

MARYLAND UPDATE FOR
THE D.C. BAR ETPL/TAXATION SECTION JOINT MEETING

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LEGISLATIVE DEVELOPMENTS

A. OVERVIEW OF 2017 LEGISLATIVE SESSION. The 2017 legislative session in Annapolis was busy with a significant number of bills introduced and considered in both chambers of the General Assembly, many of which dealt with a variety of social and fiscal issues. The Estate and Trust Law Section Council drafted and actively supported five bills in this session, three of which passed both the House and the Senate and are expected to become law. The fourth and fifth bills were withdrawn for further review. There were a number of other bills of interest to estates and trusts practitioners that were also considered in this legislative session, and actively monitored by the Section Council, some of which were also passed by both chambers of the General Assembly and are expected to become law.

1. Maryland Trust Act – Eliminating Requirement for Trustee to Notify Him/Herself. The Section Council brought this legislation to correct an oversight in the Maryland Trust Act. This bill (SB792/HB754) provides that when a Trustee is also a qualified beneficiary of a trust, there is no requirement that the Trustee provide notice to himself or herself under Estates and Trusts Article §§14.5-109 and 14.5-813.

This bill was signed by the Governor April 18, 2017. This bill will take effect October 1, 2017.

2. Maryland Trust Act – Allowing Settlor to Appoint Representatives. The Section Council brought this legislation to address a change to Maryland law created by the Maryland Trust Act. Prior to the passage of the Maryland Trust Act, Maryland did not require trustees to provide notice to beneficiaries of a trust. Under this bill (SB793/HB753), which revises

Estates and Trusts Article, §§14.5-105 and 14.5-306, the creator of a trust is given the power to name one or more persons (other than a trustee) to serve as representatives of a beneficiary or class of beneficiaries, to specify an order of priority among representatives appointed and give other persons the power to name such a representative. This allows the Settlor to decide the most appropriate person to serve in the role of representative. The representative may receive all notices otherwise required to be sent to a qualified beneficiary and may bind such a beneficiary to actions of a trustee or trust amendments so long as there is no conflict between the representative and the beneficiary. A representative appointed by the Settlor is prohibited from concurrently serving as both a Trustee and a representative. The legislation also provides a standard of care for the representative. A representative or successor representative of a beneficiary of a trust may be held liable to the beneficiary on whose behalf the representative acts only if the representative has undertaken or agreed to represent the beneficiary and the representative's action or failure to act is proven by clear and convincing evidence to have been in bad faith with respect to the beneficiary. In determining liability for bad faith representation, the action or inaction must be found to be the result of intentional wrongdoing by the representative, or the representative must have acted or failed to act with reckless indifference to the purposes of the trust or the interests of the beneficiary on whose behalf the representative acted.

This bill was signed by the Governor April 18, 2017. This bill will take effect October 1, 2017.

3. Tax Treatment for Transfers of Vehicles from Trusts. The Section Council recognized that the transfer tax exemptions under the Transportation Article for vehicle transfers to family members, heirs and legatees did not extend to similar transfers from trusts. Under Transportation Article §§13-810(c)(1)(i) and (ii), a vehicle transferred to a family member is exempt from the excise tax otherwise imposed on transfers. Similarly, under Transportation Article §13-810(c)(4), a vehicle transferred from a decedent to a legal heir, legatee, or distributee is exempt from the excise tax otherwise imposed on transfers. The legislation (SB449/HB1360) amends Estates and Trusts Article, §14.5-1001 to equalize the excise tax treatment of transfers from a trust when the same transfer would otherwise have been exempt under the existing Transportation Article.

Signed by the Governor on May 25, 2017, this bill will take effect July 1, 2017.

4. **Vehicle Laws – Transfer on Death.** HB492 codifies a vehicle owner's ability to specify one beneficiary to receive an automobile upon the death of the vehicle owner.

Signed by the Governor on May 25, 2017, this bill will take effect October 1, 2017.

5. **Share of Intestate Estate for Surviving Spouse.** SB73/HB735 increases the intestate share of the surviving spouse under Estates and Trusts Article, §3-102 from the first \$15,000.00 plus one-half of the remainder, to the first \$40,000.00 plus one-half of the remainder, if there is no surviving minor child.

Signed by the Governor on May 25, 2017, this bill will take effect October 1, 2017.

