

## 2016 MARYLAND DEVELOPMENTS

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### I. LEGISLATIVE DEVELOPMENTS

#### 1. Maryland Fiduciary Access to Digital Assets Act (SB239/HB507).

Arguably, the most significant piece of legislation impacting estates and trusts practitioners and our clients is the Maryland Fiduciary Access to Digital Assets Act (“MFADAA”). Generally speaking, a “digital asset” is any electronic record in which an individual has a right or interest – it can include assets such as webpages or blogs, e-mails and social media, and even rights to access websites and online account information. Previously, access to digital assets has been governed by each internet provider’s terms of service (“TOS”) agreement. Most, if not all, TOS agreements preclude fiduciaries from accessing digital assets.

With MFADAA, an individual now can authorize a personal representative, trustee, guardian, agent, or other fiduciary to access digital assets. Maryland’s law is modeled on the Revised Uniform Fiduciary Access to Digital Assets Act promulgated by the Uniform Law Commission; several other states have passed or are considering similar statutes. The statute balances the need of fiduciaries to access information with privacy concerns by making access an “opt-in” process. This means that an individual may affirmatively grant a fiduciary access in a will, trust, or power of attorney, but that a fiduciary would not have that access without such an affirmative grant (though in certain circumstances a court also may grant access). In this fashion, individuals retain control to grant the access they desire – and only that access – to fiduciaries. If desired, an individual can distinguish between a “catalog” of digital communication (e.g., the to/from and date of an e-mail) and the broader “content” of a communication.

The opt-in nature of this new law emphasizes the role and importance of estate planners and other advisors. We should begin to discuss access to digital assets with clients and to incorporate new provisions in our documents where appropriate. The new law updates the statutory power of attorney forms with new language regarding digital assets. While not required by this statute, it is likely that online providers will begin building their own platforms for users to make affirmative decisions to allow (or restrict) access. While those tools can be useful (sort of like “pay-on-death” designations on account), planners should keep in mind that use of such online tools would trump the provisions in estate planning documents, and should advise clients to be thoughtful when using them.

The Governor signed this bill into law on May 10, 2016 and it will take effect October 1, 2016.

**2. Maryland Trust Act – Revocable Trust – Partial Revocation by Divorce or Annulment (SB451/HB541).** This new law is another example of continuing efforts to place revocable trusts on an equal footing with wills. It provides that a divorce or annulment revokes all provisions in a revocable trust relating to a spouse, comparable to the effect that Section 4-105(4) of the Estates and Trusts Article of the Annotated Code of Maryland has for wills.

The Governor signed this bill into law on April 26, 2016 and it will be effective for divorces or annulments occurring on or after October 1, 2016.

**3. Maryland Trust Act – Non-judicial Settlement Agreements (SB571/HB888).** This law permits trustees and qualified beneficiaries to enter into binding agreements to resolve certain trust matters, where previously court action would have been required. A non-judicial settlement agreement can resolve any matter that (1) a court could have resolved, and (2) does not violate a material purpose of the trust. The statute includes a non-exhaustive list of examples, including interpretation or construction of the terms of the trust, approval of an accounting or resolution of liability, trustee succession, authorization for a Trustee to engage in a particular transaction, and moving the place of administration to another jurisdiction. Each “interested person” (meaning the trustee and anyone else who would have needed to be a party to a binding court proceeding) must consent to the agreement.

The Governor signed this bill into law on April 26, 2016 and it will be effective October 1, 2016.

**4. Maryland Trust Act – Representation (SB570/HB887).** This law modifies the Maryland Trust Act to expand the capacity to represent the interests of a trust beneficiary. Currently, such representation is available only for individuals who are one generation down (e.g, a parent representing a child). The new law adds subsection (7) to Section 14.5-303 of the Estates and Trusts Article to allow representation of a minor, incapacitated, unborn or unknown individual, or an individual whose location is unknown, by a grandparent or more remote ancestor as long as there is no conflict of interest. In addition, the law adds a new Section 14.5-304 to allow anyone, whether or not a lineal ancestor, to represent a minor, incapacitated or unborn individual or unknown individuals, if they have a substantially identical interest and there is no conflict of interest. Among other things, this new law should reduce the need to seek appointment of a *guardian ad litem* for court proceedings and non-judicial settlement agreements.

