2015 MARYLAND DEVELOPMENTS

Charles S. Abell
Furey, Doolan & Abell, LLP
301-652-6880
csa@fdalaw.com

LEGISLATIVE DEVELOPMENTS

After a very busy year for trusts & estates legislation in 2014, the 2015 legislative session was not quite as active. However, the General Assembly did pass a number of bills that will be of interest to trusts and estates practitioners.

Maryland Estate Tax

1. Filing of Estate Tax Returns with Comptroller Only. Section 7-305 of the Tax-General Article now requires filing of the Maryland Estate Tax Return with the Comptroller only. Previously, a personal representative could file with the Comptroller or with the Register of Wills, but after July 1, 2015, the option of filing with the Register will disappear. Therefore, an MET is not timely filed if it is filed with the Register; it must be filed with the Comptroller.

2. Waiver of Penalties for Alternate Payment Schedules. Section 7-307 of the Tax-General Article now precludes the Comptroller from assessing a penalty when a taxpayer is paying estate tax pursuant to an alternate payment schedule agreed to by the Comptroller, so long as the taxpayer actually pays the tax in accordance with the schedule.

This bill took effect for alternate payment schedules entered into after July 15, 2015.

Maryland Trust Act.

In 2014, the General Assembly passed the Maryland Trust Act, which went into effect on January 1. This year the General Assembly tweaked the Act in two ways:

1. Creditor Claims. There had been some confusion over when and how creditors could assert claims against the assets of a revocable trust after the settlor's death. In response to this confusion, the General Assembly passed HB666/SB 417, which revises §14.5-508(a) of the Estates & Trusts Article to provide revocable trusts with a creditor claim period similar to the period that is applicable to probate estates.

Under this new statute, if there is a regular or modified administration of the estate of a deceased settlor, then claims against assets in a revocable trust are handled through the estate – i.e., if a creditor files a timely claim in the probate estate, then the creditor can assert that claim against the revocable trust assets. Thus, in these cases, claims against the assets of the revocable trust receive the same limitations period and presentment procedures as claims against the estate.

If there is not a regular or modified administration (e.g, if there is a small estate or will of no estate), then the normal creditor claim period does not apply to revocable trusts. However, the trustee can publish a Notice to Creditors of a Settlor of a Revocable Trust, which imposes a limitation period of six months from the date of publication. The trustee must publish for three consecutive weeks in a newspaper of general circulation. If a creditor wishes to assert a claim against the trust assets, then within the six month period he must either (1) present the trustee with a written statement of the claim or (2) commence an action against the trust (and actually serve the complaint within 30 days of commencement).

This bill takes effect October 1, 2015.

2. Definition of Incapacity. HB 703/SB 419 added a definition of the terms "incapacity" and "incapacitated" to §14.5-103(aa) of the Trust Act. The statute defines incapacity as "the inability of an individual to manage his or her property or financial affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance," which is the same definition used in the context of guardianships and powers of attorney.

This bill takes effect October 1, 2015.

Modified Administration.

The General Assembly also tweaked the modified administration procedures, continuing its trend of making administration easier and more streamlined.

1. Extensions of Time for Final Report. Section 5-703 of the Estates and Trusts Article allows a personal representative in modified administration to obtain a single 90 day extension of the time to file a final report, with the consent of all interested persons. In response to growing concerns that slow sales of real property would cause estates to be pushed out of modified administration, the General Assembly amended this section to allow the Register of Wills to grant an additional extension of up to 90 days (again, with the consent of the interested persons). Note that this additional extension is in the Register's discretion – it is not automatic, as the first extension is.

This bill takes effect October 1, 2015.

2. Payment of Funeral Expenses. The General Assembly revised the provisions for payment of funeral expenses under §8-106 in two ways:

First, the default limit for funeral expenses will increase to $15,000 (from $10,000).

Second, this statute provides for approval of payment of funeral expenses in modified administration without seeking a court order. Previously, if the will did not waive court approval, then only the court could approve these expenses, but under the new statute, a personal representative can list the expenses on the final report, and if the final report is approved, then no further court action is required.

This bill takes effect October 1, 2015.

Guardianship and Disability

The General Assembly passed three bills that relate to disabled individuals.

1. Guardianship Proceedings – Attorney's Fees. HB 109 revised §§ 13-704 and 13-705 of the Estates & Trusts Article to provide that a court may award attorney's fees for bringing a petition for guardian, if the court finds that (1) the disabled individual has sufficient resources and (2) there was substantial justification to bring the petition.

This bill takes effect October 1, 2015.

2. Guardianship of the Person. HB 293 revises § 13-708 of the Estates & Trusts Article to allow the court to appoint a guardian of the person for a limited period of time (rather than a full, permanent guardianship), where the court determines that the disability is likely to cease within one year.