6. **Inheritance Tax - Exemption – Evidence of Domestic Partnership.** SB276/HB1104 amends Tax – General Article, §7-203 to provide that either a Domestic Partnership Affidavit (under Health –General Article §6-101(B)(1)) or any two proofs of a domestic partnership (under Health –General Article §6-101(B)(2)) are sufficient to exclude from inheritance tax an interest in a primary residence passing from a decedent through joint tenancy to or for the use of the domestic partner.

Signed by the Governor on May 4, 2017, this bill will take effect July 1, 2017.

7. **Recordation and Transfer Taxes - Exemptions – Property Conveyed from Sole Proprietorship to LLC.** SB111/HB363 exempts from recordation and transfer taxes real property conveyed from a sole proprietorship to a limited liability company if the sole member of the limited liability company is identical to the converting sole proprietorship.

Signed by the Governor on April 11, 2017, this bill will take effect July 1, 2017.

8. **Health Care Decisions Act – Advance Directives - Disqualified Persons.** SB562/HB498 precludes certain individuals from serving as health care agent or surrogate health care decision maker. The individuals precluded are anyone who the principal has filed a restraining order against, entered into a separation agreement with or is the subject of an application for divorce from the principal.

Signed by the Governor May 25, 2017, this bill will take effect October 1, 2017.

9. **Health Care Decisions Act – Advance Directives – Witness Requirements.** HB188 establishes that an Advance Directive includes an electronic document,

voluntarily executed by the declarant, in which the declarant's identity is authenticated in accordance with the National Institute of Standards and Technology Special Publication 800-63-2.

Signed by the Governor May 25, 2017, this bill will take effect July 1, 2017.

10. Requirements for Filial Support - Repeal. SB676/HB764 amends Family Law Article §13-101 by removing the provisions making it a crime for an adult child to fail to provide food, shelter, clothing and care to a destitute parent.

Signed by the Governor on May 4, 2017, this bill will take effect October 1, 2017.

B. SELECTED LEGISLATION THAT DID NOT PASS. As indicated in the introductory paragraph, the Estate and Trust Law Section Council was successful in having three of its five bills pass the General Assembly this session, all of which are described above. The fourth and fifth bills; namely, Elective Share of Surviving Spouse and the Temporary Appointment of Agent to Make Medical Decisions for Minor Children, will be actively promoted by the Section Council in the 2018 legislative session. In addition, a few other bills of interest to estates and trusts practitioners that were considered by the House and/or Senate in the 2017 session but not passed, are also set forth below.

1. Elective Share of Surviving Spouse. The Estate and Trust Law Section Council has debated for many years an appropriate solution to the outdated law in Maryland dealing with the elective share of the surviving spouse. Sections 3-203 through 3-208 of the Estates and Trusts Article set forth the current law relating to the right of the surviving spouse to an elective share and, the computation and the method of making the election. The essence of this statute is that a surviving spouse may elect to receive one-third (1/3) of the net estate (surviving issue) or one-half (1/2) of the net estate (no surviving issue). Note that the concept of net estate is based on the probate estate. Given that a significant portion of a decedent's wealth may have been comprised of probate assets over 40 years ago when the elective share statutes were enacted, the objectives may have been adequately carried out at that time. However, a substantial amount of an individual's wealth now passes in a non-probate form, leading to distortions of the elective share and in many cases unintended consequences. The bill that was proposed by the Section Council

(SB881/HB722) was the culmination of a significant amount of analysis and debate among its members, was developed in cooperation with the Elder Law Section, and is designed to produce a much more fair and appropriate result designed to carry out the public policy behind the elective share laws; namely, to "protect surviving spouses from being disinherited and left with no reasonable means of financial support" [*Karsenty v. Schoukroun*, 406 MD 469 (2008) at 504]. The proposed legislation eliminates the concept of a net probate estate and instead moves toward the concept of a gross estate for federal estate tax purposes, comprising not only the probate but also non-probate assets, taking into account the surviving spouse's interest in trusts and factors in assets passing to the surviving spouse outside of probate, in an effort to produce a more equitable result. The proposed bill sets forth an order from which the elective share shall be paid, and also provides for judicial modification should circumstances justify court intervention. As a result of comments received after the bill was introduced, the bill was withdrawn and a committee was formed to work toward a consensus on some remaining questions. The Section Council intends to actively pursue passage of this bill in the 2018 legislative session.

