PHILADELPHIA ESTATE PLANNING COUNCIL

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President's Message

Huldah A. Robertson, CFP®, AEP®

Welcome back everyone.

As we begin the year, we are filled with momentum to build on our successes and deliver more value to each and everyone within our esteemed council. We know the two greatest reasons people participate in the Philadelphia Estate Planning Council are - education and networking...so we have rewarding news!!!

We are honored to share with you that we have been recognized as a **"5 Star" council by National Association of Estate Planners & Councils, (NAEPC)**. This distinct award recognizes estate planning councils that have demonstrated a high level of achievement in areas critical to a successful membership experience. The estate planning councils being recognized as 5 Star Councils provide a high level of member service and are contributing to the success of not only their members, but to the estate planning community as a whole.

This is a great way to kick off an eventful year of **building and branding** within our esteemed community.

We are the largest council in the country with over **700 members strong**.

Over 120 of us volunteer on committees.

Almost 60 of our firms have partnered with us to sponsor events and benefits.

We hear you say loud and clear, no matter where you are in your career, no matter what discipline, the value you achieve is exponentially higher with active participation…so that will be our focus.

Our goal is to deliver robust value…so we are digging deeper and broader to encourage participation in:

- Events
- Committees
- Sponsorships/partnerships
- Social media

We have a strong calendar of esteemed speakers this year, with our fall luncheon series beginning in September with **Roy P. Kozupsky and Susan Hartley Moss** presenting "An Opportunity: Understanding the Emergence of a Legal Industry"; in October **M. Read Moore** presents "A New World Order for Estate Planners (or Why Is It So Difficult to Open a Bank Account)?; and in November **Mickey R. Davis** presents "Creative Ways to Obtain a Basis". We also have a number of networking, brown bag, community, holiday, and recreational events planned to explore everyone's interests.

Our committees offer an engaging environment to both provide impact to the council and enhance relationships with fellow council members. I strongly encourage each of you to participate in one of our committees.

Partnering with PEPC through any number of sponsorships delivers valuable branding opportunities for members and firms, especially with expanded

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Reflections On The DOL's New Fiduciary Regulation

Victor S. Levy and James O'Connor

"Power to the people, Power to the people, Power to the people, Power to the people, Right on."

– John Lennon

When the US Department of Labor (DOL) issued its final rule expanding the "investment advice fiduciary" definition under the Employee Retirement Income Security Act of 1974, I couldn't help but think of John Lennon's 1971, foot stomping tour de force, Power to the People. It was the second verse that was running through my mind - "You got a million people working for nothing, You better give 'em what they really own… Power to the People."

I thought to myself, the people have won. There was now a rule which modified the complex of prohibited

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COMING EVENTS

LUNCHEON PROGRAMS

The Union League
140 South Broad Street
Philadelphia, PA 19102
www.unionleague.org

11:45 – 12:00 p.m. Registration
12:00 – 12:30 p.m. Luncheon
12:30 – 1:45 p.m. Program

Dates:
Tuesday, September 13, 2016
Tuesday, October 18, 2016
Tuesday, November 15, 2016
Tuesday, January 17, 2017
Tuesday, February 21, 2017
Tuesday, March 21, 2017

WELCOME BACK PARTY

Networking Cocktail Reception
Thursday, September 22, 2016
5:30 – 7:30 p.m.
Top of the Tower
1717 Arch Street, 51st Floor
Philadelphia, PA 19103

HOLIDAY CELEBRATION

Thursday, December 8, 2016
5:30 – 7:30 p.m.
Union Trust
717 Chestnut Street
Philadelphia, PA 19106

Please register at www.philaepc.org.

President's Message continued

opportunities to tailor benefits. We welcome your interest to partner and will work with you to achieve your sponsorship goals.

And finally, our new website is just the beginning of how we will provide better resources for all of us for both education and networking. Stay tuned for interesting ways to recognize milestones within the council, which encourages valuable interaction within our community.

Building and branding…a year full of tremendous opportunity. I thank each and every one of you for your active participation this year and challenge you to participate broadly and deeply.

Sincerely,

Huldah A. Robertson, CFP®, AEP®

Sign Up for a PEPC Committee

The Philadelphia Estate Planning Council offers many opportunities for member involvement. One of the most rewarding ways to get involved is through our many committees.

The committees encompass all activities of the council including planning our social events, publishing our highly informative newsletter, enhancing our website and developing our education programs.

All members are encouraged to actively participate on a committee. Committee participation provides the opportunity to expand your professional relationships and increase your leadership skills.

To sign up, please contact the PEPC Office at staff@philaepc.org.

Fiduciary continued

transaction exemptions for investment activities which will help our nation's workers. There will be an expansion of circumstances in which broker dealers, investment advisors, insurance agents, plan consultants, and other intermediaries are treated as fiduciaries to ERISA plans (like 401(k)s and 403(b)s) and Individual Retirement Accounts, and these professionals will be precluded from receiving compensation that varies with the investment choices made or from recommending proprietary investment products absent an exemption.

So, the "people" have won, right?

Having worked in the retirement planning space for almost three decades, and having stood in front of countless future retirees in 401(k) enrollment and education meetings, I was really happy that there was a higher duty being placed upon all advisors who work in this space. The professional women and men who provide advice to help guide the population of working people in accumulating resources for a future retirement have an important responsibility. The spirit of the rule recognizes that when implementing advice in this space, workers require protection from advisors that could be exposed to conflicts of interest, i.e., making plan recommendations which serve the advisor's best interest over that of the plan participant. This conflict can come unexpectedly in the very solutions to retirement being offered, embedded deeply within the complex fee structures of the retirement plans to which workers contribute on a regular basis.

