MSBA
SECTION OF ESTATE AND TRUST

Newsletter

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Notes From The Chair

By Deborah A. Cohn, Esq.
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An important function of the Maryland State Bar Association's Estates and Trust Law Section is identifying legislative opportunities to clarify, simplify or improve Maryland law so as to better enable individuals to preserve and plan the disposition of their assets. Promoting efficient and easier administration of estates and trusts is another high priority. Each year, the Estates and Trust Law Section works with legislators to achieve these goals through promoting the Section's own legislative agenda and assisting legislators in developing their legislative ideas in a manner consistent with the Section's legislative priorities.

Mary Beth Beattie, Chair-Elect of the Estates and Trust Law Section through June, 2013, and Jonathan G. Lasley, a member of the Section Council, spearheaded the Estates and Trust Law Section's legislative efforts in 2012-2013 and deserve our special gratitude.

This column highlights some legislative victories and efforts, starting with those bills that were enacted and, as of the time of submission of this column, await the Governor's signature.

I. Modified Administration and Inheritance Tax (SB 170/HB 858): Currently, certain estates may pursue modified administration if the personal representative elects modified and all residuary beneficiaries consent. Modified administration requires fewer and less extensive filings, offers an expedited timetable, and in the right circumstances can be significantly less burdensome and costly for the estate. Modified administration, however, is not generally available for estates having residuary beneficiaries who are subject to inheritance tax.

Current law has several shortcomings. First, when the residuary beneficiary is a trust, the identity of the trustee rather than the identity of the trust beneficiaries determines whether the estate qualifies for modified administration. In contrast, inheritance tax is imposed or not imposed based on the identity of the beneficiaries, not the trustee.

Second, current law does not provide a simple mechanism for the personal representative to handle probate assets

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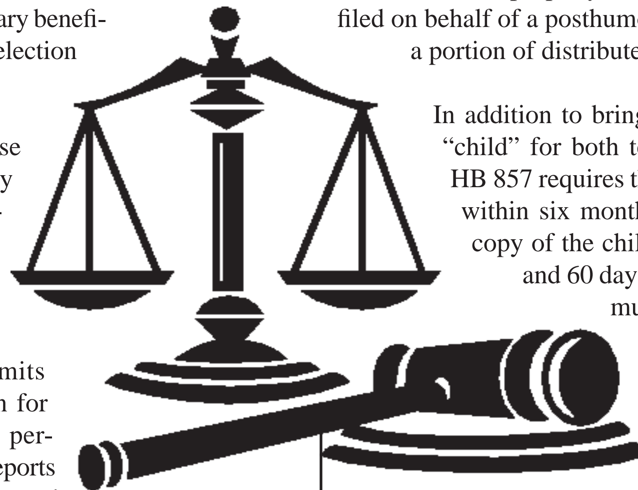
identified after the close of modified administration. For after-discovered assets, the personal representative must use regular administration.

Third, if current trust beneficiaries are exempt from inheritance tax, but remainder beneficiaries are subject to that tax, typically inheritance tax is imposed only when the trust distributes to the non-exempt remainder beneficiaries. The residuary beneficiaries may, however, elect to prepay the inheritance tax by filing an election with the Register of Wills for the county in which the estate inventory was filed. Estates using modified administration do not file inventories, meaning the residuary beneficiaries have no place to file the election to prepay taxes.



SB 170/HB 858 deals with these issues. If a trust is the residuary beneficiary, the legislation permits modified administration if the current trust beneficiaries are exempt from inheritance tax. The identity of the trustee is not determinative. It permits use of modified administration for after-discovered assets if the personal representative promptly reports the property on a final report and promptly distributes that property. Finally, since all estates file information reports, the legislation requires that the residuary trust beneficiaries' election to prepay inheritance tax be filed in the county where the estate filed its information report (rather than an inventory).

II. Posthumously Conceived Child (HB 857): In the 2011 Session, the General Assembly changed the definition of "child" in Est. & Trusts §1-205 and §3-107 to include a child conceived from the genetic material of a deceased person if that person consented, in a written record signed on or after October 1, 2012, (i) to the use of his or her genetic material for posthumous conception in accordance with the requirements of Health-Gen. §20-111 and (ii) to be the parent of the child posthumously conceived using his or her genetic material.

In addition, for an after-born "relation" to be entitled to a distribution in his or her own right, the posthumously conceived child must be born within two years after the death of the individual who had provided the requisite consents. This "two year rule," however, applied only to intestacy (Est. & Trusts §3-107) but not for other purposes (Est. & Trusts §1-205, which defines "child" for purposes other than intestacy). Applying the two-year rule only for intestacy purposes potentially created significant delays and risk with respect to distribution of testate estates and non-probate assets since the law provided no termination of the period in which an after-conceived child could be born. The current law contained no requirements or guidance for filing of the written consents or giving notice of the birth of the posthumously conceived child. This absence created a similar risk of delay and improper distribution of assets. The current law set the stage for litigation between those holding the decedent's property and those claiming title to it. Likewise, transferees of a decedent's property might become parties to lawsuits filed on behalf of a posthumously conceived child claiming a portion of distributed property.

In addition to bringing parity in the definition of "child" for both testate and intestate decedents, HB 857 requires the filing of the written consents within six months of death and the filing of a copy of the child's birth record within 2 years and 60 days after death. These documents must be filed with the Register of Wills for the county in which the decedent's estate is probated, or if there is no probate estate, then in the county of the decedent's domicile. For any decedent dying between October 1, 2012, when the original law became effective, and May 30, 2013, these documents must be filed by December 1, 2013. These filing requirements are designed to put persons holding property of the decedent on notice of a potential posthumously conceived child and to give the holders of property a place of record to which to refer before distributing property. HB 857 also includes provisions limiting the liability of individuals who, without actual knowledge of the existence of a posthumously conceived child, transfer or receive probate and non-probate assets upon the death of an individual.

HB 857 makes no changes to a posthumously conceived child's rights to Social Security benefits, allows for certainty in the distribution and receipt of the decedent's property to take place within a reasonable period of time, and likely will reduce litigation.

III. Interests in Grantor and Qualified Terminable Interest Property Trusts (HB 859): A "grantor trust" is a trust the income of which is taxed (for income tax purposes) to the trust's grantor rather than to the trustee. Under certain

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circumstances, the grantor trust will not be included in the grantor's taxable estate for estate tax purposes. A qualified terminal interest property ("QTIP") trust is a trust established by a grantor for his or her spouse under restrictions that allow the trust to qualify for the estate or gift tax marital deduction under the Internal Revenue Code.

Under existing Internal Revenue Service pronouncements, the grantor may retain a limited interest in these two types of trusts without prejudicing their intended estate or gift tax effect. The trustee of a grantor trust may have the discretion to reimburse the grantor for the income tax that the grantor is required to pay on the trust's income without causing the trust property to be included in the grantor's estate. With an inter vivos QTIP trust, if the beneficiary spouse predeceases the grantor, the grantor may in certain circumstances retain a remainder interest in the trust after the spouse's death without impacting the estate tax benefits.

Recent developments in the law pertaining to creditors' rights in trust property threaten the continued viability of these estate planning strategies. The United States Court of Appeals for the Fourth Circuit, citing a rule set forth in the Restatement (Second) of Trusts, § 156(2) (1957), stated that "[t]he creditors of a grantor may reach the assets of a [Maryland] spendthrift trust to the maximum extent that the trustee might apply them for the use and benefit of the grantors." In the case of a grantor's interest in a grantor trust, under which the trustee may reimburse that grantor for the income taxes paid on the trust income, this ruling would mean that the grantor's creditors could attach trust property to the extent of the potential reimbursements available to the grantor. Similarly, under this court decision, the grantor's creditors could reach the grantor's remainder interest in a QTIP, to the extent of the trustee's discretion to distribute trust assets to the grantor. In each case this result could apply even though the creation of the trust did not violate Maryland's law of fraudulent transfers. In addition, with respect to the QTIP, this result could apply even though the grantor's spouse is treated as the owner of the trust property for estate tax purposes.

With respect to a QTIP trust, a second problem arises if the grantor's creditors can reach trust assets as a result of the grantor's remainder interest. Under federal Treasury Regulations, "[a] power of appointment exercisable for the purpose of discharging a legal obligation of the decedent . . . is considered a power of appointment exercisable in favor of the decedent or his creditors." The grantor's remainder interest in the inter vivos QTIP, allowing the trustee to distribute trust property to the grantor after the death of the grantor's spouse, would, to the extent the courts determine that this remainder interest is subject to the claims of the grantor's creditors, be a general power of appointment resulting in estate tax inclusion of the property subject to the power. As such, even though the trust property it is taxed for estate tax purposes at the death of the original beneficiary spouse, the trust property remaining upon the grantor's later death will again be taxed in the grantor's estate to the extent the trustee may apply that property for the grantor's use and benefit.