2. **Temporary Health Care Agent for Minor.** In coordination with the Health Law Section, the Section Council proposed legislation (SB935/HB961) that would give parents and legal guardians the authority to temporarily designate an alternate decision maker or temporary health care agent for medically necessary health care treatment for a specific period of time. The proposed statute would be included in Title 20 of the Health-General Article. This bill specifically precludes a temporary health care agent from having the power to withhold or withdraw life sustaining treatment. The statute would also protect a health care provider who relies in good faith on the written authorization of the temporary health care agent. A suggested form was initially included in the proposed legislation. The form was withdrawn when it was suggested that an unintended consequence of the form might be that hospitals and medical providers would stop accepting written authorizations that were not on the statutory suggested form. The Section Council intends to actively pursue passage of this bill in the 2018 legislative session.

3. **Maryland Estate Tax – Unified Credit.** A bill (HB463) was introduced in the House which was designed to freeze the exemption from Maryland estate tax at \$3,000,000. The bill was not voted on in the General Assembly.

4. **Estate Fairness Act - Inheritance Tax Repeal.** A bill (HB1331) was introduced intended to repeal the Maryland inheritance tax. The significant financial impact to the Registers, who depend on the inheritance tax revenue to fund their operations, was noted in the hearing and the bill did not receive a vote in the House Committee.

5. **End-of-Life Option Act.** This bill (SB354/HB370) would have permitted individuals meeting certain conditions to request aid in dying. Following an unfavorable report in the Senate Committee, the bill was withdrawn.

6. **Intestate Estates – Inheritance by Surviving Parent - Repeal.** SB1100 would have repealed a parent’s share of an intestate child’s estate when there are no surviving children of the decedent. Currently, if an individual dies intestate survived by a surviving spouse, no surviving children, and surviving parents, the surviving spouse receives the first \$15,000.00 and splits the remainder equally with the surviving parents. SB73/HB735 (see A 5, above) increased the spouse’s share from \$15,000.00 to the first \$40,000.00. This bill was filed late and, while it passed the Senate, it did not make it to the House for consideration.

7. **Estates – Duties of Guardians of the Person – Fostering and Preserving Family Relationships.** This bill (HB1165) included among the duties of the Guardian of the Person that the court can order, if the court determines that it is in the best interest of the disabled person, the duty to enforce the disabled person’s right to receive visitors, foster and preserve family relationships including, as appropriate, assisting to arrange visitation and communication by telephone calls, personal mail, and electronic communications.

This bill passed the House, but did not pass the Senate.

C. **LOOKING AHEAD TO 2018 LEGISLATIVE SESSION.** In terms of the 2018 legislative session, as indicated above, the Section Council intends to actively push the elective share legislation and the Temporary Appointment of a Health Care Agent to make health related decisions for minor children. In addition, the Section Council will be conducting a review of the intestacy laws in anticipation of recommending legislative revisions and as well as reviewing the uniform trust decanting act to prepare an appropriate decanting bill for the 2018 legislative session. Other potential topics for legislation will in all likelihood be considered by the Section Council leading up to the next session.

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CASE LAW UPDATE

A. Conditional Intra-Family Loan; Co-Tenancy Contributions

In *Burak v. Burak*, 231 Md. App. 242 (2016), the Court of Special Appeals addressed several issues of co-tenancy law in the context of a divorce proceeding. Note that this case was granted certiorari by the Maryland Court of Appeals in March.

In this case, grandparents were granted custody of their grandchild and were allowed to intervene in the property distribution of the Husband and Wife. The Court found that the grandparents were entitled to the first \$131,000 of proceeds from the sale of the marital home because they made a conditional loan of that amount to Husband and Wife for the purpose of allowing their grandchild to grow up in a safe and clean environment. Husband testified that grandparents provided the money with the oral stipulation that the money would be repaid if Husband and Wife moved out or split up within 10 years of moving into the house. The wife said that she believed the money was a gift from grandparents. A “Gift Letter” provided to the mortgagor of the house was brought into evidence. The letter said that no repayment of the gift was expected or implied.

The wife appealed the Circuit Court’s decisions. The majority of the opinion relates to the child custody dispute. However, the wife also contended that the Circuit Court erred in allowing the grandparents “to interevne in the divorce property distribution hearing for ‘judicial convenience,’ [because of] the fact that [Wife] had a right to a jury trial on any such claim by the [Grandparents], it is not permitted in the family law statute or procedure....” 231 Md. App. at 273.