When the new rule was first proposed in 2010 by Barney Frank, D-Mass, it followed the greatest investment crisis of modern times, the "Great Recession" of 2007 to 2009. It was the longest recession since World War II and was notably severe in several respects – unemployment rose from 5% to 10% and real gross domestic product (GDP) fell 4.3 percent from its peak in 2007 to 2009, the largest decline in the post-war era.[1] The financial effects were extraordinary as home prices fell approximately 30% on average from their mid-2006 peak while the S&P 500 index fell 57% from its October 2007 peak to its trough in March, 2009.[2] Retirement assets invested in bonds and stocks, along with almost all investment values, were hit hard with the Federal Reserve noting that the net worth of US Households and non-profit organizations fell from a peak of approximately $69 trillion in 2007 to a trough of $55 trillion in 2009.[3]

Congress heard from its constituents that something had to be done to protect innocent victims in the financial crisis, namely the workers. The 2010 proposal was intent upon focusing on the role that advisors play in helping workers invest and plan for retirement along with potential conflicts of interest that can arise in the rendering of professional advice. But in September 2011, the financial services industry was so critical that the DOL withdrew its conflict of interest rule. Thomas Perez was sworn in as Secretary of Labor in July 2013, and he soon became the face of the new proposal. In April 2015, the DOL proposed another rule, this time requiring fiduciary advice for all retirement accounts, followed by a comment period from August to September of 2015. Finally, the DOL sent the proposed rule off to the Office of Management and Budget, leading up to the finalization of the rule and its release in April of this year. The first implementation of the rule will take place on April 10, 2017.

All financial advisors (according to a new Department of Labor definition, regardless of official title) working with

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Fiduciary continued

retirement accounts are now required to act in the 'best interest' of the client, supplanting the earlier requirement that they act 'suitably'. The new rules were a response to mounting criticism that the industry misdirects retirement savings into underperforming investment products like annuities and actively managed funds which, through various complex revenue-sharing agreements and commissions, can be very lucrative for brokers and advisors but costly to unsuspecting workers. According to a study by the White House Council of Economic Advisors, the new rule could save consumers $17 billion annually. This particular number is derived from an assumed 1% underperformance across $1.7 trillion in retirement assets that are potentially impacted by "conflicted advice."[4]

The New Regulation

Under the regulation, any person providing covered advice would be doing so as an ERISA fiduciary if the person represents or acknowledges that he or she is acting in a fiduciary capacity. If not met, a person who is not a fiduciary would nevertheless be subject to the fiduciary status under the "functional test" outlined as part of the regulation. It is helpful to see the new rule in contrast to the old one.

Original Definition of Fiduciary

This new standard replaces the five part test to determine a fiduciary that has been applicable for decades, since the original ERISA law. In 1975, the Department issued a 5-part regulatory test for "investment advice" that gave a very narrow meaning to this term. Under the regulation, before a person can be held to ERISA's fiduciary standards with respect to their advice, they must (1) make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value (2) on a regular basis (3) pursuant to a mutual understanding that the advice (4) will serve as a primary basis for investment decisions, and (5) will be individualized to the particular needs of the plan. An investment adviser is not treated as a fiduciary unless each of the five elements of this test is satisfied for each instance of advice.[5]

New Definition of Fiduciary

The new definition of fiduciary changes would essentially remove the "regular" and "primary basis" prongs (nos. 2 and 4) from the definition and thereby expand the advisory activities and persons subject to the fiduciary definition. For purposes of the ERISA Sec. 3(21) and Internal Revenue Code Sec. 4975 ("the Code") definition, a fiduciary is a person who, for compensation renders investment advice to a plan or IRA (including participants of a plan) through a recommendation as to 1. The advisability of investing in securities or other investment property, including advice on rollovers, transfer or distributions from a plan or IRA; and 2. The management of securities or other investment property, including recommendations on investment policies or strategies, portfolio composition, professional referrals for investing services, types of investment accounts (such as brokerage versus advisory) and rollover activities including the destination.[6]

The DOL also issued two new prohibited transaction exemptions--the Best Interest Contract Exemption (the "BIC Exemption") and the Principal Transaction Exemption--and amended several existing prohibited transaction class exemptions. The new exemptions and amendments will permit Advisers, Financial Institutions, and other service providers to continue to receive compensation that would otherwise be prohibited, provided that they comply with certain conditions designed to mitigate conflicts of interest.[7]

Political, Industry and Public Reaction

On April 6, 2016, the White House issued a "Fact Sheet" which declared that the final rule and related exemptions will "ensure that retirement savers get investment advice in their best interest."[8] Labor Secretary Thomas Perez, whose staff wrote the rule updates, says the new requirements will encourage long-term investing by making sure savers' financial interests get top priority in any decisions. Under current rules, advisers "say things like, 'We put our clients first,'" he said. Going forward, "this is no longer a slogan. It's the law."[9]

But many in the financial industry strongly object to the tougher fiduciary standard, saying it will raise their regulatory and liability costs, and make it tough to work with investors with low-balance accounts. The new regulation is broad and inclusive and the industry which serves this market is trying to decipher the impact of it upon their present and future business practices, and as such, many in the industry are taking steps to oppose it.

The Securities Industry and Financial Markets Association [SIFMA] and the Financial Services Institute [FSI], have opposed the new 1,000-page rule, deeming it to be unnecessarily complex and written and designed in such a way as to fit it within the jurisdiction of the Department of Labor. SIFMA in particular has supported a uniform fiduciary standard in the past, but opposed the new rule because of its unnecessarily expensive compliance requirements. With support from SIFMA and other industry groups, Congressional Republicans passed a measure halting any implementation of the Department of Labor rule until the SEC recommended an alternative; viewing this step as nothing more than an attempt to bury any extension of the fiduciary standard, President Obama vetoed the

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Fiduciary continued

measure in June 2016.

There has also been legal action taken challenging and citing their action as an unprecedented extension of the Department of Labor's mandate. Most notably, nine organizations including the US Chamber of Commerce, FSI and SIMFA joined together in early June and filed suit in the US District Court for the Northern District of Texas. In the complaint, the suit argues that "The rules and [prohibited transaction exemptions] overstep the Department's authority, create unwarranted burdens and liabilities, undermine the interests of retirement savers, and are contrary to law."[10] Plaintiffs have hired the Washington, D.C. firm Gibson Dunn whose legal team includes Eugene Scalia, Supreme Court Justice Antonin Scalia's son, who has previously won several prominent financial law cases. In his July 20 comment letter, Eugene Scalia argues that the DOL's lawful role is to create rules that regulators enforce. They cannot create rules that form the basis of a private right of action. Only Congress can do that, Scalia wrote, "To be sure, the Department has authority to interpret the definition of 'fiduciary' under ERISA and the Internal Revenue Code, …its enforcement authority, however, is limited to ERISA."[11]

Potential Consequences of New Rule

One potential consequence of the new regulation, if implemented as passed, is that it may lead to financial advisors changing their business model. The new regulation may lead some advisors to move to a flat fee instead of a percentage of assets under management model to better manage the increased fixed costs of compliance. Critics fear that flat fees may price professional advice out of the reach of investors with modest retirement savings, and perhaps as a byproduct may accelerate the growth of so-called 'robo-advisors' like Betterment and Wealthfront, which offer fast, automated retirement advice based off of simple questionnaires. This is a development which the industry is closely watching.