HB 859 creates a new Est. & Trusts §14-116 that limits the applicability of the general rule in the Restatement (Second) of Trusts, §156(2) as it might apply in two limited situations. HB 859 applies to grantor trusts where the grantor's interest in the trust consists of the trustee's authority to pay or reimburse the grantor for any tax on trust income or principal that is payable by the grantor under the law imposing the tax. With respect to inter vivos QTIP trusts, HB 859 applies to the grantor's interest in the trust income, principal, or both, following the termination of the spouse's prior interest in the trust.

To avoid the general power of appointment estate tax problem, HB 859 precludes creditors of grantors with these limited interests in a trust from attaching, exercising, reaching or otherwise compelling distribution of (1) any principal or income of the trust; (2) any principal or income of any other trust to the extent that the property held in the other trust is attributable to the original trust; (3) the grantor's interest in the trust; or (4) the grantor's interest in any other trust to the extent that the property held in the other trust is attributable to the original trust.

As a result of this legislation, Maryland would join the ranks of states allowing, at least in these limited circumstances, domestic self-settled asset protection trusts.

IV. Slayer's Statute (Ann Sue Metz Law) (HB 1211/SB 489): The common law slayer's rule is based on the principle that one should not profit from one's wrongful act. Although the common law slayer's rule is fairly straightforward in theory, its administration can be difficult. As a result, most jurisdictions have enacted a statutory slayer's rule.

Under Maryland's common law rule, a person is disqualified to inherit if he or she "feloniously" kills the person from whom he or she would otherwise inherit. However, not all killings trigger the rule. An individual who kills his or her spouse through gross negligence could inherit. *Schifanelli v. Wallace*, 271 Md. 177, 315 A.2d 513 (1974). Likewise, a slayer deemed not culpable as a result of mental illness may

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inherit even after an intentional killing.

Where the slayer was proscribed from inheriting, Maryland common law precluded the slayer *and his or her heirs and personal representatives* from taking. The normal intestacy statutes would not apply. In contrast, in a testate estate, Maryland common law permitted the default beneficiaries under the will to take in lieu of the slayer, even though these same persons might have been disqualified from taking (i.e., as the slayer's heirs) had the decedent died intestate.

HB 1211 defines a "disqualified person" as a person who *feloniously and intentionally* kills, conspires to kill, or procures the killing of the decedent. A disqualified person is prevented from inheriting, taking, enjoying, receiving or otherwise benefitting from the death, probate estate or non-probate property of the decedent, or from receiving a power of appointment conferred by will or trust or from serving as a fiduciary of the decedent. The disqualified person cannot receive the decedent's share of joint property and is not entitled to receive insurance proceeds or benefit from any other contractual arrangement.

For purposes of determining who may inherit or benefit from the death of the decedent, the slayer is deemed to have disclaimed any interest which would have passed to the slayer from the decedent.

Because the "disqualified person" is defined as one who *feloniously and intentionally* kills, conspires to kill or procures the killing, yet the slayer's statute deals with civil matters, the legislation inherently raises evidentiary questions, particularly because the civil matter may be resolved before any criminal proceeding. The concern was that if the criminal trial of the alleged slayer had not concluded (including appeals), evidence provided in the civil suit to determine if the slayer could inherit might adversely affect the slayer's defense in the criminal proceeding. This risk might dissuade the alleged slayer from testifying or proffering certain evidence in the civil proceeding. To ameliorate this risk, HB1211 provides that on the request of a party to the civil proceeding, the civil proceeding "shall be stayed" pending a final judgment in the criminal proceeding.

HB 1211 provides that a civil proceeding generally must be filed until three years after the decedent's death. However, if within the three years following the decedent's death, the alleged slayer has been criminally charged with feloniously and intentionally killing, conspiring to kill, or procuring the killing of the decedent, the civil proceeding may be filed within one year from the filing of the criminal charge. Absent a criminal conviction, which is conclusive for purposes of the slayer's statute, disqualification under the slayer's rule occurs only if supported by a preponderance of the evidence.

HB 1211 also provides protections for bona fide purchasers and third parties who distribute property without notice of an allegation that a person is disqualified. The disqualified person must return any property received erroneously.

V. Marital Deduction and Subtraction Modification for Health Insurance: SB 658/HB 1031 clarifies that property left outright to a spouse or in a Maryland-only QTIP trust qualifies for the Maryland estate tax marital deduction if Maryland recognizes the marriage of the decedent and surviving spouse. This allows same-sex spouses the same marital deduction treatment as heterosexual spouses for Maryland estate tax purposes regardless of the result of the pending Supreme Court decision with respect to DOMA. It also deals with the Maryland income tax treatment of certain costs incurred by a taxpayer to provide health insurance to the taxpayer's spouse.

VI. Guardianship Accounts - Forms and Limits: SB 168/HB 8 increases from $75,000 to $200,000 the amount that a guardian may hold in any one account in any one financial institution.

VII. Vehicle Laws - Title and Registration - Transfer to Surviving Spouse (SB25/HB725):

Currently, if a motor vehicle is *jointly titled* between spouses, then on the death of the first spouse, the surviving spouse must apply and pay for a new certificate of title. In addition, until the new certificate of title is issued and the vehicle is re-registered, the surviving spouse may not drive the vehicle. SB25/HB725 provides that until the registration in the names of both spouses expires, the surviving spouse may drive the vehicle based on the joint registration. The surviving spouse does not need to apply for a new certificate of title until the earlier certificate expires. In addition, the surviving spouse may not be charged a fee for the new certificate of title.

VIII. Family Allowance: SB 1968 increases the family allowance to $10,000 for a surviving spouse (from $5,000 under current law) and to $5,000 for a minor child (from $2,500 under current law).

IX. Special and Supplemental Needs Trusts – Regulations: SB 332/HB 1328 prohibits state agencies that provide public benefits to individuals with disabilities from adopting

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regulations that are more restrictive than federal or state law (including statutory and common law). The bill also precludes state regulations from requiring disclosure of a beneficiary's personal or confidential information without the beneficiary's consent. Finally, the bill clarifies that a court order is not required to authorize disbursements from a special or supplemental needs trust.

Several additional bills of interest were defeated this year, including:

Maryland Trust Act: While not yet enacted, HB 437/SB753, the Maryland Trust Act, continued to progress through the legislative process, passing the House but needing more work in the Senate. The goal is to codify common law, with certain modernizing features, so that one can more easily determine the law without heavy reliance on legal research. More and more families use trusts, often naming friends or family members as trustees. Codifying Maryland trust law, making it more accessible to both professional and non-professional trustees, is thus an important goal.

Legislation was first introduced in the Maryland General Assembly in the 2011 Session but ran into significant opposition by the Maryland Association for Justice which represents Maryland trial lawyers. After discussions with the trial lawyers, and with input from members of the legislature, HB 437 and SB 753 were filed in the 2012 session. The House passed HB 437 with several significant amendments and the bill was assigned to the Senate Judicial Proceedings Committee, where it died. The supporters of this legislation are hopeful that the Maryland Trust Act will be reintroduced next session.

Administration of Internet-Based Accounts: SB 29 would have allowed a personal representative to take control of, conduct, continue, or terminate an account of a decedent on a social networking website, microblogging or short messaging service website or electronic mail service website. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is working with digital asset providers to develop a comprehensive solution that will provide personal representatives and trustees the access to and control over digital assets that they need to administer estates and trusts effectively while adhering to privacy laws. Because a national approach to the issue may be forthcoming shortly, the bill was defeated after discussions with the sponsor.

Qualified Family-Owned Business Property: HB 722 would have excluded $5,000,000 of "qualified family-owned business property" from the Maryland estate tax and capped the tax rate for qualified family owned business property at 5%. Unlike the QFOBI rules of §2057 of the Internal Revenue Code, this bill was patterned after the family farm legislation from the 2011 Session. The sponsor agreed to a summer study of this issue.

Standard for Qualification as a Personal Representative or Guardian: The Petition for Probate, which currently is signed under penalty of perjury, requires the petitioner to affirm that he or she has not been convicted of a serious crime. The definition of "serious crime" is not found in the Maryland Code or the Maryland Rules. SB 649 would have provided a definition for "serious crime" for purposes of qualifying as a personal representative or a guardian. The bill passed the Senate but died in the House.