This bill takes effect October 1, 2015.

3. Funding of Special Needs Trusts. SB 217 clarifies that § 14.5-1002 of the Estates & Trusts Article does not require a court order for funding a special needs trust. Section 14.5-1002 was part of the Maryland Trust Act, and it generally restates certain provisions of the law regarding special needs trusts.

This bill takes effect October 1, 2015.

4. The ABLE Act. The General Assembly considered a Maryland version of the ABLE Act, which would create special types of accounts to benefit disabled individuals. The initial bill did not pass, but the General Assembly created a task force to study the idea, so this might be legislation for a future session.

Advance Directives

The General Assembly passed two bills relating to execution and revocation of advance directives.

1. Revocation of Advance Directives. HB 293 revises § 5-604 of the Health General Article to allow individuals to waive their right to revoke their advance directives, if they become incapable of making decisions.

This bill takes effect October 1, 2015.

2. Electronic Witness Signatures. HB 1106 revises § 5-602 of the Health General Article to create the possibility of an advance directive with electronic witness signatures. Such electronic signatures must be in accordance with protocols established by DHMH.

This bill takes effect October 1, 2015.

CASELAW

Undue Influence; Jurisdiction; Testamentary Exception to Attorney-Client Privilege

Last year in *Zook*, *v.* Pesce, the Court of Appeals considered the testamentary exception to attorney-client privilege. Shortly after the *Zook* ruling, the Court of Special Appeals had an opportunity to apply the exception (and to consider several other issues) in *Green v. McClintock*, 218 Md. App. 336, 97 A.3d 198 (Md. App. 2014). The case involved a fairly convoluted will contest. Kenneth Green had long been estranged from his relatives (for a variety of reasons). In 2003 he worked with attorney Donald Nelson to execute a will that made his friend Betty McClintock his primary beneficiary. In the Summer of 2009, with Kenneth in poor health and less than six months from death, Kenneth's brother Albert Green removed Kenneth from Maryland and brought him to Kentucky. In August 2009, while in Kentucky, Kenneth executed a new will, naming Albert as beneficiary and Albert's son Andrew as personal representative. The attorney who prepared that will apparently never met or communicated with Kenneth, but acted on directions from Andrew.

Andrew filed the 2009 will for probate in Alleghany County. Andrew later asserted that Kenneth had changed his domicile to Kentucky and sought to dismiss his own petition, but the Orphans' Court found that the administration should remain in Maryland and accepted the will for probate. Andrew did not appeal that ruling.

Betty McClintock filed a petition to caveat the 2009 will. The Circuit Court held that the 2009 will was invalid on the grounds that it was procured by fraud and undue influence. Among the evidence that the Circuit Court heard was testimony from Donald Nelson concerning the preparation of the 2003 will and certain conversations he had with Kenneth in September 2009. Andrew appealed the Circuit Court's ruling, arguing first that the court lacked subject matter jurisdiction (because he asserted that Kenneth was a Kentucky domiciliary), second that the court erred in allowing Donald Nelson's testimony, and third that there was not sufficient evidence to support a finding of fraud and undue influence.

The Court of Special Appeals first ruled against Andrew on jurisdiction. It did so not because Andrew had been lax in pursuing the claim – he had, but as the Court noted, subject matter jurisdiction cannot be waived – but because § 5-103(a) of the Estates & Trusts Article allows Maryland to probate the will of a person who is domiciled elsewhere, as long as the decedent owned property in Maryland at the time of death. Kenneth owned real property in Maryland, and therefore Maryland had jurisdiction to accept the will for probate, whether or not Kenneth was a Maryland domiciliary. Interestingly, a footnote in the opinion suggests that even if there were no real property in Maryland, the decedent's *intangible* property (savings bonds) that was physically located in Maryland would have been sufficient to permit jurisdiction.

Andrew next complained that Donald Nelson's testimony was covered by attorney-client privilege and that the Circuit Court should not have allowed it. He argued that the testamentary exception cited in *Zook* applies only to testimony regarding the actual will being contested, and not to previous wills or representations. The Court of Special Appeals rejected that argument and found that the *Zook* decision encompasses testimony that "helps to clarify the donative intent of the decedent." The Court found that Nelson's testimony helped clarify Kenneth's intent and suggested that Kenneth had no idea that he was changing his plans with the 2009 will.

Finally, the Court held that there was sufficient evidence to support a finding of undue influence and fraud. The Court reviewed the seven characteristics of undue influence: (1) the testator and the beneficiary are in a confidential relationship, (2) the will contains a substantial benefit to the beneficiary, (3) the beneficiary caused or assisted in effecting the will, (4) the beneficiary had opportunity to exert influence, (5) the will contains an unnatural disposition, (6) the will changes disposition from a former will, and (7) the testator was highly susceptible to undue influence. The Court noted that all seven factors need not be present, but that the first and the last are essential. In this case, the Court found evidence of six of seven factors, excepting the fifth (unnatural disposition).

