiary for whom RMDs can be computed using the surviving spouse's life expectancy.

Second, if you plan to create a trust for a disabled or chronically ill beneficiary (both those terms are defined in the SECURE Act), you must create an accumulation trust for the beneficiary. In that instance RMDs will come from the IRA to the trustee annually and can be retained by the trustee or applied for the beneficiary's benefit as the trustee decides and the terms of the trust permit. Thus, special needs trusts and supplemental needs trusts funded in whole or in part with IRA assets remain useful planning tools for the disabled and chronically ill. However, RMDs that are not actually distributed during the year they are received by the trustee will be subject to fiduciary income tax using the highly compressed income tax rates that have always applied to trusts and estates. Consequently, clients and their advisors need to weigh the benefit of directing IRA assets to a trust against the potentially much higher income tax rates that will be imposed on those RMDs as they are paid out.

Third, if you set up a trust for the account owner's minor child, you must set up the trust as a conduit trust if the trust is to qualify as an eligible designated beneficiary. And lest you decide to get clever and draft your trust to operate as a conduit trust while the child is under age 18 and then convert to an accumulation trust after age 18, you should know that this strategy will not be successful. The child's trust must remain a conduit trust throughout its existence. Moreover, when the child turns 18, RMD distributions computed based on the child's life expectancy will end and the trustee will be required to withdraw the remaining IRA assets in accordance with the 10 year rule.

Our understanding of the 10 year rule continues to evolve. For example, earlier this year the IRS issued a publication that suggested that beneficiaries of inherited IRAs required to follow the 10 year rule also needed to take annual required minimum distributions (RMDs) during each of those 10 years. This contradicted how the IRS handles other similar situations, including its 5 year rule (which applies when an IRA owner dies before reaching his or her required beginning date).

Most recently, however, the IRS walked back this pronouncement and issued a new one. In its latest version of the publication discussing distributions from IRAs (IRS Publication 590-B), it clearly states that beneficiaries inheriting IRAs who do not fit one of the definitions of eligible designated beneficiaries are not required to take annual RMDs during the 10 year payout period (See page 11 of Publication 590-B). They may do so, but they are not required to do so.

Similarly, the latest edition of Publication 590-B also makes clear that eligible designated beneficiaries able to calculate annual RMDs using their life expectancies may instead opt to use the 10 year rule if the account owner's death occurs before the account owner's required beginning date. Again, they may do this, but they are not required to do so. Those who do would likely conclude that the 10 year rule's flexibility of taking distributions in any amounts or skipping them in some years is more beneficial to them than locking into a life expectancy payment scheme under the stretch IRA strategy.

However, some uncertainty with these rules still remains. That uncertainty focuses on two groups of people: (1) minor children who inherit IRAs and (2) people who inherit an IRA from an eligible designated beneficiary. The question for these two groups of people is when does the 10 year payout period end? Normally the 10 year rule says the 10 year payout ends on December 31st of the year when the original IRA owner dies. So if you die in 2021 and leave your IRA to your adult child, that child must complete the withdrawal of all IRA assets by December 31, 2031.

Apparently, the IRS does not believe that that same rule applies to the two groups mentioned above. For a minor child who inherits an IRA, she starts out as an eligible designated beneficiary. Her annual RMDs are calculated based on her life expectancy. However, when she turns 18, her eligible designated beneficiary status ends and she becomes subject to 10 year rule.

According to the IRS, this beneficiary must complete her IRA withdrawal by the 10th anniversary of her 18th birthday, not December 31st of the year in which she turns 28.

Similarly, if an IRA owner dies and passes her IRA to an eligible designated beneficiary, e.g. her spouse, and that eligible designated beneficiary ("Beneficiary #1) dies before completing the withdrawal of the original owner's IRA assets, a variation of the 10 year rule applies for the person designated to receive the remaining IRA assets, i.e. Beneficiary #2. Again, the IRS publication indicates that Beneficiary #2 must complete the withdrawal of IRA assets by the 10th anniversary of Beneficiary #1's death, not December 31st of the year that is 10 years after Beneficiary #1 dies.

III. THE UNKNOWN – CHANGES TO THE FEDERAL ESTATE TAX EXEMPTION

For estate planners, the remainder of 2021 promises to be more volatile than normal. There are several proposals to change the tax laws involving both the federal estate, gift and generation skipping transfer taxes and the capital gains tax rules for assets passing by gift and inheritance. The following summary is intended to help attorneys advise clients about potential changes in the law that may arise by year end and offer some suggestions about how to advise high net worth clients likely to be impacted by these changes.

There are three significant sets of proposals to monitor. The first proposal comes from the Biden administration. It recommends that transfers of appreciated assets at death or by gift trigger a capital gains tax. In essence, the proposal eliminates both the longstanding rule that lifetime gifts carry over the donor's tax basis to the done and the rule that assets passing at death receive a basis equal to their fair market value as of the date of death (commonly called the "stepped up basis rule"). The proposal contains a $1 Million exclusion per person, as well as exceptions for some family-owned and operated businesses. Exactly how these exclusions and exceptions will work, however, remains unclear.