Unauthorized Use of Name or Likeness: HB 1271 would have established a new property right, namely a right of publicity or use of personality. This right would be transferable at death and could be enforced by designated beneficiaries and certain heirs. Maryland law currently does not recognize a right of publicity as a property right. Instead, Maryland courts have ruled that a third party who appropriates to his or her own use and benefit the name or likeness of an individual may be liable for damages based on a tort action for invasion of privacy. The privacy right, however, terminates upon the death of the famous personality. Over two-thirds of states recognize a right of publicity under common law or by statute. This bill attracted significant interest from the motion picture industry and was ultimately withdrawn by the sponsor.

Maryland Uniform Real Property Transfer on Death Act: HB 946, a Maryland version of a NCCUSL proposal, would have established a method by which a person may avoid probate by naming the beneficiary of real property on a deed while reserving the ability to continue to possess the property and dispose of it during life. Similar to pay-on-death and transfer-on-death designations used for non-probate transfers of bank accounts and brokerage accounts, respectively, this method of transferring real property was promoted as an easy method by which individuals could avoid probate on the transfer of real estate. Several other states have enacted similar legislation. The Section Council and the Real Estate Section opposed the bill for various reasons, and the bill was withdrawn after an unfavorable report in the House Judiciary Committee.

The Section's legislative successes this year and much of this column are attributable to the efforts of various current or former members of the Estates and Trust Law Section Coun-

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Reality Bytes 14.0

By Robert C. Young, Esq.
Stewart, Plant & Blumenthal, LLC

You can find an interactive online version of this column at: http://technobytesmd.blogspot.com/

I missed an installment last fall, so I am reaching back a bit to cover things that I noticed at the end of last year and then moving forward into this year:

I've Just Seen a Face

One of my favorite ways to keep up with technology is to listen to the daily podcast from Marketplace Tech Report. Back in October, they ran an interesting story about facial recognition scanning at a shopping mall in South Korea. This new commercial application of face-recognition technology combines digital photography with computer search algorithms. A digital camera captures a photograph of your face as you walk by and the search engine searches for your image on the various databases, including social media, like Facebook and Google+ or new photographic social applications such as Instagram. The objective is to identify the individual in the original image and any associated data available for that person. Put more simply, the objective is to cash in on your identity.

In this context, identity means facts about you that people will pay money to know. Who would pay for this information? People who want to use those facts to sell you something. Follow the money.

Thus, the Korean shopping mall installed these facial recognition kiosks. After capturing and searching a person's image, there follows an instantaneously display advertising directed specifically to that person's interests when matched to the products sold at the mall. The technology matches a person's likely shopping interests with the retailers located in the mall. If you like books, it could display an ad for the mall's bookstore (if there still is one in the mall). If the search finds that you have an interest in outdoor activities, it may display an ad for sporting goods or an outdoor activities store. If a birthday or anniversary is coming up in your family, it could display gift suggestions -- jewelry, ties, or toys.

Although you may think it exists only in movies or with secret government anti-terrorist squads, the facial recognition technology is out there. You may doubt that you put this kind of bankable personal information out there to be found by a search engine. Maybe that is true; maybe you are a Luddite who lives off the grid (and therefore, you are unlikely to be walking into a shopping mall in any event). True, there are some out there who have resisted the temptation of Facebook or Twitter or Google+ or Instagram, etc. But there are millions upon millions out there using social media. What about LinkedIn? Does your firm or business have a website with your picture and profile on it? Have your children "tagged" you in photographs that they posted on Facebook? Or perhaps your loving parents are on Facebook and have posted some of their family pictures?

It is not easy to remain obscure and faceless these days. You may be surprised to find out what information is out there about you. Search engines are able to search it and advertisers are able to use those searches to identify you and your likes. How do you think Google makes its money? It is not a non-profit. The information that you search for through Google reveals your interests, and Google channels search results and advertisements to your search result page based on those interests. So do not be surprised if you walk into a mall or shopping center in the near future and find a kiosk flashing pictures of products directed specifically to your attention.

Big Brother Part I

The Baltimore Sun reported last fall that the Mass Transit Administration (MTA) has been eavesdropping on its drivers and passengers. The stated purpose is to achieve greater security and safety on public transportation. The MTA believes that this technology will aid in investigating crimes on public transportation.

"We want to make sure people feel safe, and this builds up our arsenal of tools to keep our patrons safe," said Ralign Wells,

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cil of the Maryland State Bar Association. Special thanks go to Mary Beth Beattie, Jonathan G. Lasley, Richard T. Wright, John P. “Jack” Edgar, John A. Cogar, Angela M. Vallario, Danielle M. Cruttenden, Charles S. Abell, Allan J. Gibber, Anne W. Coventry, David C. Dembert, and Frederick R. Franke, Jr.

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MTA administrator. "The audio completes the information package for investigators and responders."

Of course, this is often the stated goal of surveillance of all kinds. The legal issues with other types of surveillance also are engaged here: privacy and possible misuse of information. Arguably, privacy is addressed by the fact that this is public transportation, so there should be no expectation of privacy. In application, however, it may not be so clear.

More of a concern, however, is what the MTA does with the information that it gathers. Much of this information will have nothing to do with crime, intended or perpetrated. Much of it may be everyday conversation about mundane affairs. Somewhere in the middle, however, is likely to be information of a sensitive nature, something that people did not intend to be public knowledge. What if the conversation has nothing to do with safety on the MTA, but does involve criminal activity elsewhere? What if it deals with something very personal to the passenger or driver, something that they may have told another in confidence, but now finds its way into the MTA surveillance database?

Buses have had surveillance cameras for years. Voice recording microphones are now being incorporated. Signage on the bus lets drivers and passengers know.

The State's Attorney Office thinks that the system passes legal muster. The ACLU disagrees:

"People don't want or need to have their private conversations recorded by MTA as a condition of riding a bus," said David Rocah, a staff attorney with the Maryland chapter of the ACLU. "A significant number of people have no viable alternative to riding a bus, and they should not be forced to give up their privacy rights."

State legislators have indicated that they will look at this issue. Next time you ride the MTA, be careful what you say and do.

Big Brother II

If you are worried that the MTA is listening to your conversations on the bus, you may have some sympathy for what happened to General David H. Patraeus, who resigned last year as Director of the CIA after disclosure of an extra-marital affair. The extra-marital affair part is certainly scandalous enough, but what maybe more shocking is how Patraeus was undone by a series of events when law enforcement and government investigators looked into his activity in cyberspace. The New York Times covered the details in a News Analysis piece last November. The Times correctly noted that cyberspace investigations can rapidly escalate far beyond their original, often limited, scope simply because of the wealth of information that is exposed by even a relatively focused inquiry. All of the data and information that we have sitting on our computers and online suddenly may fall under the eyes of investigators looking for something entirely different. The Times article notes that the ACLU seems to be lamenting Patraeus' undoing, at least as to the investigative methods used and the privacy rights trampled (if not actually endorsing Patraeus himself, with whom the ACLU may have other concerns). It is also highly ironic that America's spy chief (the Director of the Central Intelligence Agency) was undone by cyber investigators combing through his email. Perhaps, as the Times notes, it is better that our law enforcement folks caught up with Patraeus before another country's spies did.

Lost

Since the passing of Steve Jobs, Apple has moved forward under new leadership. No doubt some new Apple developments were in the pipeline before Jobs died and he had some degree of influence and role in the decision-making. I doubt, however, that he would have approved of the launch of the Apple Maps application.

This is old news now for many of us who have Apple devices and for those of you who follow Apple's latest product changes and development. For those who need a quick summary, Apple launched last year a new version of its operating system for iPods, iPhones and iPads, designated iOS 6.0. This new operating system brought many improvements to Apple mobile devices. It also brought a significant change in a key default application that Apple installs in all its devices.

When you get a new iPod, iPhone or iPad now, it comes with these native applications pre-installed. They include basic Apple apps for email, text messaging, the Apple App store, contacts, and now Apple's application for finding places and getting directions, simply called Maps.

Until iOS 6.0, Apple had used Google Maps as its native geographic application. Each of these mapping applications has several basic functions: looking up addresses or points of interest, in your locality or around the world and displaying them on a map; using geo-positioning software ("GPS") in the device to coordinate with your current location and provide a set of directions to your destination. The new generation of these applications competes directly with commercial GPS

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devices by adding a voice-over that narrates step-by-step instructions for reaching your destination.

The Google Maps mobile application came with a long track record of success behind it from similar software on Google's website. Many people (including me) loved Google Maps online and loved its mobile app on devices.

Apple, however, had a kind of love/hate relationship with the Google Maps app. It was a wonderful addition to the native applications that came with your Apple device, but Google was competing with Apple in the mobile device arena by developing and promoting its operating system for Android mobile devices. So Apple replaced Google Maps on its devices with a native Apple Maps app, even going so far as to eliminate the option to use Google Maps. The problem, however, is that very often the directions that Apple Maps provides are wrong. Within days of the release of iOS 6.0, commentary in print and cyberspace was buzzing with complaints and examples of how faulty the Apple search results were. One example sticks clearly in my mind: the Apple Maps app misplaced an Apple store in a major U.S. city, putting in on the wrong side of the street.