This legislation was approved by the Governor on May 19, 2016 and it will take effect October 1, 2016.

**5. Maryland Achieving a Better Life Experience (“ABLE”) Program (SB355/HB431).** This law is designed to promote financial savings to support individuals with disabilities. The law directs the College Savings Plans of Maryland Board (now renamed the “Maryland 529 Board”) to establish and administer 529 accounts for individuals with disabilities.

Assets in the accounts will not count against individuals for purposes of qualifying for Medicaid and other means-tested benefits, and there will be a limited Maryland income tax subtraction modification for contributions to an ABLE account, similar to the subtraction modification for contributions to existing 529 plan accounts.

This bill was signed by the Governor on April 12, 2016 and it will take effect on July 1, 2016.

**6. Guardians of Property and Custodians – Authority to Fund Certain Trusts and Accounts (SB853/HB960).** This bill authorizes a guardian or custodian, without court order, to establish and/or fund a special needs trust, pooled assets special needs trust account, or an ABLE account for the benefit of a minor or disabled person.

This legislation was approved by the Governor on May 10, 2016 and it will take effect October 1, 2016.

**7. Registers of Wills – Retention of Estate Files (HB472).** This bill is designed to save the Registers administrative time and expense by rescinding the current requirement to return estate files to the personal representative. Instead, this new law permits the Registers to dispose of estate files (other than the original copy of the probated will) one hundred eighty (180) days following the closing of an estate, unless a personal representative specifically requests that such papers be returned. The Registers would retain electronic copies of estate files.

This legislation was approved by the Governor on May 10, 2016 and it will apply retroactively to estates opened on or after October 1, 2014.

**8. Recordation and Transfer Taxes – Transfer of Controlling Interest – Exemption (SB597/HB1226).** This law modifies Section 12-117 of the Tax-Property Article and effectively puts corporations and limited liability companies on equal footing with respect to exemptions from transfer and recordation tax for transfers of controlling interests. Previously, Section 12-117 of the Tax-Property Article exempted transfers between corporations under common control but did not exempt transfers between limited liability companies. With this legislation, transfers of controlling interests between corporations and limited liability companies under common control or between a subsidiary entity and a new entity that has identical ownership will not be subject to transfer and recordation tax.

This legislation was approved by the Governor on April 26, 2016 and it will take effect July 1, 2016.

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The General Assembly considered, but did not pass, a few other bills of interest:

1. **Elective Share.** The Section Council for years has debated legislation to clarify Maryland's law on the elective share of a surviving spouse. The Court of Appeals decision in *Karsenty v. Schoukroun* highlighted the challenges of the current law and increased the urgency to seek a legislative standard. The Section Council worked with the Elder Law Section and other stakeholders on a bill that would provide a more predictable and equitable mechanism to serve the public policy behind the elective share. The House passed the bill, but it did not get a vote in the Senate. The Section Council expects to have this bill on its agenda for the 2017 legislative session.

2. **Single-Party and Multiple-Party Accounts – Right to Funds on Death of a Party.** This proposed legislation would have allowed creators of joint accounts to eliminate survivorship rights and to make various other elections on forms to be completed upon creation of such accounts at financial institutions. This bill received unfavorable reports in both the House and the Senate.

3. **Maryland Estate Tax.** As is often the case, there were bills that sought to change the Maryland estate tax exemption. There were bills from both sides of the debate – one would have frozen the exemption at \$2 million, and another would have accelerated re-coupling to raise the exemption to the federal level in 2016. Neither bill received a vote.

