PHILADELPHIA ESTATE PLANNING COUNCIL

VOL. XXVI, NO. 3 • SPRING 2017

President's Message

Huldah A. Robertson, CFP®, AEP®

"We hold these truths to be self-evident, that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." The Declaration of Independence.

A fitting reference to our individual and collective pursuits during our Annual Meeting timeframe at Philadelphia's newest historical hotspot – the Museum of The American Revolution!

As we reach the milestone in our calendar to reflect on our time together this year, we recognize tremendous collective accomplishments among our council – teamwork, leadership, and individuals!

From a teamwork perspective, our council was recognized as a "5 Star" Council by the National Association of Estate Planners & Councils, NAEPC. We attracted nationally recognized speakers for our luncheons and Annual Meeting, and we shared valuable guidance throughout the community through a number of outlets including the Estate Planning ….through the Philadelphia Library System.

When we look at the leadership of the council, PEPC board members, committee chairs, committee members, and sponsors, all are PEPC ambassadors as each provide insight, opportunity, and leverage to us. We are proud to have this guidance and support to navigate the evolving landscape.

On an individual basis, we welcomed new members and board members, honored members for service and contribution, recognized milestones, recommended national accreditation, and encouraged member networking to advance individuals.

On behalf of the entire council, thank you one and all for your contribution to our PEPC excellence. Thank you to all who have sponsored, engaged, lead, and participated!

Have a wonderful summer and continue to engage!

Cheers,
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.

Pennsylvania Partnership and LLC Law Revised

Suzanne A. Prybella & James C. Vandermark

Pennsylvania recently enacted new legislation that will enable attorneys, estate planners, and other professionals to advise clients seeking to place assets in a limited liability company with greater confidence when addressing issues regarding the protections afforded by the limited liability company form. Prior to February 21, 2017, Pennsylvania followed the Pennsylvania Limited Liability Company Law (15 Pa. C.S. § 8901 et seq.) (the "PLLC Law"). The PLLC Law was similar to Delaware's Limited Liability Company Act in that it included provisions regarding transfers of membership interests (which included both economic rights and rights to

continued on page 3

IN THIS ISSUE:

PEPC OFFICERS AND DIRECTORS 2016 – 2017

OFFICERS

President
Huldah A. Robertson, CFP®, AEP®, Glenmede Trust Company, N.A.
huldah.robertson@glenmede.com
215-419-6976

Vice President
Richard M. Schwartz, Pepper Hamilton LLP
schwartzr@pepperlaw.com
215-981-4457

Treasurer
J.R. Burke, CLU, ChFC, CFP, Perspective Financial Group, LLC
jrburke@pfg1976.com
610-854-0035

Secretary
Scott Isdaner, Isdaner & Company LLC
sisdaner@isdanerllc.com
610-668-4200

Immediate Past President
Douglas Simon, MD, Alex. Brown
douglas.simon@alex-brown.com
215-854-1550

DIRECTORS

Term Expiring in 2017:
Eileen Dougherty, CTFA, CFP, AEP, ChFC, Hawthorn, PNC Family Wealth
John C. Hook, Esq., Stradley Ronon Stevens & Young, LLP
Philip V. Jodz, Abbot Downing
Michael Paul, JD, LLM, CFP, CLU, RubinGoldman and Associates

Term Expiring in 2018:
Donald P. DiCarlo, JD, LLM, Tax, Wilmington Trust
Glenn A. Henkel, Kulzer & DiPadova, P.A.
Kevin Manning, CFP, Stone Pine Financial Partners
Matthew Ostrelich, PricewaterhouseCoopers LLP

Term Expiring in 2019:
James Revels, CPA, MST, Citrin Cooperman
Rachel A. Gross, Esq., Jewish Federation of Gr. Philadelphia
Eric Hildenbrand, CFA, Coho Partners
Anthony Weiss, JD, LLM, CPA, Citi Private Bank

Term Expiring in 2020:
Christopher Borden, CFP, Stedmark Partners at Janney Montgomery Scott LLC
Jill R. Fowler, Esq., Heckscher, Teillon, Terrill & Sager, P.C.
Andrew J. Haas, Esq., Blank Rome LLP
Thomas R. McDonnell, Andersen Tax

NEWSLETTER CO-EDITORS

Peggy M. Robus, CPA, MT, EisnerAmper, LLP, 215-881-8813
margaret.robus@eisneramper.com
Alan Weissberger, Esq., Hirtle Callaghan, 610-943-4229
aweissberger@hirtlecallaghan.com

COMING EVENTS

Annual Meeting, Seminar & Reception

Thursday, May 18, 2017

3:00 – 3:30 p.m. Registration
3:30 – 6:00 p.m. Program
6:00 – 8:00 p.m. Reception & Museum Access
Museum of the American Revolution
101 South Third Street
Philadelphia, PA 19106

Please register at www.philaepc.org.

PLLC Law continued

participate in the management of the business).

The PLLC Law, however, did not provide clear guidance with respect to the property rights of members or to what extent creditors could recover against a member's interest in the limited liability company. Instead, members were left to faceoff in court to define the member's property interests and the extent to which creditors could recover against such interests for the unpaid debts of the member. The uncertainty as to the protections available under the PLLC Law caused some clients to consider other entity forms and alternative jurisdictions.

On April 1, 2017, the Pennsylvania Uniform Limited Liability Company Act of 2016 (15 Pa. C.S. § 8811 et seq.) (the "PULLC Act") became fully effective and replaced the PLLC Law.[1] Unlike its predecessor, the PULLC Act specifically defined the interests held by a member. For example, it defined "transferable interest" as the "right, as initially owned by a person in the person's capacity as a member, to receive distributions from a limited liability company, whether or not the person remains a member or continues to own any part of the right."[2] The PULLC Act also makes clear that a member's transferable interest is personal property and such transferable interest is the only right that may be transferred to non-members. Thus, if a member sells or otherwise transfers their transferable interest, the recipient of the transferable interest has only the right to receive that member's distributions. The member is not dissociated as a member from the LLC and the recipient is not entitled to:

(i) participate in the management or conduct of the company's activities and affairs; or

(ii) …have access to records or other information concerning the company's activities and affairs.[3]

The PULLC Act also provides significant clarification as to the rights of creditors, which are limited to those rights provided for under the PULLC Act. This includes charging orders as the sole remedy available to judgment creditors for obtaining distributions made by the limited liability company. If a creditor is able to obtain a charging order, it will be a lien against the member's transferable interest and requires the limited liability company to pay over to the creditor any distributions that would otherwise be paid to the member. The creditor can also have a receiver appointed to ensure distributions are paid to the creditor. However, because the creditor is only able to recover against a transferable interest, the PULLC Act makes clear that it does not cause the dissociation of the member or a dissolution and winding up of the limited liability company.

Diverging from both the PLLC Law and Delaware law, the PULLC Act allows a judgment creditor to foreclose the transferable interest of the member. In most cases, the purchaser at the foreclosure sale will only obtain the transferable interest and does not thereby become a member. This is because the purchaser is also subject to PULLC Act's provisions relating to transfers of transferable interests, as discussed above. However, there is a significant caveat to this rule as it pertains to sole member limited liability companies. The PULLC Act allows creditors foreclosing against the sole member of a limited company, to force the sale of the member's entire interest, not just their transferable interest.

Enactment of the PULLC Act was part of a much larger amendment[4] to Title 15 (Corporations and Unincorporated Associations) to replace the law governing limited liability companies, limited liability partnerships, limited partnerships and general partnerships. In particular, the following changes are notable from a fiduciary obligation and asset protection standpoint:

Limited Liability Companies

- Clarifies that although a limited liability operating agreement may not completely eliminate the duty of loyalty or the duty of care of its members, it may specify (reasonable) conduct that does not violate such duties.
- Permits the transfer of any distribution right by a member of an LLC pursuant to any terms or restrictions on transfers imposed by the LLC's operating agreement.
- Specifies that a member is not an agent of the LLC, solely because it is a member of such LLC, thus eliminating the "statutory apparent authority" which was previously the law.
- Expands the permissible purposes of an LLC to include not-for-profit purposes. Previously, Pennsylvania law only permitted not-for-profit purposes with respect to corporations. A nonprofit LLC is permitted to receive and hold real property in trust for the purposes set forth in its Certificate of Organization. A nonprofit may want to create an LLC for a number of reasons, including for protection from the risks and liabilities associated with the ownership of real property or to operate a business that is not substantially related to advancing the nonprofit's exempt purpose (without jeopardizing its 501(c)(3) status under federal law).
- Creates "Benefit Companies" or "Benefit LLCs" which are entities whose purpose must be for general public benefit (and may be for a specific public benefit) meaning that it must have a "material positive impact on society and the environment, taken as a whole and

continued on page 4

PLLC Law continued

assessed against a third-party standard, from the business and operations of a benefit company". The third-party standard must be maintained by the entity and any reports and assessments confirming the third-party standard must be made publicly available (which means Benefit Companies will be very transparent entities).