Here is my own personal comparison. By chance, before I downloaded iOS 6.0 on my iPhone, I took a trip to Maine with my wife to attend a wedding; as we had never been to Maine before, we included a vacation to sightsee. The Google Maps app on my iPhone was unfailingly accurate in determining our destination and plotting a course that led exactly to the place we were going. We used this repeatedly all over Maine and into Canada without error. When we returned home, I downloaded iOS 6.0 with the Apple Maps app. In its initial performance, it was batting about .250. It can get you to the general vicinity of your destination, but it errs frequently when it tries to close in on the exact location. And the errors can be somewhat dangerous. Here is the most egregious example. I was going to a client's house for a meeting. I had not been in several years, so I put the address into my iPhone and Apple Maps provided a set of directions. All was fine until I was nearly at the client's home. Apple Maps indicated that I should make a left turn onto the client's street from the road on which I was traveling, but the client's street did not even intersect with that road. Fortunately, although it had been several years, I eventually found a road that looked familiar and, by turning onto that, was able to find an intersection to the client’s street about a quarter mile along that road.

Apple finally had to make a public apology for these glaring defects in its search functions and mapping directions. It scrambled to improve Apple Maps, with some success. More recently, Apple finally capitulated and brought back the new and improved free Google Maps application on the Apple platform. I recently used both Apple Maps and Google Maps on another trip to new places, this time Southern California, sometimes using them simultaneously. Apple Maps is greatly improved and I will concede that I am not as familiar with the improved version, because I have gone back to Google Maps since it became available. Still, I would give Google Maps a higher rating.

Many people said that this would never have happened if Steve Jobs was still around; maybe so. This was a major embarrassment for Apple, and at least one key Apple executive responsible for the Apple Maps launch departed Apple in the wake of its rudderless debut. Apple has improved Apple Maps and it is a more respectable piece of software now. But Apple also had to concede a place to Google Maps in the Apple Apps Store and on Apple devices. In the end, that was probably better than having users defect to Android phones to find their way to destinations new and old.

Spam, Spam, Spam ...

This post is especially short, because the source for it is Peter Lewis, and he is a much better writer and it is his personal story. In the wake of the bombings at the Boston Marathon on April 15, Peter began encountering new waves of spam which set his blood to boil. One particularly distasteful and macabre batch used the tragedy in Boston to entice readers. After a teaser message, readers were given a link to further information. Clicking on the link would result in malicious software being loaded onto the computer. Another wave involved email received through Facebook. By referencing one person that Peter knew, the Facebook email appeared legitimate -- an extension of Facebook's "friend of a friend" connectivity designed to build ever wider circles of interaction among users. The Facebook email, however, also contained a malicious link. Peter dashed off a hasty post to his Facebook friend: “Friends don’t let Facebook friends spam other Facebook Friends." You can read Peter's full, much more colorful story in his column Words & Ideas at www.peterlewis.com.

Planning Your Digital Afterlife -- Google-style

I have written before about the digital footprint that we are all creating and will leave behind when we die. Examples: personal information, photographs and other memorabilia on Facebook or other social media; customer accounts with

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online services like iTunes or Amazon; playlists on Spotify; and personal files stored in the "cloud" that may back up everything from personal journals to your banking and tax records; not to mention the digital archive of email, Twitter posts, listservs, and blogs like Reality Bytes. There are significant issues over who controls all this after you are gone. There are contractual agreements with providers of these services in cyberspace. Some states have enacted statutes to establish who has authority over and rights to these digital remains. Maryland considered such legislation in its recent session, and the Uniform Law Commissioners are working on a model act.

Now, one of the most significant players in this domain, Google, has set forth a policy that it labels: "Plan your digital afterlife with Inactive Account Manager." Google begins this policy statement by saying:

> Not many of us like thinking about death — especially our own. But making plans for what happens after you're gone is really important for the people you leave behind. So today, we're launching a new feature that makes it easy to tell Google what you want done with your digital assets when you die or can no longer use your account.

What follows is really the introduction to an application, the aforementioned Inactive Account Manager (" not a great name, we know"), which enables Google users to make decisions about what data Google will delete or deliver to trusted contacts after a fixed period of inactivity. Giving you some idea of the scope of this application, Google states that this services covers:

> Data from some or all of the following services: +1s; Blogger; Contacts and Circles; Drive; Gmail; Google+ Profiles, Pages and Streams; Picasa Web Albums; Google Voice and YouTube.

"Inactive" is certainly an interesting euphemism for death, but Google has a verification warning before it will do anything with your information. It will send a text message to your cell phone and an email to your secondary address provided to Google. You may have noticed, as I did, a recent prompt from Google when you logged in asking you to update, verify or provide a cell phone number and a secondary email address. There is a sort of leap of faith here that you have both a cell phone and a secondary email address, but it is probably the most reasonable approach.

I would urge all readers to check out Inactive Account Manager and post any comments or questions online at my blog version of Reality Bytes (http://technobytesmd.blogspot.com/).

SEARCHING THE MSBA ESTATE AND TRUST LAW EMAIL LIST ARCHIVES

For those persons wishing to review past messages on the MSBA Estate and Trust Law Email List, they are archived and can be accessed as follows:

1. Enter the following address in your Internet browser: www.msba.org/?lyris
2. Login using the email address used on the Email List.
3. You will then see listservs of those lists you are subscribed to.
4. Choose the list you wish to view.
5. You will then see a list of recent messages.
6. To search past messages choose "search" from the navigation menu on the left.
7. By using the advanced search options you can search the archives for particular words in the entire message, header, or body, and you can exclude words from the search.

Commission Rates of Trustees in Judicial Sales (Revised)

Compiled by Walter B. Childs, Esq.
Linowes and Blocher LLP

The Maryland State Bar Association's Estates and Trust Law Section Council recently conducted a survey of the Commission rates of trustees in judicial sales across the state. An earlier article on this topic published in the Spring 2012 Newsletter contained an error which has been corrected below. Those results are compiled here, organized by Circuit and County.

Court Auditors follow the rates established in the Deed of Trust or Court Order. If there are none, the following limits apply:

Circuit	County	If No Rates are Fixed in a Deed of Trust or Mortgage	Where Published
First	Wicomico, Worcester, Dorchester, & Somerset	10% on first $3,000, 5% on balance	First Judicial Circuit Court Rules, then Administrative Order 2011-13
Second	Talbot, Caroline, Cecil, Kent, & Queen Anne's	10% on first $3,000, 5% on balance	Second Judicial Circuit Court, Former BR Rule
Third	Harford & Baltimore	10% on first $3,000, 5% on next $50,000, 1% on balance	Old BR Rule 3 schedule for the Third Circuit
Fourth	Allegany, Washington, & Garrett	10% on first $3,000, 5% on next $50,000, 1% on balance	Local Rule BR-1, "Judicial Sales"
Fifth	Carroll	10% on first $3,000, 5% on next $50,000, 3% on next $47,000, 2% on balance	Amended Administrative Court Order - 01/11/08
	Howard	5% of Sales Price	Administrative Order - Judge Leasure - Circuit Court for Howard County - 2010
	Anne Arundel	10% on first $3,000, 5% on next $50,000, 3% on next $47,000. Over $100,000 at Court's discretion	Alex Gordon's book "Gordon on Foreclosures"

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Advanced Estate Planning Institute. . .

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Sixth	Frederick & Montgomery	4% of Sales Price	Local Practice
Seventh	Charles, Calvert, St. Mary's, and Prince George's	10% on first $3,000, 5% on next $50,000, 1% on balance	7th Judicial Circuit Rule BR 7
Eighth	Baltimore City	$165 for first $3,000, 3% of next $22,000, 2% of next $25,000, balance determined by petition of trustee and court order	Supreme Bench Rules

The Section Council expresses its appreciation to those auditors and others who responded to its inquiry on Trustee commission rates which enabled us to compile the data provided above.

Join the Estate and Trust Law E-mail List

The Estate and Trust Law Section offers an active e-mail list which is open to Section members. The e-mail list provides Section members the opportunity to post questions or comments concerning issues relevant to the practice of estate and trust law. Members may also use the e-mail list to communicate with other Section members on items of general interest to the membership.

To subscribe to the e-mail list, visit the Section's website at http://www.msba.org/sec_comm/sections/estate and click on the "Email Lists" tab. On the next screen, click on the "Join List" tab to the right of "Estates and Trust Law Section." You will be asked to enter your name and email address. You will then receive an e-mail that you must reply to in order to verify your e-mail address. When you have been added to the email list, you will receive a welcome message.