## II. CASELAW DEVELOPMENTS

### 1. Authority of Agent After Principal's Death

In *Rosebrock v. Eastern Shore Emergency Physicians, LLC, et al.*, 221 Md. App. 1, 108 A.3d 423 (2015), the Court of Special Appeals addressed the question of whether an agent's authority terminates after a principal dies but before the agent has notice of the death. The case involved a medical malpractice claim filed by Sean Rosebrock as court appointed guardian for Judith Phillips. Ms. Phillips sustained an injury in 2003 and was treated by the appellees. After suffering from an infected surgical wound, Ms. Phillips entered into a persistent vegetative state in January of 2004. In 2009, Mr. Rosebrock, as guardian, filed a complaint on Ms. Phillips' behalf against the appellees asserting several claims including negligence. In April 2011, the Circuit Court found that one of appellees, Dr. Davis, was not negligent in her care and treatment of Ms. Phillips. A motion for judgment notwithstanding the verdict was filed by Mr. Rosebrock on April 15, 2011, and denied without hearing on May 18, 2011. On June 13, 2011, Mr. Rosebrock's counsel filed a timely appeal. Neither Mr. Rosebrock nor his counsel knew Ms. Phillips had died at 10:28 pm the night before the filing. The appellees filed a motion to dismiss the appeal on the grounds that Mr. Rosebrock, as guardian, did not have the authority to file a Notice of Appeal. The appellees also argued that Mr. Rosebrock's counsel also lacked the legal authority to file the appeal.

The Court addressed the basic principles of guardianship and agency law. The Court stated that "Under well-established principles of agency law, an agent's authority terminates upon the death of the principal." *Brantley v. Fallston Gen. Hosp. Inc.*, 333 Md. 507, 511, 636 A.2d 444 (1994). Likewise, "[a]n attorney does not have authority to note an appeal on behalf of a client who has died." *Id.* at 511, 636 A.2d 444. The Court stated that no Maryland cases address the authority of an agent after the principal dies but before the agent learns of the principal's death.

The Court adopted Section 3.07 of the Restatement (Third) of Agency (2006), which states that the termination of an agent's actual authority is effective only when the agent has notice of the principal's death. Section 3.07 also states that "[t]he termination is also effective as against a third party with whom the agent deals when the third party has notice of the principal's death."

The Court noted that the appellant's counsel was given the instruction to file the appeal prior to Ms. Phillip's death and did not have notice of her death prior to the filing. Therefore, the Court held that the appellant's counsel had valid authority to file the appeal. Rule § 2-241 required a substitution of the personal representative for the guardian. That substitution was timely made.

2. **“Duty To Account Theory” – Maryland Jurisdiction over Criminal Offense in Ancillary Estate**

In *Randall v. State*, 223 Md. App. 519, 117 A.3d 91 (2015), the Court of Special Appeals addressed three questions arising out of a Personal Representative’s embezzlement of estate assets in an ancillary jurisdiction. The appellant, an Arizona resident, was appointed co-personal representative of the estate of a Montgomery County, Maryland resident. The decedent owned real property in Arizona. The appellant opened ancillary administration in Maricopa County, Arizona by filing the Letters of Administration issued by the Montgomery County, Maryland Register of Wills as her requisite “proof of authority.”

The appellant sold the Arizona property, failed to account for the sale with the Montgomery County Register of Wills, and kept the majority of the sales proceeds for herself. A Montgomery County grand jury indicted the appellant for embezzlement and theft on July 21, 2011. The appellant tried to fight extradition but was eventually convicted in August of 2013. In her appeal, the appellant raised three questions, including, whether Maryland had “territorial jurisdiction to prosecute alleged theft and embezzlement offenses when all of the acts comprising the elements [of] the offenses occurred, if at all, in Arizona?” 223 Md. App. at 529.

The Court stated that a personal representative has “a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and the estates of decedents law[.]” 223 Md. App. at 563 (citing) Maryland Code (1974, 2011 Repl.Vol.), Estate and Trusts Article (“E.T.”) § 7-101(a). The Court found that the appellant was acting under a “cloak of authority” bestowed upon her by Maryland when she opened the ancillary estate in Arizona. Although the personal representative must abide by the laws of the state in which the ancillary real property is located, the personal representative has a duty to Maryland to account for the proceeds of sale. Here, the appellant was convicted of embezzling the proceeds from the sale of the ancillary real estate, not the real estate itself. Therefore, the appellant had acquired the sales proceeds by virtue of her appointment as personal representative by a Maryland court. As a result, her “duty to account” remained in Maryland and her breach of that duty was a basis for Maryland’s jurisdiction over the offenses.

3. **Void Contract -- Person Adjudicated Disabled as Party to Contract**

The Court of Special Appeals addressed whether a contract made with a person adjudicated disabled is void or voidable in *James B. Nutter & Co. v. Black*, 225 Md. App. 1, 123 A. 3d 535 (2015). The case involved a 2009 reverse mortgage loan made to Edwina E. Black, who had been adjudicated disabled in 1994. David L. Moore was appointed guardian of Ms. Black’s person and property at the time of the 1994 adjudication. In 1995, Mr. Moore purchased a residence for Ms. Black. The 1995 deed of conveyance listed Ms. Black as grantee and made reference to the guardianship proceeding in which Mr. Moore was appointed guardian. Likewise, the 1995 deed of trust for such residence was executed by David L. Moore as guardian of the property of Edwina Black.