Limited Liability Partnerships

- Clarifies that the agreement among partners governs the partnership and that the rules of the Uniform Partnership Act are generally the default rules. Further clarifies that property is owned by the partnership and not by individual partners.
- Provides that a partner has duties of loyalty and care to address suits by partners for breach of fiduciary responsibilities.
- Provides the general partners of an LLP with liability protection similar to that enjoyed by shareholders of a corporation and members of a limited liability company.
- Creates distribution tests which address the ability of creditors to recoup improper distributions in light of the partners' shield from liability.
- Provides for the satisfaction of creditors upon liquidation (similar to corporations).

Also worth noting is that the inaction of the Uniform Limited Partnership Act severs the link between limited partnership law and general partnership law and creates an independent source of law with respect to limited partnerships.

Footnotes:

1 The PULLC Act became partially effective on February 21, 2017. During the interim period between February 21, 2017, and April 1, 2017, the PPLC Law governed only (1) limited liability companies formed on or after February 21, 2017 and (2) limited liability companies previously formed and that elected to be governed by the PULLC Act.

2 15 Pa.C.S. § 8812(a).

3 15 Pa.C.S. § 8852(a)(3).

4 See Pennsylvania House Bill #1398 (Act 2016-170)

Suzanne Prybella, an associate at White and Williams LLP, focuses her practice on commercial lending transactions as well as on estate planning and tax matters. In her practice, Suzanne advises clients on estate and wealth transfer planning, asset protection planning and estate administration, as well as issues involving federal, state and local taxation. In addition, she advises clients on issues regarding the qualification and maintenance of tax-exempt status.

James Vandermark, an associate at White and Williams LLP, concentrates his practice in the areas of bankruptcy, tax, and commercial law. He represents a variety of businesses, including financial institutions, corporations, insurance companies and government entities. His experience includes advising creditors and debtors in commercial and consumer bankruptcy cases as well as complex state and local tax matters. James also represents clients involved in bankruptcy restructuring efforts and adversarial proceedings, disputes involving business tax and real estate tax assessments, and other sophisticated commercial litigation matters.

UTMA Accounts Gone Awry; Custodians Be Aware!

Joel S. Luber, Esquire

Almost all persons, professionals and laypersons alike, are familiar with the method for making gifts to a minor under the Uniform Transfers to Minor Act ("UTMA"), a uniform law that has been enacted in all fifty states. It is one of the most common and simple and cost effective ways to do so. A gift of a registered security can be made merely by having title taken in the name of the person "as custodian for [the named minor] under the [name of enacting state] Uniform Transfers to Minor Act". Similarly, and just as easily, a bank account can be opened, or a life insurance policy beneficiary designation can be completed in the same manner.

Most people also know, and are rightfully concerned about, the one critical statutory requirement for a UTMA gift; that being the property, which is the subject of the gift, or that into which it may have morphed since the date of the gift, must be distributed outright to the minor upon his or her attaining the age of majority (sometimes 18, others 21, and under the PA statute, capable of being deferred until age 25). I cannot tell you how many times a client has come to me, as a child approaches that magic age, and asks whether there is some method to avoid distributing the property outright to the child, either by (i) simply not telling the child the account exists; (ii) transferring the property into a more traditional type of trust that has no mandatory distribution date, or (iii) moving the property into a Section 529 Plan.

But less focus is usually given at the time of creation of the account as to what uses and purposes can be made of the custodial property while the child is still a minor, at least not before a parent (unadvisedly acting as a custodian) runs into his or her own financial difficulties, who then eyes the custodial fund with solicitous intent. And then, lo and behold (and usually after the fact), the parent/custodian walks in your door and asks you to defend the use to which the custodial property was made, justifying that it was used for the "benefit of the minor".

Such was the dilemma embedded into the facts which were the subject of a very recent appellate court decision from our Superior Court in *Werner vs. Werner*, 2016

continued on page 5

UTMA Accounts continued

PA Super 221 (Pa. Supr. Ct. 2016), resulting in an opinion by Judge John Musmanno that affirmed two Orders coming out of the Orphans' Court Division of the Court of Common Pleas of Allegheny County. Although the facts were not all that unusual (similar facts were part of the record in a prior case cited in the opinion), what makes the *Werner* case worthy of consideration is that it includes two issues of first impression.

The Facts. The Werners (Melanie and Eric), after adopting two children, created two separate custodial investment accounts under the Pennsylvania UTMA ("PUTMA"), with an original principal amount of $125,000 each, intended for the children's future college expenses. In August 2009, Eric and Melanie separated, with Eric moving out of what was acknowledged to be a very large home, with monthly maintenance and operating costs of about $40,000. In May 2010, when the children were 15 and 16, respectively, Melanie withdrew the funds in the PUTMA accounts, which totaled $252,688.90, and deposited them into her personal bank account. In June 2010, she then used $235,000 of the custodial property to purchase a new home ("New Home") in the same town as the marital residence, and took title in her own name. Melanie also used some of her personal funds to make improvements to the property (e.g., landscaping, brick patio, new windows, and bathroom renovation) which she argued increased the home's utility and eventual sale price.

Melanie filed a complaint in divorce in September 2010, and the trial court entered an immediate order freezing all assets held for the benefit of the children, absent prior written consent of both Eric and Melanie. In August 2013, Melanie sold the New Home for $507,000. Within days following the sale, the children commenced a lawsuit against their mother, seeking monetary damages and an accounting. The Orphans' Court entered an order that the proceeds of the sale of the New Home be held in an escrow account. On December 22, 2014 (at that time both children were already enrolled in college), a non-jury trial commenced. Shortly prior to trial, the children filed a second Petition seeking counsel fees, having already incurred $85,000 in fees.

Court Holdings. By Order dated September 29, 2015, the Orphans' Court ruled (1) Melanie had violated her duty as custodian under PUTMA and, as damages, the children were entitled to the entire proceeds from the sale of the New Home ($507,000); and (2) denied the children's petition for attorneys' fees. Both parties filed appeals, which were consolidated by the Superior Court *sua sponte*. The Superior Court affirmed both Orders.

Melanie's Arguments. Obviously, the optics looked bad for Melanie, removing the assets out of the PUTMA accounts into an account in her own name, and then taking title to the New Home in her own name, coupled with the fact that one child never stayed in the New Home, and the other child stayed there every other week (during Melanie's custodial periods) for approximately one year. Nonetheless, she argued, presumably with straight face, that there was no breach of her duties as custodian, because (i) by virtue of the irrevocable nature of property gifted under PUTMA, her use of the funds to purchase the New Home did not change the ownership of those funds (title on the deed notwithstanding); and (ii) although conceding not taking title in her name as custodian was not in "strict conformity" with the mandate of PUTMA, the children failed to prove any loss of value or other deleterious financial consequences of her action. [There is no mention in the Opinion about how the children paid for their college educations. But the Court did say that due to the ongoing litigation the custodial property remained inaccessible to the children for years.] Thus, Melanie averred that all was done in good faith and in furtherance of the children's best interests, and that the New Home was a "necessary purchase to provide a better living environment and to avoid the extraordinary expenses to occupy the marital residence." [No mention, either, in the Opinion about the disposition of the marital residence or who received or would have been entitled to receive any proceeds of sale.]

Law and Analysis. The Superior Court had very little troubling concluding that the Orphans' Court correctly determined that Melanie's actions constituted a breach of her fiduciary duty as custodian under PUTMA. The two operable provisions of the statute cited in the Court's opinion included, in part, the following:

§ 5312. Care of custodial property.

(a) Duties of custodian. --

A custodian shall:

(1) Take control of custodial property.

(2) Register or record title to custodial property if appropriate.

(3) Collect, hold, manage, invest and reinvest custodial property.

(b) Standard of care. --

In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries….

(d) Segregation of custodial property. --

A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial

continued on page 6

UTMA Accounts continued

property of the minor. … Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered or held in an account designated in the name of the custodian, followed in substance by the words: "as a custodian for (name of minor) under the Pennsylvania Uniform Transfers to Minors Act."

§ 5314. Use of custodial property.

(a) Without court order. --

A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to:

(1) the duty or ability of the custodian personally or of any other person to support the minor; or

(2) any other income or property of the minor which may be applicable or available for that purpose….

c) Obligation of support not affected. --

A delivery, payment or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor.

The Orphans' Court found violations of §§5312(a)(2), (b), and (d), and §5314, opining that "the record fails to support the conclusion that the expenditure on the [New Home] was for the primary use and benefit of [the children]." Additionally, contrary to Melanie's assertion, the trial court concluded her misappropriation of the custodial property to purchase the New Home did not constitute a "mere retitling of the custodial [property]." But, rather, the children were, in fact, harmed by Melanie's misappropriation of the custodial property, having been deprived of any interest or investment returns that could have accrued on the custodial property had Melanie not invaded the PUTMA accounts. The Superior Court agreed, stating that the record further supported the Orphans' Court's finding that the New Home was not a necessary expenditure or for the primary use and benefit of the children (one of whom never resided in the home), also pointing out that the record did not indicate that Melanie had insufficient funds to provide for the children's residential needs, where she had access to the marital residence.

Issues of First Impression.