Personal Observations

Since the passage of the new rule and its forthcoming implementation date, I have noticed that plan sponsors are now questioning the fee structures of their plans. Many are asking for an explanation of the term fiduciary and how it relates to their liability under their plan. After speaking with several retirement plan advisors since the passage of the rule, I have concluded that there is a surge in plan platform reviews currently underway, ahead of the rule's effective date.

One of the most noteworthy and meaningful expressions that has come from the new rule came from a June 12th episode of HBO's *Last Week Tonight*, when English comedian and host John Oliver, covered his take on the DOL's new regulation in a twenty-minute rant. The subject was an unlikely candidate to draw the attention of the millennial generation, the primary viewing demographic of Mr. Oliver, who being so far from retirement, yet now became tuned into and made aware of this development. Somewhat owing to Mr. Oliver, the phrases "retirement savings" and "fiduciary standard" trended on Facebook for the first-time as viewers saw his take on the subject. And the sketch is worth watching on YouTube, especially for industry professionals, because it provides a telling insight into how the rising generation perceives the financial professions.[12]

While the numbers behind this analysis have been strongly criticized by, among others, a former chief economist of the SEC, the $17 billion savings figure is casually and confidently thrown about media outlets, including the *Huffington Post*.[13] Additional fuel was added to the fire when Massachusetts Senator Elizabeth Warren submitted to Congress a report on the perks and other compensation strategies offered to brokers and advisors for selling annuities. Her report titled "Villas, Castles, and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry" outlined how the industry which promises "Guaranteed Income for Life" to purchasers of annuities, also provides kickbacks to the advisors who sell these, calling into question whether the advice being rendered is serving the best interest of the end user or the broker who is selling the product.[14]

Conclusions

As implied from the recent lawsuits, retirement investment professionals have expressed a sense of overreaching that comes with this new rule, one that takes aim at the whole profession in response to the offenses of a small minority. The biggest single impact of this new law and the debates surrounding it might just be the indirect effect and political antagonism between "Wall St." and "Main St." In an environment of unprecedentedly low interest rates, many Baby Boomers facing impending retirement are finding that their prospects don't look as bright as they were expecting, or as their parents faced when they retired after an era of much higher investment returns and much lower costs of living. It would be easy to pin the political lion's share of the blame on the financial advisor and the investment firms which manufacture the fee-laden products in question. Yet it appears only time will tell if the outcomes were achieved by the DOL's initiative; whether this was indeed an affirmation of Lennon's Power to the People or a well-intended government policy gone awry.

Footnotes:

1 http://www.federalreservehistory.org/

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Events/DetailView/58

2 http://www.federalreservehistory.org/Events/DetailView/58

3 http://www.federalreservehistory.org/Events/DetailView/58

4 http://accf.org/wp-content/uploads/2015/11/DOL-fiduciary-rule-FINAL.pdf

5 https://www.dol.gov/ebsa/newsroom/fsfiduciary.html

6 http://www.fi360.com/uploads/media/fi360executivesummary_DOLrulerelease_041516.pdf

7 http://www.willkie.com/~/media/Files/Publications/2016/05/DOL_Publishes_Final_Rule_Defining_Fiduciary_and_Related_Exemptions.pdf

8 https://www.whitehouse.gov/the-press-office/2016/04/06/fact-sheet-middle-class-economics-strengthening-retirement-security

9 http://www.npr.org/sections/thetwo-way/2016/04/06/473146587/white-house-to-financial-advisers-put-savers-interests-first

10 http://www.investmentnews.com/article/20160602/FREE/160609985/nine-groups-file-lawsuit-to-strike-down-capricious-dol-fiduciary-rule

11 http://insurancenewsnet.com/innarticle/lawsuit-filed-overturn-fiduciary-rule

12 See Retirement Plans: Last Week Tonight With John Oliver (HBO) https://www.youtube.com/watch?v=gvZSpET11ZY

13 http://www.huffingtonpost.com/news/department-of-labor/

14 http://www.warren.senate.gov/files/documents/2015-10-27_Senator_Warren_Report_on_Annuity_Industry.pdf

Victor is President of Levy & Associates in Philadelphia, a wealth management and employee benefits firm. He has recently completed a book called The Kitchen Table Financial Plan which was published through River Grove Books and is available on www.amazon.com.

James is a senior at Cornell University. He is majoring in economics and hopes to pursue a career in the investments industry.

Dying Without A Will

Rebecca Rosenberger Smolen & Amy Neifeld Shkedy

On April 21, 2016, the musician/artist, Prince, died without a Will. While it seems shocking that someone so wealthy and famous, with an estate predicted to be worth hundreds of millions of dollars, would die leaving no Will, he was not alone. In fact, statistical studies have shown that at least 55% of Americans die without a Will or estate plan in place.

The publicity surrounding Prince's death and estate brought to light many questions people have about what happens when a person dies without a Will. Dying without a Will is known as dying "intestate" (as opposed to dying "testate," which refers to when an individual dies with a Will in place). When a person dies intestate, state law governs the succession of a decedent's estate. In Prince's case, Minnesota law will govern how Prince's assets will be distributed since he died a resident of Minnesota. For purposes of this article, we will cover Pennsylvania intestate laws. The laws vary significantly from state to state, but, overall they provide for distribution among members of a decedent's immediate family.

The laws of intestate succession in Pennsylvania, which can be found in 20 Pa.C.S.A § 2101 et seq., govern how property passes when a Pennsylvania resident dies without a Will. The laws are designed to provide for the surviving spouse and children or more remote issue (i.e., grandchildren, great-grandchildren, etc.) of a decedent and, in some cases, parents, siblings, grandparents, aunts, uncles and cousins, depending on whether certain relatives are living at the time of a decedent's death.