The reverse mortgage transaction was entered into by Ms. Black without the knowledge or consent of Mr. Moore. When Ms. Black's guardianship came to light, the reverse mortgage lender, James B. Nutter & Co., filed a complaint asking three theories of relief. One theory requested a judgment ratifying the reverse mortgage agreement. Mr. Moore and Ms. Black answered the complaint seeking a judgment that the reverse mortgage was void and a declaration of title in favor of Mr. Moore as guardian for Ms. Black.

The Court noted that a void contract is not a contract at all whereas a voidable contract is one in which one or both of the parties have the right to "avoid the relations created by the contract, or by ratification of the contact to extinguish the power of avoidance." 225 Md. App. at 12. The courts have generally been circumspect in finding a contract void. In prior cases, deeds made by grantors with mental infirmities (but not adjudicated disabled and under guardianships) were considered voidable rather than void. *Riley v. Carter*, 76 Md. 581, 595-96, 25 A. 667 (1893), *Evans v. Horan*, 52 Md. 602, 610-611 (1879), *Atkinson v. McCulloh*, 149 Md. 662, 132 A. 148 (1926), *Flach v. Gottschalk*, 88 Md. 368, 41 A. 908 (1898).

The Court distinguished this case because the grantor had actually been adjudicated disabled. The Court noted that no provision in Maryland's guardianship statute explicitly provides that a deed by a disabled person is void. However, the Court stated that the appointment and qualification of a guardian of the property vests title of the protected person's property in the guardian. Thus, the disabled person does not have anything to convey. Additionally, all purchasers of real property are on constructive notice of the documents recorded in land and court records of the county where the land is located. The Court concluded that there is "no reason to treat a deed by an adjudicated disabled person any different than any other readily-recognizable title flaw." 225 Md. App. at 22.

#### 4. **Extension of "Child" Definition under ET §1-206 to Child Support Case**

In *Sieglen v. Schmidt*, 224 Md. App. 222, 120 A.3d 790 (2015), the Court of Special Appeals held that Estate and Trusts Article § 1-206 establishes that a husband and wife who agree to conceive a child through assisted reproductive services are the legal parents of such child. Therefore, they are "jointly and severally responsible for a child's support, care, nurture, welfare, and education." Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL") § 5-203.

In this case, a married couple opted to pursue "in vitro" fertilization with donated sperm and had a child conceived and born through this method. Both parties entered into the IVF program and signed necessary papers. The name of the mother and father appeared on the birth certificate. One month after the child's birth, the mother and father separated. The mother filed a petition for child support and the father answered the petition with a denial of parentage.

The mother countered that the father is the legal parent of the child under ET § 1-206(b) which provides that "(a) child conceived by the artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes." The father

argued that “artificial insemination” is not the same concept as “in vitro” fertilization. The Court rejected that argument saying that under the father’s theory “a child conceived via artificial insemination with donated sperm would be a legitimate child of the marriage, while a child conceived via IVF using the same genetic material would not” and it is clear that either process could involve donated genetic material. 224 Md. App. at 242.

The Court determined that the presumption of legal parentage under ET § 1-206 applied and no argument had been made that setting aside paternity is in the best interest of the child. The Court went on to address the father’s support obligations.

##### 5. **Joint Tenancy; Theft from Joint or Multiple Party Account**

In *Wagner v. State*, 445 Md. 404 (2015), the Court of Appeals addressed whether an individual can commit theft from a joint or multiple-party bank account to which the individual is a party. The case involved an elderly man (“Father”) who added his daughter (“Wagner”) as a “joint owner” of his checking and savings account following the death of his wife. Father also authorized Wagner to make telephonic withdrawals from his IRA. Wagner proceeded to transfer funds from the IRA to the checking account and made numerous withdrawals and transfers from the checking account for her personal benefit without Father’s knowledge or authorization.