1. Remedies for an Accounting Action. Notwithstanding what appeared to be a fairly clear case of breach of duty as a custodian, as indicated above, the lawsuit was instituted by the children in the nature of a petition for an accounting. Section 5319 of PUTMA provides, in part, as follows:

§ 5319. Accounting by and determination of liability of custodian.

(a) Petition. --

A minor who has attained 14 years of age, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor or a transferor's legal representative may petition the court for:

(1) an accounting by the custodian or the custodian's legal representative; or

(2) a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property …

The Orphans' Court stated that the issue of available remedies for an accounting action under PUTMA presented an issue of first impression in Pennsylvania, noting that PUTMA contains no specific provision concerning the remedy for a breach of a custodian's fiduciary duty. Therefore, it concluded it was proper to look to other jurisdictions' resolution of the question. In doing so, it found persuasive the holdings from cases decided in North Carolina, Kansas, Iowa and Colorado, which included decisions that ordered a custodian who misappropriated UTMA funds to reimburse both the amount determined to be wrongfully taken, plus the interest that would have otherwise accrued on those amounts.

Thus, the issue the Superior Court had to address was whether the remedy awarded by the Orphans' Court for Melanie's breach; i.e., the entire sale proceeds of the New Home, was proper. In this case, the amount wrongfully taken was $252,688.90, taken in the year 2010. When the New Home was sold three years later in 2013, the amount realized was $507,000. Under anyone's definition of a reasonable return on an investment (effectively a doubling of the principal in three years), one would have had to applaud Melanie, and not denigrate her. Assuming, for example, a more modest yet still generous 10% interest accrual on principal, the additional amount to be restored to the children could have been assessed at about $75,000. Did the Orphans' Court go too far?

Melanie argued, as expected, that she contributed personal monies to the New Home. But the Orphans' Court was having none of that. It concluded the children were entitled to the full amount of appreciation obtained from the sale because Melanie commingled her own funds with the custodial property in violation of PUTMA Section 5312(d), which states "[a] custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor." It also cited analogous case law that holds that if a party mixes personal funds and trust funds, the trustee has the burden of distinguishing his funds from the

continued on page 7

UTMA Accounts continued

rest of the trust funds; and concluded that Melanie had failed to distinguish what amount of the appreciation was attributable to her own financial sources. The Superior Court, constrained as always by its standard of review of the findings of fact by a trial judge sitting without a jury, agreed with the rationale of the Orphans' Court and found no abuse of discretion or error of law in fashioning its remedy with an award of the full $507,000 to the children.

2. Fee Shifting. The last issue addressed by the Superior Court was the sole issue raised by the children in their cross appeal, which was whether the Orphans' Court erred in denying their request to shift attorneys' fees under (i) PUTMA, and/or (ii) general Pennsylvania law, including 42 Pa.C.S.A. §2503, as a sanction against their mother's vexatious conduct in the litigation. Again, this was identified as another issue of first impression by the Orphans' Court, stating that "whether or not fee shifting is an appropriate remedy under PUTMA has not been litigated in Pennsylvania."

The children's argument included the same observation made by the Orphans' Court in terms of the remedies under Section 5319 remaining largely unexplored theretofore, and the case law from other jurisdictions that held that the statutory language of the UTMA "contains an implied grant of authority which permits a trial court to impose a wide variety of remedies." In addition, they argued that Section 5319(a) authorizes a court to issue a "determination of responsibility", and that they could not be made whole merely by compensatory damages given the fact that any such recovery is reduced by attorneys' fees. The final pillar on which the children mounted their appeal was that the Judicial Code permits an award of reasonable counsel fees "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa.C.S.A. §2503(7). Apparently, there was no love lost between mother and her two adopted daughters.

Melanie could only counter in her brief that "there is no provision in PUTMA, or any other statute [sic], which requires or authorizes a departure from the general rule" that parties to litigation are responsible for their own counsel fees and costs; and a contention that there was no evidence presented that her conduct was obdurate, vexatious or in bad faith. [Presumably Melanie was also tightly crossing her fingers, recognizing that she was slammed with the full $507,000 as a remedy for her breach of duty.]

Interestingly, the Orphans' Court first opined that yes, indeed, "[P]UTMA allows fee shifting or an award of attorney's fees in actions against a[ ] [P]UTMA custodian when appropriate as a sanction against the [c]ustodian to ensure that the [p]etitioners are made whole", citing as precedent a Connecticut case. But then, in a bit of a surprise, it reversed direction and determined that in this case the record did not indicate egregious conduct by Melanie, stating, instead, that this was a case that "involved a personal family matter that was hotly contested by both parties, [and that] zealous litigation is not *per se* vexatious or bad faith."

True to course, the Superior Court concluded that it discerned no abuse of discretion or error of law by the Orphans' Court in denying the children's fee petition. But clearly, this was only as a result of the Superior Court's recognizing that the Orphans' Court awarded the children "damages that constituted a substantial return on their investment (the damages award exceeded the amount of the custodial property that Melanie had initially liquidated by approximately $250,000)."

Conclusion: There is no rule, per se, that prohibits a custodian under PUTMA from purchasing residential real estate. If such a purchase is to be made, however, Rule 1 is take title on the Deed as mandated by Section 5312(d). This would have served Melanie well; although it is not certain that she would have escaped without any liability for her actions, primarily because of Rule 2. Rule 2 is a little bit trickier, because it requires a complete understanding of Section 5314 of PUTMA, which is the issue I first identified above as being given "less focus" at the time of creation of a custodial account. Subsection (a) includes the mandate that expenditures of custodial property must be for the "use and benefit of the minor". While this is admittedly a very open ended mandate, the "tricky" part is Subsection (c) that also limits expenditures to those in addition to, and not in substitution for, any parental support obligation. See, also, *In re Gumpher*, 840 A.2d 318, (Pa. Super. Ct. 2003).

Thus, it is critical to understand that prior to using any custodial assets for any purpose while the child is still a minor, whether it is for the purchase of a home, payment for private school, or payment for college, a parent acting as custodian must be prepared to demonstrate that his or her own assets, and a nonparent custodian must be prepared to confirm that the assets of any other person who has the legal obligation of support of the minor, have been exhausted. Good luck you custodians out there!

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.

A New Financial Tool for the Disabled: Pennsylvania ABLE Accounts

Rise P. Newman, Esquire

A new financial tool is available for Pennsylvanians considered qualified disabled. The Pennsylvania Achieving a Better Life Experience (PA ABLE) allows for a qualified disabled individual to establish a "tax-free" savings account with federal "after-tax" money.

This Act, signed into federal law in December 2014 and signed into Pennsylvania law by Governor Tom Wolf on April 18, 2016[1], creates a more just system for individuals with a qualified disability. The enactment of ABLE account legislation makes it possible for individuals with a qualified disability to save money beyond the existing $2,000 asset limit. The funds in the ABLE Account may be used for community living expenses and may be used to pay costs, such as education expenses beyond high school, transportation or housing expenses that government benefits such as Medicaid do not cover. All federal benefits are protected, including Medical Assistance and Supplemental Security Income (SSI) benefits (with limitations) and many Pennsylvania benefits.

Eligible Individual. To be an eligible individual, the individual must meet two (2) requirements.

- Qualifying Disability. The individual must have a qualifying disability. A qualified disability is demonstrated by one of the following:
  - o The individual is entitled to Supplemental Security Income (SSI) benefits based on blindness or disability; or
  - o The individual is entitled to Social Security Disability Insurance (SSDI) benefits based on blindness or disability; or
  - o If the individual is not entitled to SSI or SSDI, the individual may self-certify that he or she has a similarly severe disability demonstrated by:
    - Blindness, as defined by the Social Security Act (SSA); or
    - Having a medically determinable physical or mental impairment with marked and severe function limitation that has lasted, or is expected to last, at least 12 continuous months or is expected to result in death AND having a written disability-related diagnosis signed by a physician.
- Qualifying Age. The qualifying disability must have started prior to age 26.

Funding of Account and Limitations. An adult eligible individual, with the legal capacity to enter into a contract, must establish an ABLE account. The eligible individual manages the account. If the eligible individual is a minor or person without the requisite legal capacity, a parent, guardian or Agent under a Power of Attorney instrument may open the account. The parent, guardian or Agent becomes the Authorized Individual who acts as the fiduciary for the account. The authorized individual may not have a beneficial interest in the account.

Presently, an ABLE account must be opened through the Pennsylvania Treasury Department. Funds contributed to the ABLE account may be placed into one or any combination of seven investment options offered by the PA ABLE Account Savings Program.

Residents of all states may open a PA Able Savings account although Pennsylvania offers Pennsylvania residents some exclusive benefits.

Contributions. Anyone may contribute to the account including the qualified disabled individual, friends, family members, an employer, a business, a trust, a corporation or other legal entity. The maximum total the qualified disabled individual and any other person may contribute in any given year is the Internal Revenue Service gift tax exclusion amount[2] . The total maximum amount that may be contributed to an ABLE account is $511,758[3] (excluding interest earned on the fund). By law, the maximum value of an ABLE account is the same maximum limitation for a PA 529 College Saving Account (each state establishes its own limits).