On the question of fraud, the Court found sufficient evidence to support a finding of fraud (remember that in a will contest a caveator is required to prove fraud only by a preponderance of the evidence, and not by the higher standard of clear and convincing evidence that normally applies to common law fraud).

Constructive Delivery of Deed

In *Daniels v. Daniels*, 217 Md. App. 406, 94 A.3d 121 (Md. App. 2014), the Court of Special Appeals considered constructive delivery of a deed. The case involved a purported transfer of property from James Daniels to himself and his wife Lana Daniels as tenants by the entirety. James executed the deed, told his wife about it, but did not record it. Instead, he kept the deed in his papers, where it still resided at his death. The Circuit Court held that, while recordation is not essential for an effective transfer, delivery is, and that the deed had not been delivered prior to James's death, even though James clearly intended to make a gift of the property.

The Court of Special Appeals affirmed the Circuit Court's decision. It noted that under Maryland law delivery is consummated only when the deed passes from the grantor to the grantee or to a third party without the grantor retaining the power to revoke. In the present case, James retained possession of the deed, and therefore had the power to revoke it. Thus, there was no delivery, constructive or otherwise, and the gift was not completed prior to James's death.

Retirement Benefits and Constructive Trust

The Court of Appeals considered the division of a decedent's pension benefits between a surviving wife and ex-wife in *Robinette v. Hunsecker*, 439 Md. 243, 96 A.3d 94 (Md. 2014). Husband and Ex-Wife (the Court referred to the parties in its opinion by relationship, not name) had entered into a separation agreement that allocated future benefits from Husband's retirement plan. Husband remarried and designated his new Wife as beneficiary of the plan. After Husband's death, Ex-Wife sought a share of the benefits, according to the terms of the separation agreement. There had not been a QDRO, however, and therefore the plan rejected Ex-Wife's claim. The Circuit Court for Frederick County imposed a constructive trust to allocate a portion of the benefits to Ex-Wife, on the grounds that it would be inequitable for Wife to retain the entire benefits (though the Circuit Court noted that the inequity in no way stemmed from wrongdoing by Wife).

In effect, the Circuit Court had granted a posthumous QDRO for the plan. Wife did not challenge the equitable findings, but argued that a court cannot impose a posthumous QDRO under federal ERISA laws. The plan actually was not covered by ERISA (it was a MCPS plan, and government-sponsored plans are exempt from ERISA), but the separation agreement referred to ERISA. Wife argued that Husband and Ex-Wife thereby agreed to incorporate the federal law. The Court of Special Appeals rejected that creative argument and found that ERISA did not apply, despite the language of the separation agreement. The Court noted that while this is a case of first impression in Maryland, the courts of other states had allowed a posthumous QDRO, and it affirmed the Circuit Court's decision. Note that this holding might apply only to plans that are exempt from ERISA; it is not at all clear that a court could take this action with a plan that is subject to the federal law.

Will Construction; Survivorship and Anti-Lapse

The Court of Appeals in *Kelly v. Duvall*, 441 Md. 275, 107 A.3d 1174 (Md. 2015) reviewed the lower courts' construction of a will. The case involved the will of Elizabeth Duvall. Ms. Duvall's son Dennis died shortly before her (but after the will was executed). The will contained a specific bequest of a house to Dennis, and also left Dennis a share of the residue. The will contained a clause that a beneficiary who did not survive Ms. Duvall for at least 30 days would be deemed to have predeceased her, with the provisions of the will applied accordingly.

Ms. Duvall's three surviving children argued that the gifts to Dennis lapsed because he did not survive their mother, and therefore that all assets should be divided only among the three surviving children. Dennis's son argued that the gifts to Dennis were not conditioned on survivorship, and that Maryland's anti-lapse statute would operate to pass the interests to Dennis's heirs. The Orphans' Court ruled in favor of the surviving childrern, and the Court of

Special Appeals affirmed, finding that the will's provisions imposed survivorship as a condition precedent to receiving a gift, and that they manifested an intent to negate Maryland's anti-lapse statute.

The Court of Appeals reversed the lower courts. It reasoned that the 30 day survivorship language in the will merely mimicked a similar provision in Maryland law, which is designed to avoid unnecessary multiple probate administration, and not to impose a blanket condition of survivorship. Looking at examples of survivorship requirements in the report of the Henderson Commission, the Court noted that Ms. Duvall's will did not contain any language conditioning the gift to Dennis "if he survives me" (or any similar language). Thus, the Court found that the language in the will did not express a survivorship requirement, and that the anti-lapse statute would operate to pass the interest that would have gone to Dennis to his heirs.