Questions or comments about the e-mail list may be directed to the Estate and Trust Law Section care of David C. Dembert at ddembert@jdlaw.com.

Highlights from the 47th Annual Heckerling Institute on Estate Planning

By Michaela C. Muffoletto, Esq.
Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

A little perspective goes a long way. When I volunteered in July 2012 to prepare a summary of the highlights of the 47th Annual Heckerling Institute to be held in January 2013, the temperatures were high, the sun was shining, and there was no relief in sight to the tax cliff we as Americans and estate planners were about to fall off. I read Richard Wright's summary of the 46th Heckerling Institute in the Spring 2012 edition of the MSBA Estates and Trusts Newsletter. As Rich so aptly put it—the question on everyone's mind at last year's institute was "Will the government allow the Bush tax cuts to expire?" At last year's Institute, the answer was a resounding "Who the hell knows?" but this year, we gained some perspective and can definitively answer the question with a clear and resounding "sort of."

Each time I attend the Heckerling Institute, I am awed by the wealth of knowledge as well as the many networking opportunities that present themselves at this annual event.

It is difficult to summarize the entire week's worth of Institute material in one short article. Over the course of the week, there were 46 scheduled presentations, several of which are break-out sessions that run concurrently with one another, so it is impossible without the assistance of human cloning to attend all of the presentations. For a more comprehensive report of the 47th Annual Heckerling Institute (or any prior Institute), you can go to the ABA website. For the 47th annual Institute, go to www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports/heckerling_2013.html. In addition, recordings of the presentations can be ordered online at www.conventioncds.com/heckerling2013.html. Below is a sampling of important topics discussed at this year's Institute.

American Taxpayer Relief Act (ATRA) - Summary

The American Taxpayer Relief Act ("ATRA") was signed into law on January 2, 2013, and created permanence in estate, gift and GST laws for the first time in over a decade. Until Congress makes further changes, there is no stated expiration to our transfer tax laws. Under ATRA, the estate, gift and GST exemptions are each $5,000,000, indexed for inflation. For 2013, this means the stated exemptions are $5,250,000. In addition, the state death tax deduction is now permanent, eliminating entirely the former state death tax credit. ATRA also established a permanent and flat estate, gift and GST tax rate of 40%.

Also made permanent was portability of a deceased spouse's unused exclusion (DSUE) introduced into the transfer tax system in 2011 courtesy of the 2010 Tax Act. For decedents dying after 2010, the DSUE amount is portable to the surviving spouse if the executor makes an appropriate election on a timely filed federal estate tax return. Several presenters mentioned the possibility of a new IRS Form 706-EZ for this purpose, but as of the writing of this article no such form exists. The DSUE amount can be used by the surviving spouse for gifts during lifetime or upon the survivor's death in his or her estate.

Regulations now also provide ordering rules for the use of the DSUE. The surviving spouse may use the DSUE amount of only his or her "last deceased spouse." This is determined at the time the DSUE amount is used—at the time of a gift if used during lifetime, or at the survivor's death if used then. If the survivor makes a gift during life, the regulations require the DSUE amount to be applied to the gift first before applying the survivor's own exclusion amount.

The regulations now provide clear guidance and a favorable result in what Sam Donaldson referred to as the "black widow" scenario where a surviving spouse uses the first deceased spouse's DSUE amount by making inter vivos gifts, then remarries and after the death of the second predeceased spouse also uses his DSUE amount, and so on and so on. What should be gleaned from all of this is that a practitioner should pay particular attention to the rules governing portability and all instances when the DSUE amount may be utilized to assure maximum use of all possible estate tax exemptions.

While portability is something practitioners have wanted for years and offers the advantage of simplicity in estate planning, in true lawyer fashion, several presenters were quick to point out that it is not a one-size-fits-all solution to estate planning. First, there are no remedial or relief provisions if an estate tax return is not filed and the portability election is not timely made. In order to make the DSUE amount portable, many estates under the exemption amount that otherwise would not have filed an estate tax return must now file a return solely to make the election; otherwise the DSUE amount is lost forever. Second, portability should not be relied upon because of the many advantages of continuing to

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use bypass trusts at the first spouse's death – creditor protection, exclusion of appreciation from taxation in the surviving spouse's estate, and state estate tax issues (where there is no portability). Furthermore, there is no portability of the GST exemption, and for many high net worth clients, the benefit gained by planning for multiple generations outweighs the flexibility offered by portability.

In addition, while ATRA made favorable transfer tax changes, it also raised ordinary income and capital gains tax rates for "high income taxpayers" or HITs. Individuals with income over $400,000 or couples with $500,000 of income are considered HITs. Estates and trusts with income over $12,000 are also deemed HITs. The ordinary income tax rate for HITs is now 39.6% and the capital gains tax rate for HITs is now 20%.

In addition, as part of the Affordable Care Act, a new 3.8% surtax was created on unearned income of $200,000 for individuals and $250,000 for couples. Estates and trusts will be subject to the 3.8% surtax on all passive income if they have AGI in excess of $12,000.

Greenbook proposals – Use 'Em Before You Lose 'Em:

In April of each year, following the release of the President's Budget, the Department of the Treasury issues "General Explanations of the Administration's Revenue Proposals," generally referred to as the Greenbook. In February 2012, Treasury released its proposals for the 2013 fiscal year including five major items that would impact estate planning:

1. Requirement of consistency in valuation for transfer and income tax purposes;
2. Limitation or elimination of valuation discounts;
3. Requirement of a minimum term for grantor retained annuity trusts (GRATs);
4. Limitation on duration of GST tax exemption to 90 years; and
5. Limitation on use or elimination of grantor trusts.

Jonathan Blattmachr and other presenters stressed to the audience the importance of utilizing techniques currently on the chopping block. Blattmachr focused on the potential elimination or limitation of valuation discounts and techniques such as GRATs. It is interesting to note, however, that prior to publication of this article, the Department of the Treasury issued its Greenbook for the 2014 fiscal year and seemed to suggest a slight shift in the focus of the Administration. This year, there is no proposal to eliminate or modify the rules on valuation discounts. One interesting addition in the 2014 Greenbook is a proposal to clarify GST tax treatment of Health and Education Exclusion Trusts ("HEETs"). The proposal is intended to clarify Section 2611(b)(1) of the Code that the GST tax exclusion for transfers made for educational or medical expenses applies only to a payment by a donor directly to the provider of medical care or educational institution and not to HEETs. This is the first year such a proposal has been included in the Greenbook.

2012-2013 Priority Guidance Plan –What's Important to Treasury:

Treasury's IRS Priority Guidance was released on November 19, 2012, and included 10 "Gifts and Estates and Trusts" projects labeled as priorities for allocation of resources during the period of July 2012 through June 2013. Those projects include:

1. Finalizing regulations under Section 67(e);
2. Issuance of guidance concerning adjustments to sample charitable remainder trust forms;
3. Issuance of guidance concerning private trust companies;
4. Issuance of proposed guidance under Section 1014 regarding uniform basis of charitable remainder trusts;
5. Finalizing regulations under Section 2032(a) regarding imposition of restrictions on estate assets during the six-month valuation period;
6. Issuance of guidance under Section 2053 regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate;
7. Issuance of regulations under Section 2642 regarding the allocation of GST tax exemption to a pour-over trust at the end of an estate tax inclusion period ("ETIP");
8. Finalizing regulations under Section 2642(g) regarding extensions of time to allocate GST tax exemption;
9. Issuance of regulations under Section 2704 regarding restrictions on the liquidation of an interest in certain corporations and partnerships; and
10. Issuance of guidance under Section 2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates.

Of particular importance to this list is the omission of decanting, which the Treasury deemed not a priority this year since there was no realistic chance of finalizing the project in the fiscal year. However, the presenters noted that decanting was new to the 2011-2012 Priority Guidance Plan and many expected it to remain on the list for years to come.

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Cases of Important Note

Wandry v. Commissioner, T.C. Memo 2012-88, is the first case in which the Tax Court approved a defined value formula gift without involvement of a charity noting that the public policy analysis does not hinge on charity involvement. Wandry involved the formation of an LLC and gifts of membership interests in the LLC having values of specific dollar amounts. The governing documents provided that in the event of an IRS challenge on valuation, the capital accounts of the LLC would be adjusted so that the percentage of membership interests transferred would have values equal to the specified dollar amounts. The taxpayers hired a qualified independent appraiser and filed a gift tax return describing the gifts in terms of the percentage of the membership interest transferred as determined by the valuation set forth in the appraisal. The IRS challenged the gifts, arguing that the description in the gift tax return and the percentage of ownership reflected in the capital accounts of the LLC controlled the extent of the gifts and that the adjustment clause was void as against public policy and not effective.