For SSI recipients, however, an ABLE account may not exceed $100,000.

Qualified Expenses. ABLE Account funds may be spent on qualified disability expenses. The expenses do not need to be "Medically Necessary". An expense is "qualified" if:

- The expense was incurred at a time when the individual was considered an Eligible Individual; and
- The expense relates to the individual's disability.

These qualified expenses, depending on the eligible individual's disability, may be used for education (preschool through post-secondary education), housing[4], transportation, moving expenses related to employment, health prevention and wellness, assistive technology and personal support (a smart phone for a child with autism, for example), financial management fees, legal fees and funeral and burial expenses.

There are many other expenses considered "qualified expenses". The beauty of an ABLE Account and its accessibility to the individual is that many of the qualified expenses that may be

continued on page 9

ABLE continued

paid, without penalty, by this account include expenses that that government benefit programs, such as Medicaid, do not cover.

If an individual is receiving SSI, there are more limitations. For example, if ABLE funds are used for housing expenses, SSI payments could be impacted when the eligible individual withdraws funds for housing or Non-Qualified Expenses and does not use the money in the same calendar month of withdrawal (Medicaid payments will not be impacted). The family must be made aware of possible impact on benefits, SSI in particular.

Continued Qualification for Government Benefits and Other Benefits. There are many reasons that an ABLE account is appealing, such as earnings on the account will not be subject to federal or Pennsylvania income tax and there is no federal or Pennsylvania state tax due when the earnings are withdrawn for spending on qualified disability expenses. Pennsylvania's ABLE Account legislation allows a Pennsylvania tax deduction for contributions to a Pennsylvania ABLE Account (a contribution, however, is not a federal income tax deduction). Furthermore, the ABLE account is not subject to Pennsylvania Inheritance tax at the death of the qualified disabled individual; the account, however, is subject to Medicaid reimbursement.

In addition, federal means-tested benefits (such as Medicaid) will not be affected (with the exception of some special SSI limitations). Similarly, funds in an ABLE account will not affect eligibility for Pennsylvania means-tested benefits (such as Medicaid) as long as the means-tested benefits are health or disability related or are for state student financial aid.

Pennsylvania law also protects funds in a PA ABLE Account from creditors. The eligible individual's PA ABLE account cannot be subject to attachment, levy or execution by a creditor of a contributor or the account owner. There is also some limited protection in Federal Bankruptcy proceedings.

Special SSI Rules. ABLE Account funds in excess of $100,000 will be counted for SSI qualification. The resource limit for SSI qualification is $2,000 ($100,000 of ABLE Account resources will be ignored for purposes of SSI qualification). Any amount in excess of $100,000 (*including any earnings on the ABLE account*) will be treated as a resource of the individual and can cause suspension of SSI benefits until the account balance is reduced.

If a client or client's relative is receiving SSI benefits, it is critical to report circumstances that might affect SSI benefits to the Social Security Administration (SSA). Federal law requires that ABLE programs report account information to the SSA monthly, including the account value and withdrawals.

Gifts to SSI recipients can impact benefits. It is critical that gifts be made directly from the gift giver to the recipient's ABLE account so that the gift is not considered countable income to the SSI recipient. Income from the SSI recipient's work is considered countable income even if the employer directly deposits the earned income into the recipient's ABLE account.

Non-Qualified Expenses. If ABLE account funds are used for non-qualified expenses, there will be penalties and tax consequences. The individual will be responsible for federal and state income tax (at that individual's tax rate) on the earnings portion of the amount used on non-qualified expenses. There is an additional 10% federal income tax due on the growth portion of the amount spent on non-qualified expenses. Additionally, the Non-Qualified funds withdrawn could possibly be counted against the eligible individual for purposes of determining eligibility for means-tested public benefits programs, such as Medical Assistance (Medicaid) or SSI.

Death of Qualified Individual, Payment of Expenses and Medicaid Payback. The funds remaining in the ABLE Account may be used for any outstanding qualified disability expenses as well as for the funeral and burial.

Under proposed IRS regs (which are not yet final or in effect), if an eligible individual dies, the ABLE account becomes part of the individual's estate. Under Pennsylvania law the account may be transferred to the Beneficiary's sibling, if any, who is also an Eligible Individual.

If there is no qualifying sibling, when the assets are transferred to the estate, any growth on the contributions will be subject to income tax. The ABLE account, however, is not subject to PA inheritance tax.

Thereafter, under certain circumstances, the funds must be used to repay any state Medicaid plan that was used by the qualified individual *after* the ABLE account was established. The state agency responsible for administering Medicaid (which, in Pennsylvania is the Department of Human Services (DHS)) may not file a claim against the account itself but may seek repayment from the estate for services rendered to a deceased account owner only if the decedent received Medicaid benefits for nursing facility services, home and community-based services, and related hospital and prescription drug services paid once the individual turned 55. Repayment is postponed if the deceased has a surviving spouse, child under 21, or disabled child of any age.

Some Drawbacks. The age limitation is one drawback because under the rules, individuals *over* age 26 are barred from opening PA ABLE accounts. Then, there

continued on page 10

ABLE continued

is a cap to the amount of money that may be contributed and accumulated. If the qualified disabled beneficiary is a Medicaid recipient after age 55, there is a post-death payback obligation from the estate receiving the funds (but only for Medicaid coverage of nursing facility services, home and community-based services and related hospital and prescription drug services paid after the disabled beneficiary turned 55). There are deferments to the payback rules if there is a surviving spouse, a child under age 21 or a disabled child of any age. Finally, SSI recipients must be fully aware of the possible drawbacks that could lead to benefit suspension or loss.

ABLE Accounts and Special Needs Trusts. An ABLE Account is not a substitute for a Special Needs Trust. For one, there is no limit on the funding or cumulative value of a Special Needs Trusts but there is a limit on the cumulative value of a PA ABLE Account. There is a different treatment for Medicaid payback (in certain cases).

ABLE Accounts are less costly to establish than a Special Needs Trust and the funds grow income tax-free. Funds in a Special Needs Trust are generally subject to income tax. ABLE accounts are subject to stricter eligibility requirements, such as the age limitation. As to accessing funds within the account, the qualified beneficiary has more direct control over an ABLE Account; whereas the Trustee of the Special Needs Trust is the one who has the control over the funds and makes the spending and withdrawal determinations. There are many other reasons, both nuanced and significant, to choose one over the other, or *both*.

An ABLE Account is a great tool available to families with a disabled child or relative who meet the strict eligibility requirements. Having the ability to save and spend on qualified expenses makes the qualified disabled individual more self-sufficient and enables them to save for future costly medical expenses and other needs.

Footnote:

1 Senate Bill 879

2 Currently $14,000

3 SSI benefits will be impacted if the ABLE account reaches above $100,000

4 In order for SSI not to be affected, money withdrawn for housing expenses must be spent within the same calendar month as withdraw

Rise P. Newman, Esquire is a Member of Spector Gadon & Rosen, P.C. and the Chair-Elect of the Probate and Trust Section of the Philadelphia Bar Association.

Trading Places: Global Lessons to Assist in Preparing for Possible Estate Tax Repeal

Pamela Lucina, Joan Crain, Justin T. Miller, John T. Welsh and Martyn S. Babitz

The elimination of the estate tax is not novel from a global perspective. Canada's system, a capital gains tax at death, may represent what could happen in the United States.

Regardless of whether repeal occurs, and what might replace it, the need for planning will continue. The focus may change, but wealth transfer planning extends beyond estate tax.

A Global Trend

When eliminating estate taxes, countries typically take one of three approaches:

1. Take no further action. A few jurisdictions that generally have low overall taxes, such as Hong Kong, abolished the estate tax without seeking any compensating capital gains tax or income tax.
2. Implement a carryover basis regime. The majority adopt an alternative that was temporarily offered in the U.S. in 2010, in which there is no step-up in the cost basis of the decedent's assets at death. Under a stepped-up basis, beneficiaries receive a new cost basis upon inheritance, equal to the current fair market value of the asset. In contrast, under a carryover basis regime, beneficiaries inherit the cost basis along with the assets, and pay capital gains tax when they sell the assets.
3. Adopt the "deemed disposition at death" regime. A minority implement this option, under which capital gains tax is assessed on the increase in market value over cost basis of the decedent's assets before they pass to heirs. Australia briefly tried this in 1979 when abolishing the estate tax, but reverted to carryover basis in 1985. Canada is the best example of this approach, having imposed and maintained it since repealing the Canadian estate tax in December 1971.

The Canadian Experience: Capital Gains Tax at Death

As of January 1, 1972, Canada replaced the federal estate and gift tax with a capital gains tax linked to an all-encompassing income tax regime, and the 10 provinces and two territories soon followed suit. In its place, the Income Tax Act (ITA) provides for a "deemed disposition" of capital property at the time of a gift or death. The donor or decedent is deemed to have disposed of capital property immediately before gifting or dying, and to have received the "deemed proceeds."[1] A step-up in cost basis for all

continued on page 11

Death Tax continued

assets to fair market value was allowed as of December 31, 1971, just before inception of the new rule.

