

**MARYLAND LEGISLATIVE AND CASELAW DEVELOPMENTS
2014**

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LEGISLATION

This was one of the busiest years for trusts & estates legislation in recent memory, highlighted by the new Maryland Trust Act and the changes to the Maryland estate tax.

Maryland Trust Act.

After several years of serious study and consideration, the General Assembly passed comprehensive trust legislation this session. The new Maryland Trust Act (“MTA”) collects most of the law of trusts in a single Article (which will be new Article 14.5), making it a very useful reference point for lawyers, trustees, and trust beneficiaries. While the Act introduces a few new concepts to Maryland law, it largely codifies existing Maryland law. Thus it is far from a simple adoption of the Uniform Trust Code (“UTC”), and practitioners should be aware that there are significant differences between the MTA and the UTC.

A comprehensive discussion of the Maryland Trust Act would be too extensive for this article, but a few highlights are:

1. Rules for judicial modification or termination of trusts (but not for nonjudicial settlement agreements, which are specifically authorized under the UTC but are not included the MTA).
2. Rules for virtual representation of beneficiaries in many circumstances.

3. Detailed rules for creditors' ability to reach (or not to reach) interests in trust.
4. Specific rules for a number of administrative matters, such as filling a trustee vacancy, giving notice to beneficiaries, etc.

There are several opportunities to learn more about the Act. The MSBA presented an hour and a half session on the MTA as part of its Advanced Estate Planning Institute; the materials from that discussion are available for purchase on the MSBA website. In addition, MSBA will present an in-depth, half-day discussion of the MTA on September 11, 2014.

The Maryland Trust Act takes effect on January 1, 2015. For the most part, it applies retroactively.

Maryland Estate Tax

The General Assembly revised §§ 7-305 and 7-309 of the Tax-General Article to “recouple” Maryland’s applicable exclusion amount to the federal level (\$5 million, indexed for inflation) by 2019. The increases in applicable exclusion phase in as follows:

2015	\$1.5 million
2016	\$2 million
2017	\$3 million
2018	\$4 million
2019	Federal level

As under current law, the Maryland estate tax is capped at 16% of the amount by which the Maryland taxable estate exceeds the applicable exclusion amount. As the exemptions rise, this 16% cap rate increasingly will become the effective Maryland estate tax rate. After 2019, the law also will allow portability of exemption between spouses.

Modified Administration – Revocation for Objection

Section 5-708 of the Estates & Trusts Article provides that modified administration is revoked when an interested person files a written objection. Responding to a concern that any objection – including, for example, an objection to a final report or to a fee petition – could cause revocation, the General Assembly revised the statute to clarify that only an objection to modified administration itself results in revocation.

This statute takes effect October 1, 2014.

Definition of Serious Crime

Section 5-105 of the Estates & Trusts Article has long precluded a person convicted of a “serious crime” from serving as personal representative. There had been little guidance as to which crimes are sufficiently serious to warrant such preclusion, however. Therefore, the General Assembly revised § 5-105 to define a “serious crime” as any crime “that reflects adversely on an individual’s honesty, trustworthiness, or fitness to perform the duties of a personal representative.” The statute gives examples, including fraud, extortion, embezzlement, forgery, perjury, and theft.

The legislature also added new § 11-114 to the Estates & Trusts Article to apply a similar standard to persons seeking to serve as guardian of a minor or disabled person.

The new statutes take effect October 1, 2014, and specifically do not apply retroactively.

Homestead Tax Credit

The General Assembly revised § 9-105 of the Tax-Property Article to allow the ordinary homestead tax credit for property owned by a trust if the settlor, grantor, or beneficiary of that

trust resides in the property without payment of rent. This provision appears to apply to both revocable and irrevocable trusts.

This statute became effective June 1, 2014.

Registers of Wills – Records

Responding to concerns from the Registers of Wills that their ever-increasing paper records were becoming unduly burdensome, the General Assembly revised § 2-209 of the Estates & Trusts Article to permit the Registers to meet their recordkeeping obligations by keeping files other than original wills in electronic form. The Registers still must keep original wills in paper form, and must make the paper file available to the personal representative within 180 days of closing an estate.

Victims of Crime – Authorization to Pursue Compensation

The General Assembly revised several provisions of the Estates & Trusts and Family Law Articles to give personal representatives, guardians, and other fiduciaries authority to seek compensation and restitution on behalf of decedents, disabled persons, and other beneficiaries who were victims of crimes.

This statute takes effect October 1, 2014.

CASELAW*Validity of Will Execution.*

The Court of Special Appeals considered the witnessing requirements for a testamentary instrument in *Groat v. Sundberg*, 213 Md. App. 144, 73 A.3d 374 (Md. Ct. Spec. App. 2013). The case involved the estate of Frank Halgas, who executed a will in 2006 and then allegedly executed a codicil to the will in 2010. Mr. Halgas's niece Melissa, who signed as one of the witnesses to the codicil, petitioned to admit the codicil to probate.