The Tax Court sided with the taxpayers and cited to Estate of Christiansen v. Comm'r, 586 F.3d 1021 (8th Cir. 2009), Estate of Petter v. Comm'r, T.C. Memo 2009-280, and McCord v. Comm'r, 461 F.3d 614 (5th Cir. 2006) in which similar formula clauses were upheld. The Tax Court distinguished between formula clauses and savings clauses, which were rejected in Comm'r v. Proctor, 142 F.2d 824 (4th Cir. 1944), and provided that a transfer is void where a donor is to "take property back" (as with a savings clause). The Tax Court went further to provide that a transfer will be valid where nothing is to revert back to the donor and the transfer is based on a "fixed set of rights with uncertain values." The Tax Court found that the taxpayers always intended to transfer a fixed dollar value rather than a fixed percentage of the LLC and the nature of the gift itself was not controlled by the description on the gift tax return. The Tax Court went further and rejected the public policy concerns in Proctor—that there is no well-established public policy against formula clauses and that it was inconsequential that the adjustment clause did not include a charitable component.

This decision was initially appealed, but then dismissed. On November 13, 2012, in an Action on Decision appearing at 2012-46 I.R.B., the IRS did not acquiesce to the Tax Court's decision and the IRS will continue to litigate against the position taken by the taxpayer in this case. Although this case is good law and the presenters recommended using formula clauses where applicable, the IRS' position is clear and they will to continue to challenge the use of formula clauses. In Maryland and the 4th Circuit, Proctor will continue to be governing precedent.

There were several other important decisions issued in 2012 and reviewed by Heckerling presenters. Several were in the area of family limited partnerships. Two of them –Estate of Stone v. Comm'r, T.C. Memo 2012-48, and Estate of Kelly v. Comm'r, T.C. Memo 2012-73—were favorable for the taxpayers and continue to emphasize the need for significant and legitimate nontax reasons for creating and utilizing the family limited partnership. In Stone, the taxpayer desired to have undeveloped woodlands held and managed as a family asset. In Kelly, the taxpayer desired to provide effective management of quarry assets, avoid controversy by ensuring equal division of the estate and protect against liability. The Tax Court held that these were significant and legitimate nontax reasons for creating the partnerships and thus the interests were excluded from the taxpayers' gross estates under Section 2036.

On the issue of whether gifts of limited partnership interests satisfy the present interest requirement of the annual gift tax exclusion, the Tax Court issued a favorable ruling to the taxpayer in Estate of Wimmer v. Comm'r, T.C. Memo 2012-157. In that case, the Tax Court agreed with its prior unfavorable rulings in Hackl v. Comm'r, 118 T.C. 279 (2002), Price v. Comm'r, T.C. Memo 2010-2, and Fisher v. U.S., 105 A.F.T.R. 2D 2010-1347 (2010) where there were restrictions on the limited partnership or LLC interests. In Wimmer, the Tax Court analyzed whether the income of the partnership satisfied the criteria for a present income interest. Using the three prong test from Calder v. Comm'r, 85 T.C. 713 (1985), the Tax Court stated that the taxpayer had to prove:

1. The partnership would generate income;
2. Some portion of that income would flow steadily to the donee; and
3. That portion of the income flowing to the donee could be readily ascertained.

In applying the three-prong test, the Tax Court found that (1) the partnership anticipated income to flow from its assets, (2) the income would be needed to satisfy the donee's income tax liabilities, and (3) the amount of income could be ascertained because the assets consisted of publicly traded stocks that paid regular dividends. The Tax Court held that the gifts of the limited partnership interests qualified as present interests with respect to the amount of the income that would flow out of the partnership. The presenters noted, however, that

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the Tax Court worked hard to reach this result and a similar result might not be reached in a similar case.

Finally of important note is the IRS' rendering of Chief Counsel Advice 201208026. The Service stated that a donor's retention of a limited testamentary power of appointment over the assets (if any) remaining in a wholly discretionary trust at the time of the donor's death, without more, does not render the entire gift incomplete; in that case, the donors had made a completed gift of the beneficial term interests in the trust because they had retained no control over distributions from the trust to its beneficiaries during the donors' lifetimes. This CCA calls into question planning with incomplete gift non-grantor trusts. The presenters advised caution when using such trusts and relying on a limited testamentary power of appointment, by itself, to cause incomplete gift treatment. In particular, several presenters debated whether the use of DING (Delaware incomplete gift non-grantor) trusts is available any longer. This debate has not been resolved with the issuance of PLR 201310002 on March 8, 2013, in which the IRS ruled favorably on the gift and income tax consequences of a DING trust.

Revisiting 2012 Family Wealth Transfers:

Following the 2012 election, most planners spent final weeks of 2012 working with clients who wanted to make large gifts in the expectation that estate and gift tax exemptions would be reduced in 2013. Many presenters advised planners to review the appropriate transfer mechanisms to assure that the gifts were actually effectuated and to pay particular attention to the filing of client gift tax returns. It is predicted that the total number of gift tax returns filed will more than double in 2013. With approximately 350 examiners to review those returns, there is uncertainty as to what may be the hot issues for audit. Certainly, no lesser standard of completeness is warranted for 2012 gift tax returns, and planners were cautioned to apply rigorous standards of care in preparing and reviewing the gift tax returns and associated appraisals.

Many of the gifts in 2012 involved Spousal Lifetime Access Trusts ("SLATs"). Several of the presenters included a discussion on SLATs in their presentation and materials. First of important note was the reminder that gift splitting is available only where the spouse can consent to all gifts made. For SLATs, gift splitting is available only with respect to the non-spousal portion of the gift, which must be both ascertainable and severable from the donee-spouse's interest. Stacy Eastland cautioned attendees to avoid reciprocal trust doctrine issues in cases where a SLAT was created for each spouse and suggested that the greater the difference between the two trusts the greater likelihood the reciprocal trust doctrine would not be applied. Mr. Eastland suggested the use of fundamentally different types of estate planning techniques to fund trusts for the other spouse, different vesting options, different distribution options, different powers of appointment, additional and different beneficiaries with each spouse, different trustees, different funding assets, and substantive timing differences as to the creation of the trusts.

For some clients, the decision to make larger gifts in 2012 was difficult. Many clients made the decision to gift only because of the possibility that they would lose some portion of their $5 million exemption after 2012. Some of those clients may now be suffering from donor's remorse. Even though the $5 million exemption was not reduced as many feared, the advantages of such gifts still remain—particularly in states such as Maryland with lower estate tax exemptions and no state gift tax.

For those clients intent on undoing their 2012 gifts, disclaimer is a possibility. Several presenters cautioned against the use of disclaimers for fear that the assets would not revert to the donor, but instead would go to alternate takers. Another possibility discussed was rescission, which is generally allowed if there is a mistake of law or fact. Many opined that a rescission on the basis of mistake in tax law changes would be difficult. It was suggested in this instance that the 2012 gifting mechanism should be reviewed—that perhaps the donor failed to effectuate the gift properly in the first instance.

Other Considerations – Many Oldies But Goodies:

In addition to the foregoing topics, this year's Heckerling Institute also included complex discussions on various planning techniques: Steve Akers' discussion on intra-family loans and notes; Stacy Eastland's discussion on sales to grantor trusts, GRATs, SLATs, remainder purchase marital trusts and several combinations of these techniques; Carol Cantrell's presentation on the use of grantor trusts; Diana Zeydel's thorough discussion of GST planning and reporting; and Ben Pruett's presentation on interesting drafting considerations. The topics covered at Heckerling range from the complex to the insightful and certainly achieve the goal of appealing to a broad group of practitioners and advisors—as it seems there is something for everyone.

2012 Advanced Tax Institute Conference

Day 3, Estate Planning Issues

By L. Laurel Lea, Esq.
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On November 7, 2012, the Maryland State Bar Association and the Maryland Association of Certified Public Accountants presented a day on estate planning issues as part of their annual 2012 Advanced Tax Institute. **Jerry McCoy**, of the Law Office of Jerry J. McCoy, who specializes in charitable tax planning and tax-exempt organizations, spoke to the attendees on Careful and Effective Charitable Giving. **Lee Slavutin**, a principal of Stern Slavutin 2, Inc., followed with a presentation on Managing and Monitoring Life Insurance Policies in Trust. Following a break for lunch, **Ben Pruett**, of Bessemer Trust, spoke to the group on Recent Developments of Interest to Estate Planners. The day closed with a presentation from **Lester Law**, of US Trust, on the topic of Portability and Planning with Large IRAs.