The Biden proposal also seeks to limit the efficacy of trusts, partnerships and non-corporate entities as asset transfer tools by requiring them to pay tax on the unrealized appreciation in their assets at the end of a 90 year period if the assets have not already been the subject of a tax recognition event during that 90 year period. The 90 year period would begin on January 1, 1940 and run through December 31, 2030. Thus, this proposal will not trigger any immediate tax recognition, but it will create a potential tax that clients will need to plan for.

Unlike traditional capital gains tax, the Biden proposal would permit the payment of capital gains tax on transfers at death to be paid over 15 years unless the assets involved are publicly traded securities. Additionally, no tax would arise on transfers to spouses or charities.

Interestingly, the Biden administration is not proposing changes to federal estate, gift and generation skipping taxes as this time. However, several other legislative proposals do seek to change these taxes significantly. The two leading proposals are from Senator Elizabeth Warren (the "Ultra-Millionaire Tax Act") and Senator Bernie Sanders (the "For the 99.5% Act"). Senator Warren's proposal creates an annual 2% surtax on households and trusts valued at over

$50 Million. An additional 1% surtax would be imposed on households and trusts valued at over $1 Billion.

The act introduced by Senator Sanders seeks to make several significant changes to the current estate, gift and GST tax system. These include:

1. Reduce the estate tax exemption from its current level of $11.7 Million to $3.5 Million and reduce the gift tax lifetime exclusion down to $1 Million.

2. Raise estate and gift tax rates to a graduated scale ranging from 45% to 65%.

3. Eliminate valuation discounts for family owned entities.

4. Require GRATs to have a minimum 10 year term and a minimum remainder interest equal to the greater of $500,000 or 25% of the amount contributed.

5. Require GST exempt trusts to terminate after 50 years.

6. Changing the annual gift tax exclusion from $15,000 per person, per year to a cumulative per year limit of $30,000 per year.

The For the 99.5% Act also targets grantor trusts by requiring that all grantor trust assets be included in the grantor's taxable estate, treating distributions from grantor trusts as gifts from the grantor, and treating the entire trust as a gift from the grantor if the trust's grantor trust status stops (permanently or temporarily) during the grantor's lifetime.

Finally, there is also an act called the STEP Act, introduced by Senator Chris Van Hollen, that targets the stepped up basis rules in a way similar to the Biden proposal. It treats any transfer by gift, to trust or upon death as a capital gains tax event. It contains a $1 Million exemption, but it is unclear exactly how this exemption would be applied, i.e. as a lifetime exemption or as a per transaction exemption. The STEP Act would also require non-grantor trusts to pay tax on otherwise unrealized capital gains every 21 years.

Thus, we can see from these proposals that strategies like intentionally defective grantor trusts, dynasty trusts, zeroed out GRATs and valuation discounts for closely held business interests are viewed as abusive. They may have limited utility for our clients going forward.

In response to these proposals many high net worth clients may benefit from popular planning strategies that could be eliminated or curtailed if the proposals discussed above pass. These strategies include spousal limited access trusts (SLATs) designed to use a taxpayer's unified credit of up to $11.7 Million by funding a lifetime trust benefitting a spouse. The basic idea of the SLAT is to use up the taxpayer's unified credit before Congress lowers the exemption to $3.5 Million. Assets in the SLAT benefit the donor's spouse and can benefit the donor's children too. At the donor's death the SLAT's assets are not part of his or her taxable estate. Similarly, when the surviving spouse dies, the SLAT's assets also escape estate tax in his or her estate too.

While interest rates remain low, some taxpayers also may want to consider setting up a grantor retained annuity trust (GRAT). In a GRAT the donor transfers assets to the trust and retains the right to receive an annuity payment from the trust for a fixed period of time. When the annuity period ends, the GRAT passes its assets to the donor's children or other beneficiaries. Gift tax is assessed when the GRAT is funded, but the retained annuity interest is designed to reduce the taxable value of the gift, thereby reducing or even eliminating the need to pay gift tax. Often the basic goal of the GRAT is to transfer future asset appreciation to family members with little or no gift tax cost. If trust assets grow at a rate greater than the interest rate assumptions used to calculate the annuity payment to the donor, the difference between the assumed interest rate and the actual rate of asset appreciation escapes estate and gift tax.

Some practitioners are also recommending the use of intentionally defective grantor trusts on the belief that future tax law changes will not apply to grantor trusts already created and funded. That assumption seems reasonable, but it is not guaranteed. Care should be taken when devising a plan that could be subject to tax under a different taxing scheme in the future. Clients should also be warned that the proposed tax changes could be made retroactively effective to the beginning of 2021. Although that seems less likely, it does have some historic precedent.