The Orphans Court held a hearing to determine whether the codicil was duly executed. Melissa admitted that she was not sure whether she signed in the presence of Mr. Halgas; she declared that she might have signed in the kitchen while Mr. Halgas was in a different room. The Orphans Court found that Melissa had not presented sufficient evidence to prove proper execution, and therefore did not admit the codicil to probate.

On appeal, Melissa first argued that the codicil was entitled to a presumption of proper execution. The Court observed that the burden of proof can shift to a document's opponents, but only if the document's proponent can make a prima facie showing of due execution. The codicil did not contain an attestation clause and the Court found that there was not sufficient other evidence to make that prima facie showing. Therefore, the Court held that the burden of proof remained with Melissa, as proponent of the codicil.

Melissa then argued that being in the same house as the testator, even if not in the same room, should be considered to be "in the presence of the testator," for purposes of §4-102 of the Estates & Trusts Article. The Court refused to read the statute this way, and therefore it affirmed the decision of the Orphans Court.

Petition for Disinterment

In *Unger v. Berger*, 214 Md. App. 426 , 76 A.3d 510 (Md. Ct. Spec. App. 2013), the Court of Special Appeals considered the proper venue for hearing a dispute between two sisters over the proper burial place for their aunt, Ann Freeman. Ms. Freeman died in Georgia in 2010. Her niece Marilyn Berger arranged to bury her in Arlington Cemetery in Baltimore. Another niece, Elizabeth Unger, opened probate in Georgia and petitioned the Circuit Court in Maryland to have Ms. Freeman's body disinterred, so that Ms. Unger could arrange burial in New Jersey, next to Mrs. Freeman's husband. Ms. Unger also asserted a claim for breach of fiduciary duty against Ms. Berger.

Ms. Berger moved to dismiss, in part on the grounds that the petition for disinterment should be heard in Georgia, where the probate administration was ongoing, and not in Maryland. The Circuit Court agreed and granted the motion to dismiss.

The Court of Special Appeals reversed, at least with respect to the petition to disinter. The Court held that Georgia had exclusive jurisdiction over the claim for breach of fiduciary duty (and therefore affirmed with respect to that claim), but held that only a Maryland court could order disinterment, because the body was located in the State.

The Court did not consider the merits of the petition for disinterment – it remanded the case to the Circuit Court for that purpose. It did, however, note that disinterment is a disfavored remedy and cited the factors established by the Court of Appeals for considering a petition for disinterment, including the wishes of the decedent, the influence of the decedent's religious beliefs, the wishes of a widow, widower, or next of kin, and the regulations of the cemetery.

Appointment of Successor Trustees.

In *Miller v. Rosewick Road Development LLC*, 245 Md. App. 275, 76 A.3d 422 (Md. Ct. Spec. App. 2013), *cert denied*, the Court of Special Appeals considered the standing of successor beneficiaries to seek removal of trustees. The case involved a trust with 55 beneficiaries, which primarily held real property outside La Plata. The beneficiaries had squabbled over the trust, with resolution arriving in a December 1998 consent order. Among other provisions, the consent order appointed trustees (and authorized them to appoint their successors) and gave each beneficiary the right to transfer his or her interest in the trust. Several beneficiaries sold their interests to Rosewick Road Development, LLC.

The trustees undertook to sell the real property, but by 2010 still had not done so. Rosewick Road asked the Circuit Court to remove the trustees and to appoint successors who would complete the sale and liquidate the trust. As it happens, one of Rosewick's affiliates was the most aggressive prospective buyer of the trust's property, but at a price that the trustees deemed insufficient. The Circuit Court found that the trustees were imprudently fixated on getting top dollar for the property and ordered that they be removed.

On appeal, the trustees argued that Rosewick Road lacked standing to seek their removal, since it was not a party to the 1998 consent order. The Court of Special Appeals rejected this argument, holding that when Rosewick Road acquired the interests of trust beneficiaries it also acquired those beneficiaries' rights to enforce the consent order. The Court also held that the Circuit Court had jurisdiction to remove the trustees, based on the courts' general superintending power over trusts, even though the consent order left appointment of successor trustees to the existing trustees.

While the Court of Special Appeals declined to reverse on those grounds, it found that the trustees' methods of marketing the property were a reasonable exercise of the "large discretionary powers" granted by the consent order. The Court therefore held that the trustees had not breached their fiduciary duties, and it vacated the Circuit Court's order.

Tolling of Timing for Appeal

The Court of Special Appeals considered the tolling effect of a motion for reconsideration in *Ederly v. Ederly*, 213 Md. App. 369, 73 A.3d 1229 (Md. Ct. Spec. App. 2013). The case involved an estate that was bitterly contested between the decedent's children. The Orphans Court appointed a third party to serve as personal representative – and then rescinded that order when the third party had second thoughts. The Orphans Court finally appointed David Ederly, one of the children, to serve on December 5, 2011. Hanan Ederly, another son, filed a motion for reconsideration on December 12. The Orphans Court denied Hanan's motion on January 3, 2012.