The Court of Special Appeals found that this was not the appropriate setting for the grandparents to assert their claim for repayment of a conditional loan.

The Court could not find any legal authority to support the Circuit Court's decision to allow the grandparents to intervene in the property distribution. Likewise, the Court could not find any other Maryland cases discussing a third party's ability to intervene in a divorce in order to assert a money claim against either or both of the divorcing parties. The Court found that the Circuit Court erred in considering and resolving the grandparents' claim against the house sale proceeds.

The Court also upheld the Circuit Court's order awarding compensation to the husband for one-half of the expenses paid by husband toward the maintenance of the family home after the couple's separation. The Court of Special Appeals noted that in *Crawford v. Crawford*, 293 Md. at 311, 443 A.2d 599, they held that "a co-tenant in a tenancy by the entireties is entitled, to the same extent as a co-tenant in a tenancy in common or joint tenancy is entitled, to contribution for that spouse's payment of the carrying charges which preserve the property."

The Court also cited the "Crawford Credit" policy as articulated in *Baran v. Jaskulski*, 114 Md.App. 322, 328, 689 A.2d 1283 (1997). That policy states:

"Crawford Credits—the general law of contribution between cotenants of jointly owned property applies when married parties, owning property jointly, separate. A married, but separated, cotenant is, in the absence of an ouster (or its equivalent)

of the nonpaying spouse, entitled to contribution for those expenses the paying spouse has paid.”

The Court of Special Appeals upheld the Circuit Court’s award of “Crawford Credits” to the spouse. They found no abuse of discretion in the Circuit Court’s award to the husband, the sole party paying the mortgage on the house, of contribution against those payments from the wife.

B. Life Estates; Deed Construction; Gift not an “Encumbrance”

In *Grimes v. Gouldmann*, 232 Md. App. 230 (2017), the Court of Special Appeals considered a case involving two inconsistent deeds executed by Dianne Hudson (“Hudson” or the “Life Tenant”) for the same property.

In the 1990 deed, she reserved a life estate and granted a remainder interest to the appellees (three relatives). Under the terms of the 1990 deed, Hudson also reserved the power “to sell, mortgage, lease or otherwise encumber” her interest and the remaindermen’s interest.

In the 2009 deed, Hudson reserved a life estate in the same property but granted a remainder interest to the appellants.

Following Hudson’s death, the appellees filed suit to have the second deed set aside as invalid for two reasons: (1) the 2009 remaindermen had exerted undue influence on Hudson; and (2) the 1990 deed prohibited transfer of the property by gift making the 2009 deed void *ab initio*. The Circuit Court for Baltimore County found that the 1990 deed did not give Hudson the power to dispose of the property by gift and concluded that the 2009 deed was invalid.

The appellants asked the Special Court of Appeals to rule whether the 1990 deed gave Hudson the power to dispose of the 1990 remaindermen’s interest by way of a gift to the 2009 remaindermen. The Special Court of Appeals noted that basic principles of contract interpretation apply when construing language in a deed. The Special Court of Appeals noted that the language in the 1990 deed was “uncommonly narrow” and did not contain the broader powers of disposition contained in the deeds (such as the power to “otherwise dispose of” etc.) previously considered by

the Maryland Courts. 232 Md. App. at 335. The Court also noted that the appellants seem to have noticed the narrow powers in the 1990 deed. Interestingly, the 2009 deed broadly restricted Hudson's retained powers with respect to the property. In that later deed, Hudson had no power to "in any manner dispose" of the property. Id. at 335, 336.

The appellants cited language in the 1990 deed which expanded upon Hudson's retained power to "sell, mortgage, lease or otherwise encumber" the property. The additional language stated that Hudson "may, by her own act and deed, fully and effectually bar and extinguish her own interest and the interest of the remaindermen in such manner she may deem proper without any obligation on the part of any purchaser, lessee, or mortgage to see to the application of the money derived...." Id. At 333. The Court held that such language was meant to give Ms. Hudson as much power as possible to exercise her ability to "sell, mortgage, lease, or otherwise encumber" the Property, but did not expand those powers.

The appellants also argued the power retained by Hudson in the 1990 deed to "otherwise encumber" the property encompassed the power to make a gift of the property. The Court noted that Maryland Courts have "avoided giving an exact definition of encumbrance." 232 Md. App. at 337. However, the Court of Appeals has held that an encumbrance is a "right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all." 232 Md. App at 337 citing *Magraw v. Dillow*, 341 Md. 492, 501 (1996). The Court of Special Appeals rejected any notion that a gift would qualify as an encumbrance.