The "rules of succession" in Pennsylvania can be summarized as follows:

1. Surviving issue and surviving spouse. If the decedent is survived by his or her spouse and any "issue" (i.e., children of the decedent and any descendants of a predeceased child, as the case may be), and all of the issue are also the surviving spouse's issue, then the surviving spouse would receive the first $30,000 of the estate, plus one-half of the remaining estate, if any, and the children would receive the remaining one-half balance (in the case of a deceased child, such child's descendants would take such child's share). However, in the event that at least one of the decedent's issue is not also the surviving spouse's issue, then the surviving spouse would only receive one-half of the estate (and not the first $30,000).

2. Surviving spouse but no surviving issue. If the decedent is survived by a spouse but not by any surviving issue or parents, then the surviving spouse would inherit the entire estate. If there are any parents living, then the spouse would receive the first $30,000 of the estate, plus one-half of the remaining estate, if any, and the decedent's parents' would receive one-half of the remaining balance (the parents would share equally, if both are living, or all would go to the survivor of them if only one parent is living).

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Without a Will continued

3. No surviving spouse. If there is no surviving spouse, then the decedent's estate would pass to the following heirs, in the order named below:

a. Issue. First, the entire estate would pass to any surviving children (and, in the case of a child who is not living, his or her share would pass to his or her living descendants, if any).

b. Parents. If there is no surviving issue, then the entire estate would pass to the decedent's parents (the parents would share equally, if both are living, or all would go to the survivor of them if only one parent is living).

c. Brothers, sisters or their issue. If no parents survive the decedent, then the estate would be distributed to the decedent's siblings (or their respective issue).

d. Grandparents. If no siblings (or issue of siblings) survive the decedent, then the grandparents of the decedent would receive the estate (one-half to the paternal grandparents and one-half to the maternal grandparents), or their respective issue.

e. Uncles, Aunts, and their Children and Grandchildren. If no grandparent survives the decedent, then the estate would be distributed to the decedent's uncles, aunts, and their children and grandchildren.

f. Whole and half blood. In determining relationship of any of the above, biological and adopted children are counted, but step-children are not. Also, "half" relatives would inherit as if they were "whole."

g. Commonwealth. If none of the relatives named above survived the decedent, then the Commonwealth of Pennsylvania would receive the estate.

It is important to note that intestacy only governs property passing under a decedent's probate estate, or property which would otherwise have passed pursuant to a Will had there been one in place. Intestacy does not, however, govern the disposition of non-probate assets, such as retirement plans and life insurance proceeds which pass by beneficiary designation form (or if no such form was completed by the decedent, by the terms of the account agreement prepared by the financial institution), transfer or payable on death accounts, property in trust, property held in joint accounts with rights of survivorship, or other non-probate assets.

Even though the law provides for succession to family members when one dies without a Will, so that property will rarely escheat to the Commonwealth, it is still important to have a Will in place for many reasons. First of all, a Will provides peace of mind so that a person can specify the beneficiaries who will receive the assets of his or her estate, how much each beneficiary will receive and whether the assets will pass in trust or outright. Secondly, a Will allows an individual to designate an executor to handle the administration of the estate. Under intestacy, since there is no designated executor under a Will, an administrator would need to be appointed, but the appointed party may not necessarily be the best party for the job (or at least not the party that the decedent may have had in mind to handle the estate). Finally, the administration of an intestate estate is generally significantly more costly than a well-planned estate administration, can cause fighting among family members, such as disagreements regarding the distribution of certain items (imagine how Prince's relatives will decide how to divide his music collection), and may very well lead to greater inheritance and estate tax than would have otherwise been imposed.

We will likely never know why Prince did not prepare a Will. Obviously, it had nothing to do with the financial cost of doing so, since he could certainly well afford such cost. The most likely cause was simple procrastination, since the deadline for preparing a Will is the last one that any of us will face. However, because we almost never can know when that deadline will arrive, it is important to be vigilant about getting a Will in place, and updating it periodically as life's circumstances change, from time to time, before it is too late.

Rebecca Rosenberger Smolen and Amy Neifeld Shkedy are co-founders of the boutique firm, Bala Law Group (www.balalaw.com), and concentrate their practices in trust and estate planning and administration.

Forfeiture of Inheritance For The Sake of Love

Joel Luber, Esquire

Facts: Jack and Jane were married in 2010 and lived together in a home owned by Jane. After a few tumultuous years, in 2013, Jack moved out of the home and into an apartment not far away. In 2014, Jane initiated divorce proceedings. Initial pleadings were filed but no further action took place. Jane died in 2015 before a final decree in divorce was entered. Between the date the divorce case was filed and the date of death, both Jack and

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Jane engaged in multiple extramarital affairs. Nonetheless, Jack and Jane maintained a friendship; he helped her whenever she asked for items such as lawn maintenance and snow removal; took her to the emergency room on several occasions; continued to help her financially; and helped to take care of Jane's ailing mother.

Soon after Jane died, Jack filed a Petition for Grant of Letters of Administration (Jane left no Will), and Letters of Administration were granted to him the same day. But along comes Jane's sister who challenges the grant of Letters, and asks the Court to deny Jack any claim to Jane's estate as a surviving spouse.

The Issue: Whether Jack should share in the estate of his deceased wife in light of their separation, the commencement of divorce proceedings and his subsequent extramarital conduct.

The Holding: Jack loses!! Welcome to the world of the Victorian Age in which our Pennsylvania Legislature still resides, where 60 year old mores still rule the day. Both the Lackawanna County [Scranton] Orphans' Court ruled, and on appeal, the Superior Court, affirmed, Jack forfeited his right to Jane's estate as a surviving spouse. This was the decision in a case recently handed down by our Superior Court, filed on March 18, 2016. *In re: Estate of Kathleen Talerico,* 2016 PA Super 66; 2016 Pa. Super. LEXIS 164.