Careful and Effective Charitable Giving, Presentation by Jerry McCoy

Jerry McCoy began his portion of the program by briefly discussing the previous night's presidential election and how there was still a great deal of uncertainty regarding the tax regime, including what might happen with deductions like the charitable deduction. He explained that the charitable deduction rules first came into play in the Tax Reform Act of 1969, and previous changes to the rules were designed to stop abuses of the system. This time, however, tax reform is intended to decrease the complexity of the tax code, and the charitable deduction rules are viewed as part of the overall complexity problem. Only about one-third of all taxpayers itemize their deductions, and the charitable deduction is among those that cost the government the most in revenue.

McCoy also explained that a frequently discussed technique of 2012 year-end estate planning had been charitable lead trusts ("CLT"). The environment for CLTs is favorable because of the high current gift and estate tax exemption and low interest rates. McCoy said that, in particular, charitable lead annuity trusts ("CLATs") have been promoted, for which he recommended graduating the annuity stream during the trust term in order to ensure a greater remainder for the family at the end of the trust term, while maximizing the contribution to charity along the way.

McCoy spent some time discussing the charitable individual retirement plan ("IRA"). He explained that the law permitted an individual who is over 70 ½, in lieu of taking out his or her required minimum distribution ("RMD"), to give it directly to charity. The direct charitable IRA rollover expired at the end of 2011 but there were legislative efforts to have it retroactively restored for 2012 transfers.

After this brief overview of 2012 year-end charitable planning, McCoy moved on to discuss charitable planning more broadly, with an emphasis on examining case law so that planners could learn from the mistakes that had been made in other situations. To that end, McCoy spent some time summarizing and discussing cases in which taxpayers had failed to substantiate their charitable contributions properly. A donor must substantiate a contribution in excess of $250 for federal income tax purposes with contemporaneous, written acknowledgement from the recipient charity. Even though the rule is simple, McCoy said that failure to substantiate a charitable gift properly results in lost deductions.

McCoy also discussed the advantages of giving appreciated property directly to charity rather than selling such property and donating the proceeds because the gift of the property receives a fair market value deduction and capital gain is not incurred. In order to obtain a fair market value deduction, however, the taxpayer must establish the value of the gifted property, and McCoy spent some time reviewing the requirements for a qualified appraisal to lock in the value of the gifted property to obtain the maximum deduction available.

Finally, McCoy discussed the doctrine of substantial compliance when substantiating the value of a gift for purposes of obtaining the charitable deduction. He reviewed the case law on substantial compliance, in particular the case of Bond v. Commissioner, 100 T.C. 32 (1993) (holding that the taxpayers' submission of all the information required for a qualified appraisal, but not the appraisal itself, was sufficient), and urged planners to be sure to substantiate a gift properly, so that problems and litigation will not ensue.

Indeed, McCoy's overarching lesson was that mistakes in the charitable gift arena can generally be avoided through careful and thoughtful planning. He advised asking clients why they wish to make a charitable gift and to plan according to their goals. He also cautioned against over-planning.

Managing and Monitoring Life Insurance Policies in Trust, Presentation by Lee Slavutin

Lee Slavutin discussed managing and monitoring life insur-

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ance policies held in trust. The irrevocable life insurance trust ("ILIT) is a very popular estate planning vehicle, which, when properly drafted, can be tax-free and sheltered from creditors. Nonetheless, an ILIT arrangement can easily go wrong. Slavutin's presentation focused on trustees' duty to stay on top of these trusts in order to fulfill, and not run afoul of, their fiduciary obligations.

Slavutin hoped the audience's main take-away from his discussion would be the importance of maintaining good files. A trustee (and the grantor) must document every stage of the process, including why a specific policy was chosen and what is being done to ensure that the trust and the policy are achieving the grantor's goals, in order to demonstrate the prudence used throughout the process.

Slavutin urged trustees to obtain from the insurance broker a regular in-force illustration of the policy, even for term policies and guaranteed products. Even with a guaranteed universal life policy, assuming the insurance company is solvent, if the trustee is late or misses a premium payment but pays within the grace period, the policy could be penalized. Obtaining an in-force illustration will alert the trustee to that penalty. For term insurance, one of its primary benefits is the conversion option to a policy with cash value, which may not last the length of the policy, and an in-force illustration will alert the trustee to that fact.

Slavutin said that there are two major things he wished to emphasize to the audience: (1) taking into consideration published guidance and (2) what trustees should be doing when monitoring policies held in trust.

The most important piece of published guidance from Slavutin's perspective is the Uniform Prudent Investor Act ("UPIA") because life insurance is an asset just like any other. Slavutin discussed sections of the UPIA as they apply to life insurance, especially the trustee's responsibility to investigate and monitor assets.

Slavutin noted that the UPIA grants the trustee the ability to delegate duties to those who have expertise in a given area, and that a good insurance broker is a good resource, but the trust and its assets are ultimately the trustee's responsibility. He advised reviewing the insurance held in an ILIT every year but at a minimum every two to three years, even if state law permits a waiver of liability in the trust instrument.

In the life insurance context, the UPIA's principles of diversification apply when thinking about the choice of insurance company and the choice of insurance product to be held in trust. He noted that no type of policy is always right for every client; a particular client, for example, may need a policy with cash value, rendering a term policy inappropriate.

Slavutin illustrated his points by reviewing recent case law, including, for example, In re Stuart Cochran Irrevocable Trust, 901 N.E.2d 1128 (Ind. Ct. App. March 2009), in which

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Editor's Note

Our goal is for the *Estate and Trust Law Section Newsletter* to provide current, useful information on areas of interest to Section members. The Newsletter can be better tailored to suit members' needs with input from you. If you would like to suggest a future topic, change of format, or submit an article, please contact the Editors at:

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the successor trustee hired an outside consultant to review a proposal to replace the policy held in trust with a policy that had a substantially reduced death benefit. When the client died one year after the policy's replacement, the beneficiaries sued the successor corporate trustee. In holding for the trustee, the court emphasized three things in particular: (i) that the trustee had undertaken proper due diligence; (ii) that he had obtained a second opinion; and (iii) that it is not appropriate to judge the situation with hindsight. Slavutin said that it was probably not always necessary to hire an outside consultant, but that if there is something about a situation that raises a red flag or causes discomfort, it is probably a good idea to do so.

Slavutin next turned to the tasks the trustee must undertake when monitoring policies in an ILIT. Most importantly, administrative tasks like timely payment of premiums, proper beneficiary designations, and the timely issuance of withdrawal notices must be followed. Beyond these tasks, Slavutin's checklist of four things that should be monitored for insurance policies are: (1) the financial strength of the company; (2) the suitability of the product for the client; (3) the adequacy of the premium; and (4) the health of the insured.

Slavutin emphasized the importance of wisely selecting the company from which to buy a policy. To that end, Slavutin discussed the ratings systems for insurance companies. He said that he does 95% of his business with 10 to 15 companies. For the initial screen, Slavutin advised asking the broker for the company's Comdex score. The best companies have a Comdex score of 95 or over. The only major reason to purchase from a company with a score below that level is for a client who has a health problem if there is a better offer from a slightly lower-rated company. Slavutin said he might sometimes even go with a company with a Comdex score in the high 80s, but that he would not ever go much below that level and would prefer to stick with companies who score above 90.

A trustee should also determine if the company's ratings have changed or been downgraded. If the company is losing money, that raises the concern that the company is not pricing a product properly. Life insurance should not be purchased based on price alone, but should be purchased from a quality company.

When determining the suitability of the product for the client, Slavutin urged the audience to look at all of the facts, and then document why a certain product is being presented to a client. Slavutin briefly reviewed the different types of insurance policies, including term and the three types of cash value policies: (i) whole; (ii) universal; and (iii) guaranteed universal, all of which should last for the insured's life. The primary suitability question one should ask is why the particular type of insurance is being used. He noted that some clients should perhaps have more than one type.

Term insurance, for example, can be particularly useful in estate planning for a young family who can obtain a large amount of insurance at a low premium to cover their incomes. For clients in their 30s and 40s, Slavutin said that a good rule of thumb for the amount of death benefit is twenty times the client's after tax income.

Slavutin urged participants not to prescribe a product for a client until they understand the problem they are trying to solve. Finally, Slavutin briefly noted the importance of keeping track of the health of the insured. If health factors change, it may be possible to reduce the premium.

Recent Developments of Interest to Estate Planners, Presentation by Ben Pruett

Ben Pruett began his discussion with a look at the recent challenges to the Defense of Marriage Act ("DOMA") and how that affects planning for same-sex married couples, particularly in light of Maryland's adoption of marriage equality in the previous night's election. In light of the challenges to DOMA, Pruett discussed whether planners with clients in same-sex marriages should include marital deduction planning in their documents. Even though DOMA remains on the books, Pruett thought it prudent, if otherwise appropriate, to plan for the possibility of taking the marital deduction for these clients in case it becomes available. He advised designing trusts for the benefit of the same-sex surviving spouse so that they could qualify for the marital deduction in the event that DOMA is struck down by the Supreme Court.