In Canada, capital gains incurred in a given year are taxed at the same rate as the owner's ordinary income that year, but the tax is assessed on only 50% of total capital gains. There are exemptions for certain qualifying property (e.g., principal residences, charitable donations of publicly traded stock), and property passing to a spouse or common law partner is deferred to the second death as with the U.S. marital deduction.

Technological improvements have facilitated tracking cost basis. This is now routine practice for most financial institutions and advisors, making the Canadian system more feasible.

The absence of estate taxes has not reduced estate planning in Canada, although the methods may differ from those prevalent in the U.S. Canadian tax planning typically focuses on mitigating income or capital gains tax.

How the Canadian Model Might Work in The U.S.

A Lower Tax Rate

The top capital gains tax rate is 20%, half of the top estate tax rate. In addition, however, only appreciation of assets, and not their entire value (as with the estate tax) is subject to the tax. Accordingly, capital gain taxation at death would be at both a lower rate and apply to a lesser amount.

Avoids Double Tax

A common argument against the estate tax is that it taxes previously taxed income during lifetime again at death. A capital gains tax at death, however, would only apply to previously untaxed, unrecognized gains.

continued on page 12

Death Tax continued

Encourages Investment

The incentive to hold appreciated assets until death for basis step-up would be removed, encouraging the sale of more assets during lifetime, recognize those gains and re-investing them, thereby increasing the velocity of transactions for overall economic benefit. Additionally, concentrated positions could be more readily diversified, reducing long-term investment risk.

What We May See in the New Administration

Based on the skeletal outline of estate tax reform proposed by President Trump (simply proposing to "abolish the death tax") and Republican leadership in Congress, we cannot yet know what comprehensive estate tax reform may ultimately include. Based on global trends, two likely possibilities could accompany estate tax repeal.

In the first scenario, the current step-up in basis rules could be eliminated and replaced with a carryover basis. Beneficiaries would take the decedent's basis in the inherited assets, resulting in capital gains tax being paid on the previously untaxed appreciation only after heirs sell the assets.

The second scenario would adopt deemed disposition at death (as in Canada), resulting in an immediate capital gains tax at death on all previously untaxed appreciation. What this structure could mean in the U.S. is broadly outlined above, but this approach could be applied in various ways. Below are some possible scenarios and exceptions should this system be enacted:

- The rule could apply to all assets owned at death, possibly including assets owned by a grantor trust that typically would not have been included for estate tax purposes. Beneficiaries would continue to receive assets with a stepped-up basis similar to the current rules, but only after the decedent's estate pays all the necessary capital gains taxes.
- An exception could apply for assets left to charity or a surviving spouse, likely requiring spouses to take a carryover basis.
- There could also be an exception for certain small family-owned businesses and farms, requiring a carryover basis or deferred tax liability to be paid by installments, similar to current rules for paying estate tax over a 14-year period.[2]

In addition, a certain amount of appreciation could be exempt from capital gains taxes at death. President Trump proposed during his campaign a $10 million exemption from capital gains tax at death; however, it is unclear whether the exemption would apply to married couples (with a $5 million exemption per person) similar to current exemptions for estate tax purposes. Additionally, it is unclear if the exemption would apply to assets' full fair market value or only the previously untaxed appreciation. If there is an exemption, heirs may still be required to maintain carryover basis so that a future sale by the beneficiary would be subject to capital gains tax. On the other hand, legislation could provide that the exempt assets receive a stepped-up basis, eliminating capital gains tax on the previous assets' appreciation.

What To Consider From A Planning Perspective

Given the possibility of tax policy changes over the next few years, it is important to build flexibility into estate plans. Because there is no certainty as to the timing or details of the tax policy changes, we recommend estate planning that prevents or minimizes the federal estate, gift and GST taxes, while also incorporating the ability to address any issues that may arise as a result of changes in tax policy. Equally important are the values of the non-tax benefits from estate planning, such as asset protection, probate avoidance, business succession and asset management advantages.

Comparing the Different Tax Scenarios

Joe and Janet Smith have worked hard creating ABC Company and are curious how the potential changes in the estate tax may impact their wealth at death. They currently have a $12 million diversified investment portfolio with a $9 million basis, a $2 million home with a $2 million basis, and a concentrated position in ABC Company worth $6 million with a $0 basis. They have two children, Bobby and Betty, who will inherit all the assets after Joe and Janet's death.

After the death of both Joe and Janet they would have the following tax liabilities under current law and three of the potential replacement tax systems:

Current Estate	Carryover Tax	Basis	Capital Gains Tax at Death	Capital Gains Tax at Death With Exemption
Taxes Paid at Death	$3,608,000	$0	$1,800,000	$400,000
Future Tax on Unrealized Gain	$0	$1,800,000	$0	$1,400,000
Current & Future Taxes	$3,608,000	$1,800,000	$1,800,000	$1,800,000

continued on page 13

Death Tax continued

Minimizing the Estate, Gift & GST Taxes

The uncertainty around the fate of the estate tax has not removed the significance of planning around it. Many strategies implemented to remove future appreciation from an estate will most likely continue to be effective, even if the estate tax is replaced. Specifically, it is still important to pursue estate freeze transactions that do not require a significant risk of gift tax, such as grantor retained annuity trusts (GRATs) and sales to intentionally defective grantor trusts (IDGTs), and to continue to make gifts up to the gift tax exemption. If the estate tax is repealed (even temporarily) but the gift tax remains, these structures will have succeeded in shifting appreciation out of the estate without paying gift tax.

If the new law is similar to Canada, these freeze techniques may make it possible to shift appreciation out of an estate, while deferring any capital gains taxes at death. This should be done sooner rather than later, as there is uncertainty about whether the new gift tax exemption (if any) will remain at the current $5.49 million or decrease.

Regardless of which freeze technique is employed, consider using a grantor trust as a recipient of the gifted assets. A grantor trust is ignored for income tax purposes and allows the donor to make extra gifts to the trust by continuing to pay the income tax on the income of the trust. In addition, most irrevocable trusts, even grantor trusts, generally provide protection from creditors, divorce claims and even some forms of elder abuse.

Building Flexibility into Plans

Naming a trust protector in an irrevocable trust is one way to provide potential flexibility in the future. A trust protector can make limited changes to the trust in the event that changes are beneficial from a tax perspective. For example, the trust protector could shut off grantor trust status should it be advantageous for the trust to become its own tax-paying entity for income tax purposes. This can be beneficial if income splitting becomes an optimal strategy, as it is in Canada.

If the estate tax is repealed and the current basis step-up rules remain, a trust protector has the power to swap low-basis assets held in a grantor trust with higher- basis assets held outside the trust. That way, the low-basis assets are included in the grantor's estate and receive a full basis step-up.

In addition to these considerations for irrevocable trusts, flexibility should be added to current dispositive estate plans as well. Wills and trust formulas are often based on current tax law, which may have unintended consequences if that law were to change. For example, many estate plans use formula clauses stating that the credit shelter trust should be funded with the maximum amount of assets that does not result in a federal estate tax. If there is no estate tax, this means no other trusts, including the marital trust, will be funded. While the spouse may be the beneficiary of both the credit shelter trust and marital trust, this is often not the case in second marriages. Even in first marriages, the spouse may not be the primary beneficiary of a credit shelter trust.

Other options include alternative provisions in estate planning documents to take effect in the event the estate and GST taxes do not apply, and/or giving an agent under a power of attorney (or a trust protector) the ability to amend an estate plan in the event of incapacity. For example, if the GST tax is repealed, it might make sense for a trust protector to include grandchildren as beneficiaries of a trust — who would not have been included given the current GST tax.

Planning Beyond The Tax Considerations

In the U.S., wealth planning involving non-tax issues predates talk of abolishing the estate tax. Governance around how a family's assets are managed, and not squandered, cannot be forgotten. Empowering the next generation to have the skill set to successfully manage assets should be an ongoing focus for every family and incorporated as part of any estate plan.

Other areas of focus include protecting the family assets from creditors, ex-spouses and political dangers, as well as avoiding relatively high probate, or "death administration" fees. Confidentiality, particularly for those with multinational connections, is rapidly becoming a top priority. As the trend for global transparency forces traditional and formerly very private jurisdictions to report the financial assets of non-residents, the wealthy are seeking structures and countries that have robust data security laws and systems, allowing them to preserve at least some measure of privacy. In fact, some states in the U.S. are currently cited among those offering the best solutions.

While increased flexibility in estate planning is important to manage tax changes as they arise, advisors must ensure that the grantor's intent is not forgone. Less focus on the tax aspects of planning allows everyone to step back and articulate the primary goal of wealth transfer. It is possible that we may be no longer confined to tax language that requires distribution standards to be guided by the internal revenue code. In other countries where estate taxes are not an issue, it is common for the grantor to draft a letter of wishes or a statement of intent as part of their trust planning to give guidance to future generations and to guide the trustee in navigating through

continued on page 14

Death Tax continued

periods of uncertainty. Articulating and documenting the values that the family wishes to transfer, rather than just focusing on tax avoidance, leads to the development of a client's legacy and should allow a family to be well prepared to address any current and future changes occurring in the world of estate planning.