The Law: The death of a spouse during the pendency of a divorce proceeding abates (stops) the divorce action and any and all claims for equitable distribution. *In re Estate of Cochran*, 1999 PA Super 242, A.2d 1029 (Pa. Super. 1999). Although the *Probate, Estates and Fiduciaries Code* (the "PEF Code") contains substantial provisions designed to insure the fair distribution of the marital estate upon the death of one spouse, in this case the relevant section of the PEF Code was as follows.

§ 2106. Forfeiture.

Spouses share. A spouse who, for one year or upwards previous to the death of the other spouse, has *willfully neglected or refused to perform the duty to support* the other spouse, or who for one year or upwards has *willfully and maliciously deserted the other spouse*, shall have no right or interest under this chapter in the real or personal estate of the other spouse (emphasis added).

Thus, the narrow legal issue was, did Jack willfully neglect or refuse to perform his duty of support of Jane for more than a year; or did Jack willfully and maliciously desert Jane for more than one year?

The Pennsylvania Supreme Court has recognized that the mere fact of separation does not create a presumption of willful and malicious desertion. Instead, there must be an actual abandonment of matrimonial cohabitation with intent to desert, willful and persisted in without cause. *In re Estate of Kostick*, 514 Pa. 591, 526 A.2d 746 (1987). Moreover, where an allegation of desertion is based on separation, the party advocating forfeiture (Jane's sister) must prove there was a desertion without cause or consent of the other spouse. *In re Estate of Fisher*, 442 Pa. 421, 276 A.2d 516 (1971). However, once such a showing has been made, the parties' separation is presumed a willful and malicious desertion and the burden shifts to the surviving spouse to prove the contrary.

Jack argued in Court that he separated from Jane either with just cause, or with Jane's consent, such that desertion was not proven. Jack further maintained that if the presumption of desertion on his part existed, it was neither willful nor malicious in that his extramarital relationships allegedly did not occur until *after* Jane had engaged in the same. The Orphans' Court apparently didn't buy the "she hit me first" argument. It simply concluded that Jack forfeited his right to share in his wife's estate due to his extramarital affairs during the separation. On appeal, the Superior Court agreed, relying on holdings from two Supreme Court cases dating back to 1950 and 1953, and then taking the easy way out based on its mandated deferential standard of review, by concluding "we can find no abuse of discretion in the [lower] court's decision."

Here are the holdings from those two Supreme Court cases: (1) *In re Archer's Estate,* 363 Pa. 534, 70 A.2d 857 (Pa. 1950), "where there had been a separation by mutual consent and thereafter both spouses enter into adulterous relationships with paramours, neither spouse may share in the other's estate, irrespective of who was the first to transgress." (2) *In re Crater's Estate*, 372 Pa. 458, 93 A.2d 475 (Pa. 1953), "upon proof of [a spouse's] adultery during the separation, the inference justifiably arose that [the] open disregard of [that spouse's] marital obligations was intentional and, as a consequence, a wil[l]ful and malicious desertion..."

To be fair, the Superior Court did acknowledge, in a footnote, that it might have been inclined to rule the other way, but was disinclined to revise the PEF Code by judicial fiat, wherein it stated: "Although our adherence to precedent compels that we apply the Supreme Court's interpretation of Section 2106 in the context of the instant case, we echo the sentiment expressed by a prior panel of this Court: '[I]t remains for the legislature to study and decide whether scrutiny and revision of the Probate Act is necessary or desirable by reason of the mores of a society which inspired legislative enactment of no-fault divorce, when an individual may lawfully shed a marital partner, without the express consent of that partner and by reason of little more than the passage of time...',

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Forfeiture continued

citing *Estate of Fulton*, 422 Pa. Super. 133, 619 A.2d 280, 285 (Pa. Super. 1992)".

Finally, although the *Talerico* case was a statutory forfeiture proceeding, the Superior Court apparently felt it needed further statutory authority to support its decision. And so it looked to Section *6111.1 of the PEF Code*. That section, entitled "Modification by divorce or pending divorce", provides as follows:

Any provision in a conveyance which was revocable by a conveyor at the time of the conveyor's death and which was to take effect at or after the conveyor's death in favor of or relating to the conveyor's spouse shall become ineffective for all purposes unless it appears in the governing instrument that the provision intended to survive a divorce, if the conveyor:

(1) is divorced from such spouse after making the conveyance; or

(2) dies domiciled in this Commonwealth during the pendency of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa.C.S. § 3323 (relating to decree of court) *and grounds have been established* as provided as 23 Pa.C.S. § 3323(g). (emphasis added).

The Superior Court then said this: "Section 6111.1 embodies a clear legislative intent that a spouse's death in no way invalidates a separation and pending divorce contemplated by the spouses prior to that death. Our decision today further effectuates the intent of the legislature in that regard." Of course, no decree in divorce had been entered prior to Jane's death. And there is nothing in the opinion of the Court that describes the initial divorce proceeding filed by Jane. Apparently, the Court felt that "grounds [could] have been established" by Jane if she had chosen to do so.

Joel S Luber, Esquire is Chair of the Estates & Trusts Group at Reger Rizzo Darnall LLP. Joel concentrates his practice in sophisticated estate planning for high-net-worth individuals, asset protection planning, estate administration, Orphans' Court practice, and general corporate and income tax planning.

Medicare: I'm Eligible, Now What?

Susan H. Kavanagh

Starting in 2011 and continuing for the next 18 years, baby boomers will be turning 65 at a rate of 8,000-10,000 per day. With over 3 million people reaching this milestone each year, it is very likely that you will field Medicare questions posed by "newly eligible" baby boomer clients. As an advisor or someone anticipating retirement, it is important to have some basic knowledge of Medicare and resources that will help make this important health insurance transition easier.