On January 11, Paul, another brother, filed a notice of appeal of the original December 5 order appointing David. The Orphans Court struck the notice of appeal as not timely filed, as it had been filed more than 30 days after December 5.

The Court of Special Appeals vacated the order striking the notice of appeal. The Court held that, pursuant to Rule 8-202(c), the motion for reconsideration tolled the time for noting an appeal, and that the tolling applied to all parties, not only to Hanan. Therefore, Paul's appeal was timely, since it was noted within 30 days of the denial of Hanan's motion.

Effect of Divorce on Will

In *Nichols v. Suiters*, 435 Md. 324, 78 A.3d 344 (Md. 2013), the Court of Appeals considered the application of Estates & Trusts §4-105(4), which provides for revocation of provisions relating to a testator's ex-spouse after divorce. The case involved Jesse and Virginia Lee Suiters, who executed a Separation Agreement in 1996 but did not divorce until 2006. In 2003, Jesse executed a will that left the bulk of his estate to Virginia, whom he identified by name and not by relationship. He also named Virginia personal representative.

Jesse died shortly after the divorce was final. Virginia argued that §4-105(4) should not revoke her benefits under the will. She argued that, under §4-105(4), there is no revocation if "otherwise provided in the will or codicil or the decree." Virginia pointed to the Separation Agreement – which specifically permitted the parties to make testamentary provisions for each other, regardless of the status of their marriage – and to Jesse's execution of a will that identified her by name rather than by relationship as evidence that Jesse had "otherwise provided" that her benefits not be revoked by their divorce. The Circuit Court held that the divorce did revoke Virginia's benefits. The Court of Special Appeals reversed.

The Court of Appeals then reversed the Court of Special Appeals. It noted that §4-105(4) (and similar statutes in other states), is intended to prevent unintended consequences when a testator neglects to revisit his will after divorce. The Court held that the statute creates a presumption that divorce revokes provisions relating to the former spouse, and that only "a clear and direct statement that the divorce did not change the testator's donative intent" can overcome this presumption. The Court of Appeals did not believe that the statements in the separation agreement or the will were sufficiently clear and direct to overcome the presumption, and therefore it held that the divorce decree revoked the provisions relating to Virginia.

Judge Battaglia and two other judges dissented from the majority's opinion, arguing that there was sufficient evidence that Jesse did not intend for revocation to apply. The dissent noted that not only did the separation agreement specifically contemplate one party making a will to benefit the other, but Jesse had identified Virginia as beneficiary by name, and not merely by reference to her status as his wife. The dissent also argued that the majority opinion adopted a standard applied to similar statutes derived from the Uniform Probate Code, but that §4-105(4) uses less restrictive language than the UPC model.

Notice of Filing Accounts

The Court of Special Appeals in *Vito v. Klausmeyer*, 216 Md. App. 376, 86 A.3d 675 (Md. Ct. Spec. App. 2014) considered a motion by Margaret Vito, who was beneficiary of a testamentary trust under her father's will, to vacate the approval of a probate account, on the grounds that she had not received notice of the accounting prior to approval. Ms. Vito acknowledged that, as a mere trust beneficiary, she was not an interested person in the probate administration. However, she argued that the standing of a trust beneficiary to object to the accounting (which the Court recognized in *Spry v. Gooner*) entitled her to notice of filing the account.

The Court disagreed. It held that § 7-501(a) of the Estates & Trusts Article limited the class of persons entitled to notice to interested persons, and that the *Spry* decision did not expand that class. The Court held that Ms. Vito was not entitled to notice of the account, despite her standing to object to it.

Testamentary Exception to Attorney-Client Privilege

In *Zook v. Pesce*, 438 Md. 232, 91 A.3d 1114 (Md. 2014), the Court of Appeals considered the testamentary exception to the attorney-client privilege. Mary Catherine Zook challenged a living trust that her father created in 2008, arguing that her father lacked capacity and was subject to undue influence. The 2008 trust apparently superseded an earlier trust instrument. Ms. Zook sought disclosure of that earlier instrument; the lawyer who prepared it refused, asserting the privilege of his by-then deceased client.

The Court of Appeals noted that Maryland does recognize a testamentary exception to the attorney-client privilege, under which confidential communications between attorney and client can be admitted in a dispute between putative heirs or devisees after the client's death. The Court declined to apply the exception to this case, however. It noted that the contents of the earlier instrument would not be relevant unless Ms. Zook could establish her claims of incapacity or undue influence. The Court noted that Ms. Zook could not produce evidence to sustain those claims (the Court stated that evidence that the decedent was seriously ill was not by itself sufficient to show lack of capacity), and therefore held that there would be no reason to ignore the attorney-client privilege in this case.