Conclusion

The proposals from President Trump and the Republican leadership in Congress may result in estate tax repeal and corresponding changes to the gift and GST tax rules. Such changes will not eliminate the need for estate planning as has been the case in several other nations that have eliminated the estate tax.

Canada provides a model of what may occur in the U.S., with imposition of a capital gains tax at death. The current uncertainty requires careful planning, guidance and flexibility.

Furthermore, the need for wealth planning extends beyond the tax considerations. This is also evident from looking at global trends, as well as longstanding concerns in the U.S. regarding asset management and protection, succession planning and other legal issues.

Footnotes:

1 Income Tax Act, par. 70(5)(a), Department of Justice, Canada.

2 IRC section 6166

Pamela Lucina
Managing Director, Family Wealth Strategist

Pamela Lucina is a managing director for BNY Mellon Wealth Management, and the leader of the Family Wealth Strategists team. Pamela has 20 years of experience providing comprehensive wealth planning advice and governance to individuals and families. Most recently she was with JPMorgan, where her key responsibilities included providing wealth and estate planning services to the firm's largest and most complex clients, and advising families on next generation education and philanthropic matters. Prior to JPMorgan, Pamela spent 10 years in private practice, both as a tax consultant with Arthur Andersen and in the trust and estates department of Mayer Brown in Chicago. She is a Fellow of the American College of Trust and Estate Counsel (ACTEC), is well published, and is a frequent speaker at industry conferences and events. Pamela has a Bachelor's degree from Marquette University, and a Juris Doctor degree from DePaul University. She is based in Chicago, IL.

Joan Crain
Senior Director, Family Wealth Strategist

Joan works closely with wealthy families and their advisors to provide comprehensive and customized wealth planning. She joined the firm in 2001 and has more than 25 years of experience working with individuals and families, with special focus on the legal, tax and personal challenges when navigating through major life transitions. Joan is frequently invited to speak to client, professional groups, and numerous local Bar conferences and estate planning councils throughout the United States. She has an MBA in finance from Rollins College, a bachelor's degree from McGill University and a Bachelor of Education from Queens University. She is a CFP® professional and earned the designations of Certified Trust and Financial Advisor and Registered Trust & Estate Practitioner (TEP). She is on the Executive Committee of the Board of Directors and Chairs the Professional Advisory Committee of the Community Foundation of Broward. Joan is based in Ft. Lauderdale, FL.

Justin T. Miller
Senior Director, Family Wealth Strategist

Justin works closely with wealth advisors and portfolio managers to provide comprehensive wealth planning advice to clients and their families. He is a frequent speaker at professional education conferences throughout the country, and has been quoted as an industry expert in numerous business publications. Justin is an adjunct professor at Golden Gate University School of Law, an executive committee member of the State Bar of California Taxation Section, a member of the board of directors of the California Bar Foundation, and is a Fellow of the American College of Trust and Estate Counsel (ACTEC). He received a J.D. and LL.M. in taxation from NYU School of Law and a B.A., with honors, from U.C. Berkeley. Justin is based in San Francisco, CA.

John T. Welsh
Vice President, Wealth Strategist

John has over 9 years of experience providing comprehensive wealth and tax planning advice to individuals, families and private business owners. As a member of the BNY Mellon Wealth Management team, John assists in both the wealth and investment strategy for clients nationally. Most recently, he was with a major Chicago law firm, where he was a part of the private client group providing wealth and estate planning services to ultra-high net worth individuals, families, family offices and foundations. Prior to that, John spent 5 years as a tax consultant with a Big Five accounting firm and a consulting firm in Chicago. John received his Bachelor's degree from University of Notre Dame, and his Juris Doctor from Northwestern University School of Law. He is based in Chicago, IL.

Martyn S. Babitz
Vice President, Wealth Strategist

Marty advises clients on all aspects of family wealth transfer, business succession, philanthropy, and income tax, estate tax, gift tax, and generation skipping tax mitigation strategies. He has over twenty-nine years' experience in wealth management and estate planning, previously as an attorney in private practice with New Jersey based firms McCarter & English and Archer & Greiner focusing on estate planning, tax planning, charitable planning and business succession planning. He has been widely published in national and regional legal periodicals, is a course planner and faculty member for the Pennsylvania Bar Institute, and a member of the Pennsylvania and New Jersey Bars as well as the Philadelphia Estate Planning Council. Marty earned a Bachelor of Science in Economics, summa cum laude, from the Wharton School of the University of Pennsylvania and a Juris Doctor from the University of Pennsylvania Law School. He is based in Philadelphia, PA.

2017 Life Insurance Trends

Michael DeFillipo

The election of President Trump, indications of increased interest rates, rising political populism in Europe, and a general air of uncertainty has created challenges – along with opportunities – for advisors and their clients.

Aside from the continuous use of life insurance products for business purposes (the need for buy-sell funding, key person coverage, non-qualified deferred compensation and investor protection will remain robust, independent of large tax reform), we are experiencing several key trends for legacy and life insurance planning. We'll explore the finite nature of estate and gift tax regimes and how the fundamentals of life insurance continue to provide value as part of legacy and in-life planning.

Death and Taxes

While they are the only certainties in life, exactly what those taxes will be … in life or at death … are a bit up in the air. For the life insurance industry, the specter of full federal estate tax repeal has left many advisors, attorneys and individuals question what advanced gift and estate tax planning decisions should be made with the unknown of what rules to play by. This is not new ground – we've faced these questions twice (2010 and 2012) in the last decade alone.

While no one can predict the legislative actions of this or any future Congress, the notion that some form of wealth transfer tax will forever be eliminated is highly unlikely; the Estate Tax, in some form, will come back – and when it does, there's no guarantee we'll enjoy the current exemption level, portability and coupling between estate and gift tax regimes.

Buying Insurability on the Cheap

Where clients and their advisors may want to pause for more clarity before engaging in significant, and perhaps irrevocable, gifting and planning, the need to protect insurability is still paramount. The use of large, short duration term insurance, particularly from those carriers who offer a robust conversion platform, provides the opportunity to "warehouse" death benefit in an inexpensive form until more is known about immediate and intermediate death benefit planning.

Along with the short-term death benefit protection, the conversion "call option" provides coverage for an unfavorable change in health. The ability to acquire permanent insurance without the need for medical qualification not only hedges against insurability, but provides a laddered expense for coverage – clients may be able to secure short-term death benefit at very attractive rates then implement a permanent plan at a later date when additional funding may be available. This two-phase approach provides a solution where a liquidity event is anticipated in the future, whether that be through an intergenerational transfer of wealth or a sale of a business. The need for flexibility is a key concern for clients and advisors in this period of uncertainty.

Accumulation and Distribution

Of the three essential tax properties of life insurance – an income tax free death benefit, the ability to move death benefit proceeds from a taxable estate and the tax deferred inside build up – the last item is one we find least understood, and therefore underutilized as technique. Even in the event of overall tax reform, those individuals in the higher income tax brackets will always have a need to find vehicles to defer or eliminate current taxation.

The industry has been trending toward the use of Indexed Universal Life ("IUL") policies in recent years, particularly after the 2008-2009 recessions. IUL products feature downside protection against market loss in exchange for giving up a portion of the potential upside of direct equity investment. Policies are credited an interest through the carriers General Account based upon the performance of a widely available Index – the cash value is not directly invested in these Indexes.

While the life insurance provides death benefit protection (particularly in the early years), the policy design and framing of the solution is to create an additional source of supplemental income. Unlike in traditional insurance designs, the "cost" of the solution isn't the insurance premium – the dollars going into the policy are characterized more as contributions - but instead the insurance charges deducted from the cash value. By properly designing the insurance policy to have the lowest available net death benefit, clients can reduce these charges to a minimum.

Funded with after-tax dollars, the cash value component of life insurance grows income tax deferred and can be distributed tax-free in the form of a withdrawal (return of premium) and loan (gain); in this sense, the life insurance "wrapper" is similar to creating a ROTH IRA account. However, unlike a ROTH, there are no contribution limits (subject to policy limitations) nor timing restrictions on taking withdrawals, but be sure to not run afoul of a modified endowment contract.

Death Benefit Returns within a Portfolio

The use of permanent insurance will continue to be a meaningful tool in estate planning, even in a situation where the death benefit isn't used to "pay the tax". Unlike marketable securities or physical

continued on page 16

Life Insurance Trends continued

assets, death benefit proceeds are cash at the exact time it is needed, removing the need to liquidate other holdings should the need arrive.

While for many of us it's not the optimal scenario, there are few financial products that can deliver the type of returns life insurance does in the early policy years. At life expectancy, we can look to the Internal Rate of Return (IRR) of the death benefit as a tax-free return on premium dollars. In light of equity market volatility over the past 10-15 years, we're seeing a trend towards the use of products with a contractual guarantee (e.g., Guaranteed Universal Life, or "GUL") as opposed to products that feature more cash accumulation, and therefore flexibility. (All guarantees are subject to the claims paying ability of the issuing company.)