Some background: Medicare and its companion program Medicaid were signed into law in 1965 by Lyndon B. Johnson. Since then, the Medicare Program has evolved in response to beneficiary needs, developments in medical care/best practices, insurance industry advances, etc. Initially, Medicare consisted of **Part A** (hospital and medically necessary skilled nursing facility, hospice and home care) and **Part B** (some preventive care, doctors and other healthcare providers' services, outpatient care, DME (Durable Medical Equipment) and home care). Eligibility for Medicare was expanded from covering persons age 65 and over to include disabled persons under the age of 65, persons with End Stage Renal Disease (ESRD), federal civilian employees, the President, members of Congress and federal judiciary. Since Parts A and B require beneficiary cost sharing in the form of per diem hospital co-pays, outpatient deductibles and coinsurance, Medicare solicited private health insurers to provide insurance that would reduce or eliminate basic Medicare's beneficiary cost share. Medicare Supplement (Medigap) and Medicare **Part C** (Medicare Advantage) plans were created. These plans did an effective job of covering the medical balance bills/cost share part of the equation until prescription drugs emerged as an important tool in the prevention and treatment of disease. Medicare recognized this change and how it was financially impacting Medicare beneficiaries. As a result, Medicare **Part D** (prescription drug coverage) was added in 2006.

The basics and history of the Medicare Program are all very interesting but people as "first time eligibles" can be overwhelmed by the process of choosing plans, comparing insurers and rates, and the whole application process. It is usually helpful to follow a few steps to facilitate the plan review and selection process.

Step 1: Apply for Medicare and consult with a Social Security Administration (SSA) agent

The agent will be able to answer questions about your Medicare application, eligibility, the effective date of Parts A and B, Parts B and D premiums (which may be income adjusted) and other applicable benefits. If considering delaying the effective date of Part B, the agent can elaborate on whether or not this is advisable based on employment status, employer size, etc.

Step 2: Research Other Sources of Medicare Supplement Coverage

- Check for Medicare Supplement, Medicare Advantage or equivalent retiree coverage offered through a former employer (commercial company or Government/Military), Association,

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Medicare continued

Union or Trade Group. Many times former employers offer subsidized coverage that is better or equivalent to individual Medicare Supplement or Part C plans. Employer retiree plans may offer prescription drug benefits with no coverage gap or "donut hole." Note: enrolling in an individual Medicare Supplement plan or Part D prescription drug plan may automatically terminate the group retiree plan, thus leaving benefits on the table. Be sure to check with the retiree plan administrator before enrolling in an individual Medicare plan.

- Medicare/Medicaid Dual eligibility: check with Social Security and the local Department of Human Services office regarding enrollment and plan options.

Step 3: Evaluate Individual Medicare Plan Options

Assuming clients ruled out any group coverage and have a Part B effective date, they should research which individual Supplement or Medicare Advantage plans are suitable for them. In determining this, it is advisable to consider lifestyle issues such as planned relocation (includes moves to an Adult Community, Assisted Living or Continuing Care Retirement Communities (CCRC), residing several months each year in another state (snow birds), plan administrative ease, provider network participation, provider freedom of choice, medical conditions requiring special care or benefits and prescription drug utilization. It is very important to compile such a list to help with the plan evaluation process.

Following are the insurance plans that "supplement" or enhance basic Medicare (for other options, refer to the 2016 Medicare & You handbook).

A. Medigap Plans

- Private health insurance plans that supplement original Medicare Parts A and B
- Medicare is primary claims payer and Medigap pays secondary or after Medicare pays
- Provides freedom of choice, no referrals required
- Each insurer offers standard plans and chooses which they offer in a particular market (A, B, C, D, F, G, K, L, M, N)
- Premiums may be higher than Medicare Advantage plans but point of service costs can be less depending on the plan chosen
- Cannot be used to supplement a Medicare Advantage plan
- Plans do not cover prescription drugs so a separate Medicare D plan must be purchased for this benefit. Note: prior to 2006, some Medigap plans offered minimal prescription drug coverage and were grandfathered when the Medicare D plan was first introduced.

B. Medicare Part C Medicare Advantage Plans: there are two types of plans

1) Medicare HMOs (Health Maintenance Organizations)

- Usually have to choose a PCP (Primary Care Physician) who coordinates all care. The HMO builds a referral network around the PCP who must issue referrals to Specialists or other providers in their network.
- May include prescription drug coverage and extra benefits
- Low premiums can be offset by cost sharing at point of service
- If non-referred, non-emergent care is received outside of the network, the member is responsible for all provider bills
- The insurer is the primary administrator responsible for member benefits and claims payment
- Geographic limitations apply resulting in member financial responsibility if non-emergent care is received out of the network.

2) Medicare PPOs (Preferred Provider Organizations)

- Usually do not have to choose a PCP or obtain referrals
- Have freedom to seek care from network or non- network providers. Note: use of non-network providers can result in high out of pocket financial exposure
- May include prescription drug coverage and extra benefits
- Low premiums can be offset by cost sharing at point of service
- The insurer is the primary administrator responsible for member benefits and claims payment
- Geographic limitations may apply and can impact coverage level for non-emergent care.

C. Medicare D Prescription Drug Plan

- Plans are offered and administered by private insurance companies
- Can be stand-alone plan or bundled with Medicare Advantage plans
- Requires beneficiary cost sharing (deductible, co-pays, coinsurance) that changes each year
- Three coverage levels: initial, coverage gap or donut hole, and catastrophic
- Premiums, formulary and member out of pocket costs vary by insurer and can change annually, e.g. the insurer can waive or reduce the annual deductible, add or delete drugs on their formulary, change the co-pays per drug tier, etc.
- Time and financial penalties levied for late enrollment
- Cannot have more than one Medicare D plan in place (stand alone, bundled with a Medicare Advantage plan or as part of

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Medicare continued

a retiree group program).

- Premium may be income adjusted.

Step 4: After comparing plans and rates, submit application(s) at least one month prior to your Medicare Part B effective date

Depending on the type of plan(s) selected, one or two applications will have to be submitted to insurers, e.g. Medigap and Medicare D plans must be applied for separately. Contact the insurance company for application information.

Note: For people already on Medicare, the Medicare Annual Open Enrollment begins October 15th and ends December 7, 2016. Changes made during this time will become effective January 1, 2017.

For help, please refer to the following resources:

- 1-800-Medicare (1-800-633-4227)
- www.medicare.gov
- Medicare & You 2016 handbook
- Social Security 1-800-772-1213 or www.ssa.gov
- SHIP for Pennsylvania - APPRISE 1-800-783-7067
- Administration on Aging www.aoa.gov
- Medicare Approved Supplemental Plan Insurers

Note: This article contains a general description of the Medicare program. It does not represent all of the benefits or options available to the consumer. For comprehensive details regarding Medicare, refer to the resources listed above.