Note: This ruling was consistent with the holdings in *Burke v. Burke*, 204 Md. 637 (1954), in which the Court examined "practically identical" powers contained in a deed transferring title to a life tenant. In that case, the Court never addressed the power to make a gift and instead held

that a transfer incident to divorce was a “sale” allowed under the terms of the controlling deed. 232 Md. App. at 337.

C. Beneficiaries’ Power to Amend Irrevocable Trust; Beneficiary Standing

In *Grueff v. Vito*, 229 Md. App. 353 (2016), the Court of Special Appeals addressed several questions related to an irrevocable trust and a revocable trust created by James B. Vito (“Vito”). In 2013, Vito’s daughter Candace Grueff (“Grueff”) filed an eight count complaint against the trustees of both trusts seeking their removal and trust accountings. A discussion about the matters surrounding both trusts follows.

The Irrevocable Trust

Vito created the irrevocable trust in 1983 for the “immediate benefit” of his four children: Grueff, Michael, Judith, and Tim. 229 Md. App. at 357. Each child had a 25% beneficial interest in the trust and was entitled to annual distributions of their share of net income and capital gains. The irrevocable trust agreement could not be “altered, amended, revoked or terminated, in whole or in part, by” Vito. *Id.* At 356. However, the agreement provided that it could be “revoked, altered or amended by an instrument in writing, signed by the holders of not less than seventy-five (75%) interest herein....” 229 Md. App. at 357. The agreement was amended five times under that provision. The first three amendments related to the trusteeship or the duration of the trust. The fourth amendment provided that Judith and Michael (each 25% beneficiaries) would serve as trustees.

The 2013 complaint filed by Grueff included counts seeking (i) to remove Judith and Michael as trustees, and (ii) asking for an accounting. Two months later, her three siblings (Judith, Michael, and Tim) executed a fifth amendment reducing Grueff’s beneficial interest in the trust

from 25% to zero. Judith and Michael, as trustees, filed a motion to dismiss stating that Grueff was no longer an income beneficiary and therefore lacked standing to sue.

The Circuit Court held that the Fifth Amendment removing Grueff as an income beneficiary was valid. Therefore, the Circuit Court found that Grueff was not an interested person under Rule 10-103 and did not have standing to seek the trustee's removal and could not seek an accounting for the time following the Fifth Amendment.

Grueff filed a notice of appeal asking whether the Circuit Court erred in dismissing her claims against the irrevocable trust on the grounds that she lacked standing. In order to address the standing question, the Court of Appeals considered whether the Fifth Amendment (removing Grueff as an income beneficiary) was valid. The Court addressed that question *de novo*. The Court stated that "the power to amend may be granted by the settlor in the trust instrument" and that the Court must look to "the settlor's intent and to this end will consider the settlor's circumstances and all the provisions of the trust instrument" to determine the scope of the amendment power. The Court noted that if the amendment power was read broadly, it would seem to give the holders of a 75% beneficial interest the power to remove a beneficiary. However, the Court looked to the four corners of the instrument for evidence of Vito's intent. The Court noted: (1) the trust was titled the "James B. Vito Family Trust"; (2) the trust stated that Vito was giving property to the trust "for the immediate benefit of his children"; (3) the trust identified all four children as "Beneficiaries" and "Beneficial Owners"; (4) the trust stated that Vito was giving property to the trustee to be held in equal shares for his children; and (5) the trust provided that the trust principal would be paid over in equal shares to his children upon termination. 229 Md. App. at 371, 372, 373. The Court could not find any evidence that Vito intended to benefit some but not all of his children.

In addition, the Court noted an absurd result if the amendment power was read to include removing or changing beneficial interests. If a beneficiary was removed and only three beneficiaries remained, the 75% beneficial interest requirement would, in practice, require a

unanimous decision of the three remaining beneficiaries to remove any other beneficiary. The Court also dismissed the argument that the power should be construed to allow the alteration of beneficial interests because that power is a less “significant power than” the specifically granted power to revoke the trust. 229 Md. App. at 374. The Court dismissed this argument finding that a revocation of the trust would result in each child receiving an equal share of the trust property and would not run contrary to Vito’s intent to benefit his children equally.