The ability to predict, and in certain cases guarantee, a known rate of return at various points, allows for added flexibility in the use and deployment of other assets during life; the life insurance death benefit replenishes or levers up the portfolio when passed to the next generation. Using permanent insurance also provides a funding source for estate equalization when balancing assets between multiple family members, or as a simple tool to provide a "target" inheritance to heirs.

Long Term Care Planning

A mentor of mine would often say that 'actuaries are smart people' (he of course being one), and, by-in-large, that's certainly true. One area where actuaries and life insurance companies came up short was in the pricing of stand-alone long term care products. Many of these contracts came with non-guaranteed renewal premiums and little or no equity component to use as an escape hatch. Several insurers left the marketplace, and those that stayed generally raised costs for existing policy holders.

The definitions of long term care are specially defined as the inability to perform two of the six Activities of Daily Living ("ADLs") or mental/cognitive impairment; in other words, needing care didn't automatically qualify for getting a benefit.

Going forward, the planning for long term care through insurance has largely been incorporated as part of the strategies and design detailed earlier. For more direct coverage, many insurance carriers now provide a rider available on permanent products that will accelerate the death benefit in the case of a long term care event (sometimes at an additional cost). Should the insured never need that money for care, a death benefit is still payable to the beneficiary, preventing the loss of those premiums. In situations where individuals are seeking less rigidity in a qualifying definition for access to the policy value, an over-funded cash accumulation product can be a tax-preferred means of self-insuring.

Life Insurance as Role Player in Estate Freezes

The combination of rising interest rates and questions over whether proposed Treasury Regulations under Code Section 2704 will become finalized is creating a shrinking window of opportunity for using estate freeze techniques as a way to move asset appreciation out of the estate. In these techniques, life insurance can provide a supplemental role, as a non-correlated asset class for investment performance protection and/or as a hedge against mortality risk in a zeroed-out Grantor Retained Annuity Trust (GRAT).

Questions and uncertainty around taxes aren't new to 2017, nor will this be the last time we're faced with a potential change. The fundamentals properties of life insurance will continue to make these products important assets within an asset plan, independent of short term changes to tax law.

Michael is a 2004 graduate of Swarthmore College with a degree in Biology. He has over 12 years of experience in the insurance industry, joining 1847 Financial in August, 2016. Currently, Michael holds a Life Accident and Health, Series 65, 63, 6 and 7 Licenses. He received his Chartered Life Underwriter (CLU®) designation from The American College of Financial Services in 2017. Michael has been a speaker at several industry marketing events, focusing on the technical aspects of life insurance design and application.

Current Events

Brian Gilboy

We are in tumultuous and uncertain tax (and otherwise?) times. This column provides some recent updates that may affect and inform Philadelphia Estate Planning Council members.

IRS Suspends Private Letter Rulings on Some GST Issues and Pre-Submission Conferences on estate, gift and GST tax Issues.

The IRS has announced it is temporarily suspending private letter ruling issuance on certain generation-skipping trust matters. It has also announced it is temporarily suspending pre-submission conferences on estate, gift, and generation-skipping transfer tax issues.

According to the Office of Chief Counsel, the reason for both suspensions is budget cuts resulting in an insufficient number of staff attorneys to handle these matters.

Sub-Regulatory Guidance

After temporarily pausing the issuance of sub-regulatory guidance in light of the government wide restriction on the issuance of regulations, the Trump

continued on page 17

Current Events continued

Administration has given IRS the go ahead to once again issue sub-regulatory guidance.

Sub-regulatory guidance includes notices, revenue procedures, and revenue rulings. The IRS had argued that such guidance should not fall under the scope of the President's executive order to cut two regulations for every one issued.

The IRS will still undergo an evaluation of its existing regulations, and identify for repeal or modification, those regulations that are deemed costly and unnecessary in accordance with a different executive order.

GST Exemption and Applicable Exclusion Amounts for Pre-Windsor Transfers May be Re-calculated.

The IRS issued notice 2017-15 (2017-6 IRB), in which it provided administrative procedures in which certain taxpayers and executors of deceased taxpayers may recalculate the taxpayers remaining applicable exclusion amount and remaining GST exemption amount to the extent the taxpayer allocated exemption or exclusion to certain transfers made while married to a person of the same sex.

Prior to *Windsor*, a taxpayer married to a person of the same sex could not use the marital deduction for transfers to his or her same sex spouse and a transfer to such spouse above the annual exclusion amount would constitute a taxable gift, using up the taxpayers applicable exclusion amount.

Moreover, same sex couples could not use their relationship to determine their generational status for GST purposes and thus age difference alone could create a skip between spouses.

Now, a taxpayer who previously had to use a portion of his or her applicable exclusion amount on a transfer to his or her same sex spouse and/or a taxpayer whose transfer to a same sex spouse was treated as a skip for GST purposes requiring the allocation of GST exemption may undo such usages of applicable exclusion amount and/or GST exemption on a Form 709, on an amended Form 709 (if the limitations period has not expired), or on the Form 706 for the taxpayer's estate if not reported on a Form 709. The taxpayer should include a statement at the top of the Form 706 or Form 709 that the return is "FILED PURSUANT TO NOTICE 2017-15."

In the case of re-calculating usage of applicable exclusion amount, the taxpayer would attach a statement supporting his or her claim for the marital deduction and detailing the recalculation of his or her remaining applicable exclusion amount.

In the case of re-calculating GST exemption, the taxpayer would attach a statement that his or her allocation of GST exemption in a prior year is void, and a copy of the computation of the resulting exemption allocation and the amount of exemption remaining available.

We've made it through another income tax filing deadline. Enjoy the respite and the spring weather.

Mr. Gilboy is a partner at the boutique estate and trust planning and administration firm of Gilboy & Gilboy LLP located in Philadelphia, Pennsylvania. He is a current co-chair of the tax committee of the Philadelphia Bar Association Probate and Trust Law Section and a member of the Executive Committee. He has been named a "Pennsylvania Rising Star" by Super Lawyers from 2013 through 2017.

January Luncheon Program

Sponsored by:

BESSEMER TRUST

Scott Lillis (sponsor), Huldah A. Robertson (President) and Dana G. Fitzsimons (speaker)

February Luncheon Program

Sponsored by:

AB BERNSTEIN

Huldah A. Robertson (President), Tara Thompson Popernik (speaker) and Donald Braun (sponsor)

NAEPC® Notes

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 Journal of Estate and Tax Planning is one of the many features available to you on the NAEPC website. A new issue will be posted within the next month. Some recent articles of interest from the December issue include;

Estate Planning Traps That Have Nothing to Do With Estate Taxes by Stuart M. Horwitz, JD, LLM (Taxation) and Jason S. Damicone, JD, LLM (Taxation).

The Kloiber Case: Delaware Dynasty Trust Broken into Pieces by Beneficiary's Divorcing Spouse by Steven J. Oshins, JD, AEP® (Distinguished).

Little Things Mean A Lot: Tips For Dividing Art And Collectibles In Divorce Or Death by Morgan Rigaud, Qualified IRS Appraiser.

Articles of original content continue to be sourced for future issues. If interested, contact: editor@naepcjournal.org

You may not be aware that you can sign-up to have the Journal delivered to your in-box. To avail yourself of this free benefit go to the NAEPC homepage at naepc.org and use the Publications & Events tab. The Journal is the third item on the drop-down menu. You can also browse back issues.

The Robert G. Alexander Webinar Series continues on the following dates and features the following national speakers:

May 10, 2017 at 3:00 PM EST,
Speaker: Diana S.C. Zeydel, JD, LLM, AEP® (Distinguished)

TOPIC: "Effective Estate Planning for Diminished Capacity; Can You Really Avoid A Guardianship?"

June 14, 2017 at 3:00 PM EST,
Speaker: Lee J Slavutin, MD, CLU® AEP®, ChFC®, MSFS, AEP® (Distinguished)

TOPIC: "A Potpourri of Planning Ideas with Life Insurance"

July 12, 2017 at 3:00 PM EST,
Speaker: Philip Cubeta, CLU®, ChFC®, MSFS, CAP®

TOPIC: "Meet the Rileys: Can this Case be Closed?"

August 9, 2017 at 3:00 PM EST,
Speaker: Gideon Rothschild, JD, CPA, AEP® (Distinguished)

TOPIC: "Alternatives to Self-Settled Trusts"

September 13, 2017 at 3:00 PM EST,
Speaker: Richard A Oshins, JD, LLM, MBA, AEP® (Distinguished)

TOPIC: "The Perfect Modern Trust Including Income Tax Sheltering Opportunities"

Please check the website for the fees.

NOTE: If you cannot attend on the day of the webinar, you can listen at a later date, and will be sent the appropriate link.

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 54th Annual NAEPC Advanced Estate Planning Strategies Conference will be held in New Orleans, LA from November 15, 2017 thru November 17, 2017. I hope you'll join me there for this great educational and networking opportunity. This event is open to ALL members!