Pruett summarized the current state of the law regarding the use of defined value clauses in making gifts of hard-to-value interests, an issue of particular importance at the end of last year, when many clients were making substantial gifts in anticipation of scheduled changes to the estate and gift tax laws. Defined value clauses are a way to make a gift of an asset that is hard to value by setting up the gift as a formula (i.e., "I give a portion of my interest in a limited liability company having a value equal to [a specific dollar amount])." The IRS disfavors these types of transfers and bases its challenges to them on a 60-year-old Fourth Circuit case, Commissioner v. Procter, 142 F.2d 824 (4th Cir. 1944). Procter was the last

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time IRS really won on this issue.

Pruett discussed the recent tax court case of Wandry v. Commissioner, T.C. Memo 2012-88. In Wandry, the donor transferred that number of units of a limited liability company that had the value of X dollars. The IRS was rather sternly rebuked by the Tax Court in its opinion in Wandry. The IRS appealed the decision but recently withdrew its appeal without explanation. Pruett said that it is nonetheless difficult to say whether Wandry can be relied upon. There is no indication that the IRS is willing to acquiesce in the decision; it simply appears that the agency did not want to appeal Wandry, perhaps because it was in an unfavorable circuit. Pruett thought, however, that the IRS' continued reliance on Procter is misplaced.

For year-end gift planning, Pruett noted that not everyone needed to make such a gift, and discussed the popular 2012 year-end planning vehicle of spousal lifetime access trusts, or SLATs, which were trusts created by spouses as a way to make substantial year-end gifts. Pruett expressed some concerns about those vehicles, particularly when such a trust gave a spouse a limited power of appointment that was immediately exercised in favor of a continuing trust for the benefit of the grantor spouse. He felt that the immediate exercise of such a power ran the risk of having the trust assets be included in the grantor's estate.

Pruett also expressed concern about the new Virginia law permitting self-settled asset protection trusts and whether these types of trust can truly achieve their purpose to protect assets other than those (such as offshore assets) that are not subject to a court's jurisdiction.

Finally, Pruett discussed the impact of portions of the current transfer tax laws that were set to expire at the end of 2012, particularly with regard to a number of issues involving the generation-skipping transfer tax, and reviewed the Obama administration's, and other, proposals on the table with respect to transfer taxes and estate planning. Because the package that Congress and the President passed at the beginning of the year rendered much of that discussion moot, it is not repeated here.

Portability and Planning with Large IRAs, Presentation by Lester Law

Lester Law of US Trust spoke about portability and planning with large IRAs. He began with an overview of the basics about IRAs. He noted that every plan agreement has different default provisions but nobody reads them. Law briefly explained the difference between IRAs and defined benefit plans and gave a quick overview of the required minimum distribution ("RMD") rules.

Law then discussed IRA beneficiary designations, and the importance of ensuring that an IRA can be stretched out over the life expectancy of the designated beneficiary. To that end, Law explained the use of conduit trusts, which allow the plan to look through the trust and use the life expectancy of the oldest trust beneficiary. Law also advised that the separate sub-trust, created under a revocable trust, that was intended to hold the IRA should be the designated beneficiary, not the revocable trust itself. In the absence of a designated beneficiary, Law noted that the retirement plan agreement controls who is the beneficiary of the IRA. In all events, the default rule that an IRA must pay out within five years should be avoided, and an estate should not be designated as the beneficiary of an IRA if at all possible.

Law then discussed large IRAs (relative in size to the overall estate) and examples of how to plan with these assets. A number of his examples explored the use of large IRAs in conjunction with the portability rules and election that were passed in late 2010, and which allow a surviving spouse to elect on a timely filed federal estate tax return to use the

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Don't forget to sign up for the Estate and Trust Law Section E-mail Discussion Group! (See Page 11 for more details)

Advanced Tax Institute. . .

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predeceased spouse's unused estate and gift tax exemption. Law said that he believed that portability would remain on the books (it has) and that it represented the largest change in the estate tax laws since the 1981 introduction of the unlimited marital deduction. In states with a state estate tax, like Maryland, portability makes it possible to fund a credit shelter trust up to the state exemption amount on the first death, and then make use of the first spouse's remaining unused federal exemption to either eliminate, or substantially reduce, estate taxes on the second death (depending on the size of the estate).

Law discussed a number of client scenarios in which a Roth IRA conversion could benefit a client from a tax-planning perspective. In converting to a Roth, the client must pay the income tax for the year of the conversion, but the assets in the Roth are then permitted to grow tax-free forever, and do not incur income tax on distribution, nor do Roth IRAs have an RMD. Among other examples, Law demonstrated the efficacy of leaving a Roth IRA to a conduit trust for grandchildren and also provided an example of the benefits of a Roth conversion even in states with a state estate tax like Maryland.

Law also noted that while he agreed that a traditional IRA is an excellent asset to give to charity, a Roth IRA is not. Instead, Law recommended leaving the Roth to a conduit trust and leaving other assets to charity. Law then ran through a series of examples which demonstrated the efficacy of converting to a Roth IRA for clients who did not anticipate needing these assets for their retirement. He noted, however, that a Roth IRA makes sense only if one can stretch out the payments over the beneficiary's life expectancy; otherwise it is not significantly better to have assets in a Roth IRA than in a traditional IRA. He noted that Congress has talked about mandating a five-year distribution period after death for all IRAs and eliminating stretch-out payment periods altogether. For now, as long as beneficiaries may stretch out payments over their life expectancies, large IRAs and Roth conversions provide excellent planning opportunities.

ESTATE AND GIFT TAX STUDY GROUP 2013 - 2015

The MSBA Estate and Gift Tax Study Group and the Estate and Trust Section Council welcome the new co-chairs:

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To volunteer to speak or for additional information please contact the co-chairs.

NOMINATING COMMITTEE REPORT

The following is the report of the nominating committee for the Estate and Trust Law Section of the Maryland State Bar Association for positions to be filled for the 2013-14 fiscal year.

Nominations for officer positions for a one-year term:

Chair:	Mary Beth Beattie
Chair-Elect:	Eileen D. Day O'Brien
Secretary:	Charles S. Abell

Nominations for council member positions for a two-year term: 2013-2015

Walter S. B. Childs
Anne W. Coventry
Michael W. Davis
Jay M. Eisenberg
Angela M. Vallario
Benjamin Woolery

Other nominations for officers and members may be made by written nomination signed by no fewer than 15 members of the Section. Any such nomination(s) must be submitted to the current Secretary, Eileen D. Day O'Brien, no later than June 4, 2013, ten (10) days before the Section's annual meeting, which will be in Ocean City, Maryland on June 14, 2012 at 8am.

Got News?

Please send your professional news or announcements to one of the Editors at:

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MSBA ANNUAL MEETING

OCEAN CITY, MARYLAND

June 12-15, 2013

MSBA's Annual Meeting offers an opportunity to exchange ideas with colleagues and sharpen your skills through instructional sessions and presentations by prominent members of your profession.

As well as relaxing in the sun and the surf.

For More information, Contact Wanda Calvin Claiborne at 410-685-7878
or visit the website at

www.MSBAAnnualMeeting.org

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Estate and Trust Law Section Annual Meeting Agenda

The MSBA annual meeting in Ocean City will be held from Wednesday, June 12th through Saturday, June 15th. The Section Meeting will be held **Friday June 14th at 8am.** The section will present the following program immediately following the brief Section Meeting.

Modern Family:

Estate Planning & Probate Issues For Families With Children Born Through Assisted Reproductive Technology (Art)

As more children are born using ART, the topic is one that needs to be addressed in providing advice to our clients and when preparing their estate plans. When the client uses the term "children" or "descendants" in their estate planning documents, who do they mean to include? What if the intent is not clearly spelled out in the client's document? What does State law provide and how does it apply? How do new laws in this area impact the distribution of irrevocable trusts created long before ART became so popular? What does a Personal Representative of an Estate or a Trustee need to consider when making distributions under Wills and Trusts where posthumously conceived children could claim an interest? What can lawyers do prior to a child being born through ART to protect their clients? These and other related issues will be discussed by a panel to include case law, State law, practical advice and drafting solutions. The end of the program will include an interactive review of hypotheticals with audience participation.

The panel includes:
Danielle M. Cruttenden, Chair, of Merrill, Cruttenden & Collinson, P.A.
Jennifer Fairfax, Esq. of Jennifer Fairfax, LLC
Nicole Kinsey White, Esq. of Kinsey Law Group, P.C.

For more information, visit www.msbaannualmeeting.org or call
Wanda Claiborne of the MSBA at 410-685-7878.

www.MSBAAnnualMeeting.org