The Court of Special Appeals concluded that the Fifth Amendment was invalid and ineffective. Therefore, Grueff remained a current income beneficiary of the irrevocable trust and was an “interested person” with standing to (1) seek removal of the trustees; and (2) seek an accounting.

The Revocable Trust

In 1999, Vito established a revocable trust with himself as trustee and he restated such trust in 2004. The trust provided that should Vito revoke the trust, the trust property would revert to him. During Vito’s life, the trust income and principal were to be applied for Vito’s support. Upon Vito’s death, the revocable trust would establish marital trusts for the benefit of Vito’s spouse and a Residuary Trust for the benefit of Vito’s spouse and descendants (including Grueff). Vito amended the trust, in part, on two other occasions to address specific bequests and equalizations.

The 2013 complaint filed by Grueff sought removal of the trustees and alleged breach of fiduciary duty, negligence, and breach of trust against the trustees of the revocable trust. The Circuit Court found that Grueff did not have standing to seek the trustee removal under 10-712(b) because she was not an “interested person” under Rule 10-103 because she was not a current

income beneficiary of the revocable trust. In addition, the Circuit Court found that Grueff did not have standing to bring the other claims because she was a remainder beneficiary.

Grueff appealed the Circuit Court decision that she did not have standing to assert her claims. The Court of Appeals examined Rule 10-103(f) and concluded that Grueff was not an “interested person” with standing to seek the removal of the trustees because she was neither a current income beneficiary of the trust nor the heir of a disabled person. Although the Circuit Court had appointed a guardian of Vito’s property in 2011, the Circuit Court never adjudicated Vito disabled or incompetent.

The Court of Appeals went on to address standing under Maryland common law. The Court noted that during Vito’s lifetime, the trustee’s duties were owed to Vito only and Grueff’s interest was wholly contingent on Vito not taking action to amend or revoke the trust. The Court found that “[u]nder common law standing principles, the absence of any duty to Grueff on the part of Trustees is fatal to her claims for breach of trust, negligence, and so forth.” 229 Md. App. at 382. Therefore, the Court of Appeals upheld the Circuit Court’s ruling that Grueff did not have standing to assert her claims with regards to the revocable trust.

D. Marital Deduction Savings Clause – Estate Tax Apportionment

In *Bandy v. Clancy*, 449 Md. 577 (2016), the Court of Appeals considered whether the Orphan’s Court erred in finding that a marital deduction savings clause contained in a codicil to the testator’s will would result in a trust for the testator’s older children bearing all of the federal and state estate taxes. The case involved the will and codicils of the author Tom Clancy who died in 2013. At the time of his death Clancy was married to his second wife with whom he had a minor child. Clancy also had four adult children from a prior marriage.

In 2007, Clancy executed a will that created three trusts out of the residuary estate: a Marital Trust for the benefit of his spouse (structured to meet the requirements of a qualified

terminable interest property (“QTIP”) trust under Section 2056(b)(7) of the Internal Revenue Code); a Family Trust for the benefit of his spouse and minor child; and the Older Children’s Trusts for the benefit of his adult children. The will stated that estate taxes would be paid out of the residuary estate “subject, however, to the provisions contained in Item Sixth hereof with respect to the Marital Share therein created....” Id. At 590. Item Sixth contained an estate tax marital deduction savings clause directing that “the Marital Share shall not be charged with or reduced by any estate, inheritance, succession or other tax...” 449 Md. at 591.

In the second codicil to his will, Clancy amended the provisions of the Family Trust so that it also would meet the requirements of a QTIP trust under Section 2056(b)(7) and would qualify for the federal estate tax marital deduction. Among other changes, the second codicil removed his minor child as a beneficiary of the Family Trust and mandated that the entire net income of the Family Trust would be paid to his spouse at least quarter annually during her lifetime. The second codicil also included a marital deduction savings clause with respect to the Family Trust directing that the personal representative and trustee may not “exercise any authority, power or discretion over” the Marital Share or the Family Trust “nor shall any payment or distribution of my personal representative or my trustee be limited or restricted by any provision of this Will, such that, in any such event, my estate would be prevented from receiving the benefit of the marital deduction as hereinbefore set forth.” 449 Md. at 595.

After Clancy’s death, Mrs. Clancy petitioned the Orphan’s Court for a Declaratory Judgement seeking a determination that the Family Trust was not obligated to pay any estate taxes. The Orphan’s Court concluded that the savings clause in the second codicil reflected Clancy’s intent that the Family Trust would be free of any federal estate tax liability.