Judges Battaglia and Watts dissented, reading the will to express a clear intention that only living children should inherit, and not the heirs of deceased children.

This case highlights the need to draft wills with clear statements about what happens to a gift if a beneficiary does not survive, to avoid the ambiguity that occasioned years of litigation in this case.

Ownership of Joint Accounts

Jacqueline Wagner appealed her conviction for theft in *Wagner v. State of Maryland*, 220 Md. App. 174, 102 A.3d 900 (Md. App. 2015). She had been convicted in Circuit Court for embezzling funds from an account that she owned jointly with her father. Ms. Wagner argued that she was not guilty of theft because, as a joint owner, she was entitled to withdraw funds, and she was not subject to fiduciary duties.

As Marion Wagner aged, he added his daughter Jacqueline to his checking account as a joint owner. At trial, he testified that he did so specifically so that she would "be able to get the money if I couldn't get it myself." Over a three year period, Jacqueline withdrew more than $181,000 from Marion's IRA and more than $251,000 from his checking account, primarily for her own benefit. The Circuit Court convicted Jacqueline of theft, based on these withdrawals.

Jacqueline argued that § 1-204(f) of the Financial Institutions Article specifically authorized her, as a joint owner, to withdraw funds from the account. The Court of Special Appeals disagreed, noting that this section only directs banks to release funds to joint owners. The Court held that right to withdraw does not equate to right to ownership. Instead, the Court held that, barring evidence of the intent of an account owner to make a gift to another joint account owner, funds in a joint account continue to be owned by the person who owned it prior to deposit. In the present case, there was no evidence that Marion intended to make a gift to Jacqueline; indeed, he testified emphatically to the opposite. Therefore, the Court of Special Appeals held that Jacqueline was not entitled to withdraw funds for her personal benefit, and that she committed theft when she did so.

Disciplinary Proceedings

The Court of Appeals considered disciplinary proceedings against a prominent Maryland attorney in *Attorney Grievance Commission of Maryland v. Hodes*, 441 Md. 136, 105 A.3d 533

(Md. 2014). The opinion is lengthy, with extensive factual findings, which I will only summarize here.

Michael Hodes had acted as attorney-in-fact for his client Gloria Ominsky. Following Ms. Ominsky's death in 2011, Mr. Hodes served as personal representative of her estate, and then as trustee of the testamentary trust created under her will. The Court found that Hodes had committed several offenses while acting in these capacities, including withdrawing more than $15,000 from the client's accounts for his and his wife's personal use, disbursing more than $270,000 to himself from the trust accounts funds (and back-dating paperwork to make the transaction appear to be a loan), and making false statements under oath to bar counsel.

In addition to unsuccessfully challenging the factual allegations, Mr Hodes argued that he was not subject to discipline because he was acting in a personal, non-legal capacity when he served as attorney-in-fact and trustee. The Court disagreed with that analysis, noting that these roles stemmed from his attorney-client relationship with Ms. Ominsky, but also opined that he would have been subject to discipline in any case because the trial court found that he had acted dishonestly and fraudulently in a manner that could give rise to criminal liability. The Court found that Mr. Hodes had violated Maryland Rules of Professional Conduct 1.7, 1.15, 8.1, and 8.4, and entered an order disbarring him.

Adverse Possession and Claims Against An Estate

The Court of Special Appeals considered the question of whether a claim for adverse possession could be barred against an estate in *Nimro v. Holden*, 222 Md. App. 16, 110 A.3d 805 (Md. App. 2015). The case involved property owned by Dan Westland in Anne Arundel County.

Guy Nimro alleged that he and his predecessors in interest had used the property in a sufficiently open, exclusive, hostile, and adverse manner for more than 20 years, such that he had acquired the property by adverse possession.

Mr. Westland died in 2006, and Jane Holden was appointed personal representative of his estate. Years later, Mr. Nimro brought a quiet title action to recognize his ownership pursuant to adverse possession. Ms. Holden moved to dismiss the action, on the grounds that Mr. Nimro had not filed a claim against the estate within the time frame prescribed by § 8-103 of the Estates & Trusts Article. The Circuit Court agreed with the personal representative that Mr. Nimro's claim for adverse possession was barred, and dismissed the quiet title action.

The Court of Special Appeals vacated the judgment of the Circuit Court. It noted that, under Maryland law, legal title passes after 20 years of adverse possession, without need for judicial determination. According to the facts found by the Circuit Court, ownership of the property passed to Mr. Nimro by adverse possession well before Mr. Westland's death. Thus, the Court of Special Appeals held that Mr. Nimro was not asserting a claim against the estate, but simply was seeking judicial recognition of his existing property rights. For this reason, the Court held that § 8-103 did not apply to bar Mr. Nimro's action.