Susan Hart Kavanagh is the founder and President of Kavanagh Solutions, a consulting firm specializing in health insurance problem resolution, plan/benefit review and guidance when Clients must select a Medicare or non-Medicare policy.

NAEPC® Notes Fall 2016

M. Eileen Dougherty, CTFA, CFP®, AEP®, ChFC®

As a reminder, because you are a member of The Philadelphia Estate Planning Council, you are also a member of The National Association of Estate Planners & Councils (NAEPC®). To learn more about the many benefits available to you as a member of NAEPC® please visit www.NAEPC.org or speak with your author. I write this column to bring you up to date on ideas of interest to our membership.

The Robert G. Alexander Webinar Series, originally launched in September 2013, provides estate planners with accessible, high quality, multi-disciplinary education. Programs are available live and on-demand. Live programs typically take place on the second Wednesday of each month at 3:00 pm EST. The program continues on the following dates and features the following national speakers;

September 14, 2016
Topic: Income Tax Deductions for Charitable Bequests of IRD
Speaker: Christopher R. Hoyt

October 19, 2016
Topic: Tricky GST Issues
Speaker: David A. Handler

As a member of the board of NAEPC, I have the ability to "gift" a webinar each time one is held. If you are interested in any of these webinars, please contact me at eileen.dougherty@hawthorn.pnc.com and indicate "I want a free NAEPC webinar" in the subject line. First come, first served!

The 53rd Annual NAEPC Advanced Estate Planning Strategies Conference will be held in Phoenix/Scottsdale Arizona from November 16, 2016 thru November 18, 2016. This year the speakers and topics include; Michael Amoia speaking about *Loan Regime Split-Dollar for Both Single and Joint Lives*, Jonathan Blattmachr speaking about *The Critical Importance of High Investment Returns and Tax Free Compounding, and How to Achieve Them*, and Samuel Donaldson giving the *Annual Tax Update*. In addition, *An Interview on the Nature and Practice of Our Profession and its Capacity to Meet the Challenges of the "Shirt Sleeves" Proverb* will be presented by James Hughes, *The Mathematics of Estate Planning* will be given by Robert Keebler and *Privileges/Valuation-Exploring Privileges in the Context of Hiring Appraisers* will be the topic of choice from Stephanie Loomis-Price. Kathryn Miree will educate us on *Ten Charitable Planning Ideas for the Current Environment* while Nancy Rapoport will advise us on *Collaboration Across Small and Great Divides: Teamwork, Tensions, and Client-Center Solutions*. As well, Jeffrey Schoenblum will cover *The Governing Law Clause in Trusts-Not Just Boilerplate Anymore*. *What Can We Learn from Estates of Deceased Celebrities?* is the title of John Scroggin's session and Kathy Wiseman will present *Family and Multi-Disciplinary Team Dynamics for High Performance Family Wealth and Business Succession Planning.*

I hope you'll join me there for this great educational and networking opportunity in a lovely setting. This event is open to ALL members!

SAVE THE DATE

WELCOME BACK PARTY

Thursday, September 22, 2016

Top of the Tower, 1717 Arch Street 51st Floor, Philadelphia, PA

Mediation for Divorce: A Sensible Alternative to Litigation

Debbie Schneider

Alternative dispute resolution (ADR) is gaining in popularity both in the general community, as well as the legal community. Many states and local governments are now requiring matters to be subject to ADR before the dispute even enters the formal litigation pipeline. There are four main categories. The first is negotiation. Negotiation most typically does not involve any third parties, but the basic principles of negotiation are used by the parties themselves. There may be coaches in the background offering the parties advice, but their role is strictly informal. This model requires highly motivated parties to succeed.

The second type of ADR is arbitration. Many different types of disputes are handled by arbitration; typically union, labor and insurance matters. The parties have a contractual obligation to enter into the formal arbitration program and a decision is imposed on the parties. The arbitrators are typically third parties acting in quasi-judicial capacities.

The third type of ADR is collaborative law, most often utilized in divorce cases. The matter is resolved, using contractual guidelines, and sometimes the attorneys involved have been trained in collaborative law principles. There may or may not be third parties and sometimes experts, assisting the parties and their respective attorneys. Most often the contract also specifies that the parties will not resort to traditional litigation to resolve the matter. No one imposes a resolution on the parties.

The fourth subset of ADR is mediation. Parties in mediation utilize a third party professional to assist them in resolving the matter. The mediator is always committed to neutrality and will never take sides in a dispute. There is no resolution imposed on the parties, but many mediators will propose what they believe is a fair and reasonable compromise.

The subject of this discussion is mediation for family law issues, primarily divorce.

With the help of third party professionals, couples are able to arrive at a healthy compromise and move forward with their lives. They are able to retain much of their marital estate rather than dissipating their assets in litigation; not waste time in the limbo and angst of endless litigation and most importantly maintain the good will that they have for each other. Good will is vital to couples with children; the parties may be contemplating no longer being married, but those two people and their children are still a family.

In addition to attorney-mediators, other professionals, including family/child therapists and CPA-Accountants, are part of a basic mediation program. The first step is for the clients to participate in a disclosure process in which they submit relevant documentation to support their assets and liabilities. They supply the most recent three years of personal income tax returns, and if there is a business at issue, the business/corporate returns are requested as well.

Every couple's divorce is unique, so although the facts are different, the approach taken by the mediators is similar for every couple. Address the facts, find out each party's position, making sure each party's position is clearly understood by the other party, and work at a compromise until each party is satisfied with the result. Ideally, the parties will be amicable, but it is not necessary. The parties have to agree that mediation is their preferred forum for resolution, and they have to agree to participate in good faith. If they can make those two decisions, many couples will be successful in mediation.

Parenting Plans and Custody

For couples with minor children, often the most important issue is custody of the children. Any couple in Pennsylvania with children under the age of 18 and who have not graduated high school are subject to the custody laws. I truly believe that for many couples the only real issue is their children. They know that their divorce will be an adjustment, (often an enormous adjustment) but as "grown-ups" they are prepared to face it. What they have a much harder time reconciling is the impact that they know the decision to divorce will have on their children. For these couples, they are seeking expert guidance on transitioning their children from one household to two households, and all of the philosophical underpinnings that support that transition. Additionally, many of our couples have not told their children of their plan to divorce; they are seeking counsel from a professional on how best to tell their children that everyone's life is about to change.