The Court of Appeals reviewed the Orphan’s Court conclusions *de novo*. In construing the will and codicils, the Court of Appeals looked to evidence of Clancy’s intent. The Court noted that the second codicil clearly intended to qualify the Family Trust for the marital deduction by way of the 2056(b)(7) QTIP election but did not amend the provisions that directed payment of

estate taxes out of the residuary estate. The Court of Appeals determined that the savings clause in the second codicil overrode the broad direction to pay estate taxes out of the residuary estate. The codicil's savings clause prevented the personal representative and trustee from exercising any "authority, power, or discretion" to disqualify any portion of the Family Trust from the marital deduction, such as the payment of federal estate taxes. The Court also noted that a different conclusion would result in the Family Trust bearing the burden of federal estate taxes both at Clancy's death and at the death of Mrs. Clancy. The Court rejected the adult children's argument that they were unfairly burdened with estate taxes in order to benefit Mrs. Clancy. The Court found that both the minor child and the adult children were burdened for the benefit of Mrs. Clancy. In order for the Family Trust to qualify for the marital deduction, the second codicil reduced the minor child's interest in the Family Trust to a remainder interest that could be diminished during Mrs. Clancy's life if corpus was invaded to meet her needs.

D. Misappropriation of Estate Assets; Personal Representative's Bond

In *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24 (2017), the Court of Special Appeals addressed an estate case in its third level of court review. This case involved the misappropriation of Estate assets by a personal representative. Hartford Fire Insurance Co. ("Hartford") was the surety on a \$20,000 personal representative's bond obtained by the Estate's former personal representative (the "Former PR"). It is important to note that the Estate was open for a lengthy amount of time in order to receive periodic payments from asbestos related litigation. The Former PR did not obtain the bond until the Estate had been open for 10 years (Date 1).

Approximately six months after obtaining the bond (Date 2), the Former PR was removed as PR and the Current PR was appointed. The Court gave the Former PR five days to turn over

“all known assets, property, and records pertaining to the [the] [E]state” to the Current PR. 232 Md. App. at 30.

Five months following the Former PR’s removal (Date 3), the Current PR filed a petition seeking the Former PR’s return of the Estate’s misappropriated assets. The Orphan’s Court issued a show cause order to the Former PR to return estate assets. Hartford was not notified on the petition for the show cause order. The Orphan’s Court proceeded to find that the Former PR misappropriated \$13,566.23 in Estate assets.

The Current PR brought an action on the bond in the Orphan’s Court. Hartford was served with an order to show cause in writing why the action on the bond should not be granted. Following an evidentiary hearing, the Orphan’s Court condemned the bond in the amount of \$13,566.23.

Hartford appealed the bond condemnation to the Circuit Court arguing that the Estate bond only could be condemned for the sums misappropriated between the date the bond was issued (Date 1) and the date of the Former PR’s removal (Date 2). Hartford’s argument was that the bond was not in effect during all of the misappropriations by the Former PR.

The Circuit Court tried the case *de novo* and issued an order condemning the bond for a lesser amount of \$3,256.96. The Estate then sought a three-judge panel review in the Circuit Court that reinstated the condemnation of the bond in the amount of \$13,566.23. Hartford appealed to the Court of Special Appeals. One of the issues on appeals was “Whether the in banc court erred in holding that personal representative’s bond is retroactive...” *Id.* at 42.

The Court of Special Appeals considered several procedural issues before addressing the retroactive nature of a bond. It then found that the *de novo* trial court erred in ruling that the bond

only could be condemned for money misappropriated between Date 1 (bond issuance) and Date 2 (Former PR removal).

The Court stated that Hartford's retroactive argument "rests on the fallacy that a personal representative who misappropriates estate assets only breaches her duty to the estate at the exact time of the misappropriation. Misappropriating estate funds is a wrongful act that can be the basis for removal of the personal representative; and when that happens, a breach of duty is committed when the removed personal representative fails to account for and deliver to the successor personal representative the property belonging to the Estate." *Id.* at 53.

The Court found that the application of the bond to funds misappropriated prior to the bond's issuance was not an issue of retroactivity. Instead, the Former PR's failure to deliver estate property to the Current PR was a breach of her fiduciary duties at that time. A personal representative's failure to repay misappropriated Estate funds is a continuing breach of duty covered by a bond issued after the misappropriation.