Annual Meeting, Seminar & Reception

Thursday, May 18, 2017

The 2017 Annual Meeting, Seminar and Reception will take place at Philadelphia's newest museum, The Museum of the American Revolution. Following the program, a cocktail reception with open bar and dinner buffet will take place in the Grand Court and attendees will have access to tour the museum.

"The Critical Importance of Tax Free Compounded Returns in Estate and Financial Planning--and How to Obtain Them"

This presentation will discuss various methods that advisers have attempted to use to build significant wealth, including Value Investing, Technical Analysis, and Algorithmic Trading, and explain why overtime each of these has failed to continue to produce positive returns. The discussion will introduce the concept of artificial superintelligence and how it is now being used to produce significant and continuous positive investment returns, regardless of movements in pubic markets.

Speakers:

Jonathan Blattmachr *is a Principal in Pioneer's estate planning advisory group. He brings over 35 years of experience in trusts and estates law.*

Jeff Glickman *is a co-founder and is responsible for trading systems development and technology at J4 Capital, the company for which has has developed a form of artificial super intelligence.*

The Philadelphia Estate Planning Council Welcomes New Members!

January, February and March, 2017

Andrew Addis	R:SK Advisory
Richard Astrella	Star Real Estate Group
Jennifer Bellis	TD Wealth Private Client Group
Andrew Black	Finance of America
Colin Burke	
Mary Condora	BNY Mellon Wealth Management
Philip Cubeta	American College
Edward Dippold	Raymond James & Associates
Keith Eby	Haverford Trust Company
Christine Fodor	Wells Fargo Bank, NA
Bill Francis	University of PA, Wharton
Victoria Gordon	Goldman Sachs & Co.
Anthony Jasienski	DNB First Wealth Management
James Kelly	West Capital Management
Sigrid Lundby	BNY Mellon Wealth Management
Anthony Mento	LIFE Brokerage, LLC
Gina Morelli	Isdaner & Company LLC
Molly O'Brien	Buchanan Ingersoll & Rooney PC
Rebecca Peikes	RSM US LLP
Breanna Raue	Glenmede Trust Company, N.A.
Judy Siderer	Intervention Associates
James Sykes	Isdaner & Company LLC
Emalee Welsh	Morgan, Lewis & Bockius LLP
Neal Wiley	Alexander & Pelli, LLC
Daniel Williams	BNY Mellon Wealth Management
William Winters	Tompkins Wealth Advisors

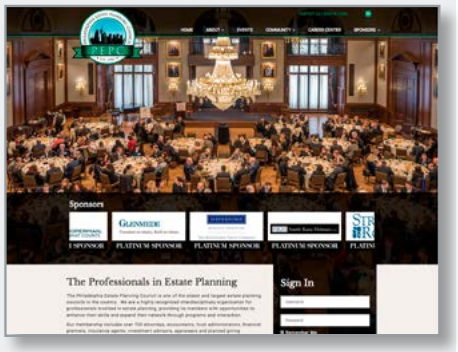
March Luncheon Program

Sponsored by:

BERNSTEIN

Huldah A. Robertson (President), Martin M. Shenkman (speaker) and Tanya Gleyzer and Adam Reid (sponsors)

Be sure to visit the new PEPC website!



www.philaepc.org

Distinguished Estate Planner Award

The Philadelphia Estate Planning Council presented its 2016 Distinguished Estate Planner Award to Nina B. Styker at the January 17, 2017 luncheon meeting at The Union League of Philadelphia. The purpose of this annual award is to honor an individual for outstanding contributions in the field of estate planning.

Nina B. Stryker is a partner with Obermayer Rebmann Maxwell & Hippel LLP, and Chair of the Estate and Trust Department. Ms. Stryker's practice is devoted exclusively to estate and trust law. She has considerable experience in estate planning, guardianship work, estate related litigation and all phases of estate and trust administration.

Distinguished Estate Planners: Paul Heintz (1996), Jack Terrill (2015), Ted Watters (2008), Nina Stryker (2016), Robert Freedman (1999), Al Gibbons (2005) and Eugene Gillin (2006)

Rebecca Rosenberger Smolen presents the 2016 Distinguished Estate Planner Award to Nina B. Stryker

Thanks to all our Committee Volunteers

Annual Meeting
William Haines, Co-Chair
Scott Isdaner, Co-Chair
Stephen Target

Awards
J.R. Burke
Donald DiCarlo
Eileen Dougherty
Jill Fowler
Rachel Gross
John Hook
Scott Isdaner
Betsy Joyce
Kathleen Kinne
Huldah Robertson
Peggy Robus
Richard Schwartz
Douglas Simon
Rebecca Rosenberger Smolen, Chair

Ethics
Martyn Babitz
Richard Bell
Eileen Dougherty, Co-Chair
Samuel Freeman
Glenn Henkel, Co-Chair
Linda Henry
Kelly Johnson
Matthew Levitsky
Skip Massengill
Melinda Rath
Michael Schiff
Mark Sobel

Membership
Michael Angelos
Robert Bacine
Michael Bonventure
J.R. Burke, Chair
Eileen Dougherty
Andrew Haas
William Haines
Scott Isdaner, Vice Chair
Philip Jodz
Caitlyn Kennedy
Samuel Kenworthy
Kathleen Kinne
Robin Manix
Alan Mittelman
Michael Paul
Lonn Selbst
Jeffrey Sloan
Rebecca Rosenberger Smolen
Dennis Springer
Robert Winkelman
Tim Zeigler

Newsletter
Michele Ahwash
Renzo Cerabino
Rick Davis
Michael DeFillipo
Michael Fox
William Hussey
Susan Kavanagh
Samuel Kenworthy
Matthew Levitsky
Victor Levy
Joel Luber
Michael Mallick
Alan Mittelman
Michael Moyer
Mary Lisa O'Neill
Jeffrey Podraza
Peggy Robus, Co-Chair
Jeffrey Sloan
Frank Spezzano
Alan Weissberger, Co-Chair

Nominating
J.R. Burke
Eileen Dougherty
Samuel Freeman
Albert Gibbons
Glenn Henkel
John Hook
Scott Isdaner
Huldah A. Robertson, Chair
Richard Schwartz
Douglas Simon

Outreach
Richard Bell
Alyse Blumberg
Michael Breslow
Jay Cherney
Charles Cutter
Joey Ann Fowkes
Samuel Freeman
Andrew Haas, Co-Chair
William Haines
Philip Jodz, Co-Chair
Kent Keith
Andrew Klazmer
Mary LeFever
Steve Mangine
Terri McDermott
Tom Mesko
John Reilly
Joseph Roberts
Kip Schaefer
Kevin Sheehan
Douglas Simon
Rebecca Rosenberger Smolen

Programs
Mark Alvino
Mark Blaskey
David Bloom
Michael Bonventure
J.R. Burke, Vice Chair
Lawrence Chane

Thanks to all our Committee Volunteers continued

Rick Davis
Erik Evans
Alexia Fishman
Samuel Freeman
Albert Gibbons
Andrew Haas
William Haines
Bob Hart
Scott Isdaner
Philip Jodz
Kathleen Kinne
Alan Mittelman
Michael Moyer
David Peppard
Melinda Rath
Huldah Robertson
Karen Robinson
Peggy Robus
Cliff Schlesinger
Richard Schwartz, Chair
Kevin Sheehan
Douglas Simon
Rebecca Rosenberger Smolen
David Watson
Anthony Weiss
Andrew Wilusz
Jeffrey Winkleman

Roundtable

Bob Hart
Thomas McDonnell, Co-Chair
Matthew Ostrelich, Co-Chair

Social

David Anthony
Richard Astrella
Christopher Borden, Co-Chair
Frank Branca
Morris Gocial
Sheila Gorman
William Haines
John Hook
Jerry Jevic
Stuart Katz
Marc Klebanoff
Chip Lee
Mary LeFever
Andrei Lemeshevski
Kenneth Mann
Kevin Manning, Co-Chair
Robert Miller
Vince Mitchell
Amy Parenti
Peggy Robus
Laura Weiner
Tim Zeigler

Sponsorship

John Hook, Co-Chair
Michael Paul, Co-Chair

Technology

Alyse Blumberg
Michael Bonventure
Eric Hildenbrand, Chair
Julie Olley
James Revels
Jordan Rosenblatt

Women's

Joey Ann Fowkes, Co-Chair
Jill Fowler, Co-Chair

Mark Your Calendar

Tuesday, September 19, 2017
Topic: "Divorce and Estate Planning"
Speaker: Jeremiah W. Doyle, IV
BNY Mellon Wealth Management
Boston, MA

Tuesday, October 17, 2017
Topic: "Putting It On & Taking if Off: Tax Basis Management in the New Paradigm"
Speaker: Paul S. Lee
Northern Trust
New York, NY

Tuesday, November 14, 2017
Watch for more information soon!

Tuesday, January 9, 2018
Topic: "Business Succession Planning"
Speaker: Turney P. Berry
Wyatt, Tarrant & Combs, LLP
Louisville, KY

Tuesday, February 13, 2018
Watch for more information soon!

Tuesday, March 20, 2018
Watch for more information soon!