The custody laws provide for modification, so provisions to review and modify are always built into parenting agreements.

The Heart of the Process – Financial Mediation

Mediation should address all of the financial issues of the parties, and should be conducted by a family law attorney-mediator.

The marital residence and its ultimate disposition should be discussed, as well as any other real estate.

The retirement assets are discussed as well, and if outside valuations or input is required, plans are made to obtain those expert opinions as well. The investment community, financial planners, and the

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Mediation continued

parties own CPA's are often consulted here and asked to provide necessary advice and counsel. Dividing retirement assets in divorce often require the use of Qualified Domestic Relations Orders (QDRO), created and governed by the ERISA statues. Third party providers can draft and process the QDRO for the parties, if need be. Although the appellate courts in Pennsylvania would prefer that each party retain their own retirement assets, it is often necessary to split the accounts, and QDRO's are valuable tools in a divorce, providing a means to save taxes and penalties.

Child support, spousal support and alimony are discussed and an agreement is reached with regard to these issues as well. Every issue should be discussed, and a basic agreement is reached.

Tax Issues

The divorce laws in Pennsylvania and the tax laws intersect very dramatically. Some time and effort should be devoted to addressing the tax issues. This is something that litigation attorneys won't pay any attention to because they feel that the tax consequences are for another place and time.

If the parties have ownership interests in any business, or they are self-employed, an accountant may play a larger role. They may be doing a business valuation consistent with the guidelines established by the IRS, at IRS Manual, Chapter 48, 4.48.4 Business Valuation Guidelines, or they may do an income analysis to determine appropriate income amounts for child and spousal support calculations.

The Agreement

Once all of the mediations are completed and the parties have reached a satisfactory compromise, the attorney-mediator creates the first draft of their Marital Settlement Agreement. The parties meet and review the Agreement together, making revisions as necessary. The attorney-mediator then provides a second draft. The parties are advised to have the draft Agreement reviewed by an attorney of their choosing.

Many couples forego the second opinion only because they are already at peace with the agreement that has been reached, but they always have the option of a second opinion. The Agreement goes through as many drafts as necessary, and it is executed by the parties.

Estate Issues

Couples are advised that their divorce will create changes for their estate, and that they need the advice of competent counsel to revise their Wills/Trusts. For some couples the divorce is the very first time that they have ever thought about their testamentary plans; many already have children.

Fortunately, many couples are motivated to create an estate plan, looking forward to their impending status as a single person.

Financial Planning

If possible, it is a good idea to meet with a financial advisor.

The Divorce

The divorce laws were revised in 1980 in Pennsylvania; at that time the no-fault divorce statutes were created. With that action, the legal requirements and ramifications became less onerous. Either party could be the plaintiff because there is no legal significance to being either the plaintiff or the defendant.

The parties do not have to set foot in a Courtroom, and most couples are extraordinarily pleased when told how simple it is, to be completed through first class mail.

Other Family Law Issues

Mediation is an extremely useful forum for resolution of any family law issue, adoption, custody, and of course prenuptial and post-nuptial agreement. It is an idea whose time has come.

Debbie Schneider is an attorney mediator at the Alpha Center for Divorce Mediation, joining the organization in 2005. A graduate of the Villanova University School of Law, Ms. Schneider's previous experience includes all facets of matrimonial and family law, both in private practice and as a clerk presiding over family court matters.

2016 Annual Meeting

The 2016 Annual Meeting was held on May 5, 2016 at the College of Physicians of Philadelphia. A panel consisting of Charles P. Sabatino, J.D, C. William Hanson, III, MD and David J. Casarett, MD, MA spoke on "Effective Advanced Directive Planning from Pen to the Clinical Realities." Following the program, attendees enjoyed a Cinco de Mayo themed reception and access to one of Philadelphia's most unique museums, the Mütter Museum.

President Doug Simon passes the gavel to Vice President Huldah A. Robertson.

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Annual Meeting continued

Thomas McDonnell, Laura Weiner, Gary Waxman, Alyse Blumberg and Jeannette Leighton

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2016 Golf & Tennis Outing

The PEPC Annual Golf & Tennis Outing was held on May 23, 2016. The golf outing was at Whitemarsh Valley Golf Club and the tennis outing was at the Philadelphia Cricket Club.

Michael Rosenblatt, Joseph Stoll and Melinda Rath

Andrew Haas, Kevin Manning and Eric Hildenbrand

Charles Bender, Alan Mittelman, Thomas McDonnell and Doug Simon

Mary Wagner, Matthew Levitsky, Peggy Robus and Joe Robus

Frank Branca, Jr., Frank Branca, Sr., Vince Mitchell and Frank Rock

2016 Golf & Tennis Outing continued

2016 Tennis Outing participants

Andrew Wilusz at the Tennis Outing

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Mark Your Calendar

Tuesday, September 13, 2016
Topic: "An Opportunity: Understanding the Emergence of a Legal Industry"
Speaker: Roy P. Kozupsky, Moses & Singer, LLP & Susan Hartley Moss, Wealthaven, LLC
New York, NY

Tuesday, October 18, 2016
Topic: "A New World Order for Estate Planners (or Why Is It So Difficult to Open a Bank Account)?"
Speaker: M. Read Moore
McDermott, Will & Emery LLP
Chicago, IL

Tuesday, November 15, 2016
Topic: "Creative Ways to Obtain a Basis"
Speaker: Mickey R. Davis
Davis & Willms, PLLC
Houston, TX

Tuesday, January 17, 2017
Topic: "Fiduciary Issues"
Speaker: Dana Fitzimons
Bessemer Trust
Atlanta, GA

Tuesday, February 21, 2017
Watch for more information soon!

Tuesday, March 21, 2017
Topic: "Estate Planning for Chronic Illness"
Speaker: Martin M. Shenkman
Shenkman Law
Fort Lee, NJ

SAVE THE DATE

ANNUAL HOLIDAY CELEBRATION

Thursday, December 8
5:30 - 7:30 p.m.

Union Trust
717 Chestnut Street
Philadelphia