The Circuit Court found Wagner guilty of theft and embezzlement under CR § 7-104. CR § 7-104(a) provides that a person may not willfully or knowingly obtain or exert control over property, if the person uses the property knowing that the use will deprive the owner of the property.

Wagner appealed and the Court of Special Appeals affirmed. Wagner filed a petition for writ of *certiorari*.

In challenging the lower courts, Wagner argued that under FI Section 1-240(f), she had full authority to exert control over the funds in the account. Wagner contended that there was no restriction on her withdrawal of funds from the account. The State argued that theft conviction was supported by sufficient evidence because Father had not authorized Wagner’s withdrawal of funds from the account to use for Wagner’s benefit.

FI § 1-240(f) provides:

(f) Withdrawals. -- Unless the account agreement expressly provides otherwise, the funds in a multiple-party account may be withdrawn by any party or by a convenience person for any party or parties, whether or not any other party to the account is incapacitated or deceased.

FI § 1-240(b)(5) provides:



“Convenience person” means any person who is authorized to draw upon funds in an account:

- (i) Under a power of attorney given by 1 or more parties to the account; or
- (ii) By virtue of a designation in the account agreement appointing that person as agent of a party or the parties to the account for the convenience of the party or parties.

The Court of Appeals noted that it cannot set aside the judgement of the trial court on the evidence unless clearly erroneous. With regard to statutory interpretation, however, the Court uses a *de novo* standard of review. The cardinal rule in statutory interpretation is to look at the plain language of the statute and the intent of the legislature.

By its plain language, the Court concluded that FI § 1-204(f) “authorizes only the act of withdrawal from a multi-party account, nothing more or nothing less.” The right to withdraw does not confer ownership on the party holding the withdrawal right.

The Court examined the legislative history behind FI § 1-204 which was enacted to change the common law principles applying to the disposition of a multi-party account upon the death of a party. The common law required that you look to the parties’ intent regarding survivorship rights. The legislation was introduced to establish a basic rule that in the absence of an express agreement regarding a multi-party account, the funds in the multi-party account belong to the surviving parties.

The Court noted that the statute does not create a basic rule regarding the ownership of a multi-party account prior to the death of a party. Although joint title creates a presumption of an ownership interest in both parties, the presumption can be rebutted with evidence to the contrary. The Court concluded that the law requires an examination of the Father’s intent to determine whether he intended to make an irrevocable gift of joint ownership in the account.

Here, the Court found sufficient evidence to rebut the presumption of joint ownership of the account. The Court of Appeals found that Wagner willfully and knowingly obtained or exerted control over the funds in the Father’s IRA and the account with the intent to deprive him of the funds in violation of CR § 7-104(a). Her conviction for theft was upheld.

## 6. **Statute of Limitations on Caveat of First-Filed Will**

In *Green v. Nelson*, 2016 WL 1704666 (2016), the Court of Appeals addressed the statute of limitations for caveatating an earlier filed will when a later filed will is found to be fraudulently procured. In this case, the decedent executed a 2003 will naming a friend as primary beneficiary. In 2009, the decedent executed a new will which revoked the 2003 will and named his brother

(“Green”) as sole beneficiary of his estate. Green filed the 2009 will for safekeeping with the Register of Wills prior to decedent’s death.

Following the decedent’s death, Nelson and Malamis (the “2003 PRs”) filed the 2003 will and the Orphan’s Court issued an administrative probate order appointing the 2003 PRs as personal representatives. As an heir, Green received notice of the probate proceeding and was advised of the date by which objections must be filed.

Two months later, Green petitioned the Orphan’s Court for judicial probate asserting that the 2009 will was the decedent’s last will and testament. The beneficiary of the 2003 will contested the 2009 will on the grounds of fraud and undue influence. The Circuit Court found the 2009 will to have been fraudulently procured. Brother appealed the decision to the Court of Special Appeals (which affirmed the Circuit Court) and filed a petition to caveat the 2003 will while the appeal was pending. The petition to caveat the 2003 will was filed almost three and a half years after the appointment of the appellees. The Orphan’s Court denied the petition to caveat on the grounds that it was untimely under ET § 5-207. That decision was upheld by the Circuit Court.

ET § 5-207 provides:

“Regardless of whether a petition for probate has been filed, a verified petition to caveat a will may be filed at any time prior to the expiration of six months following the first appointment of a personal representative under a will, even if there be a subsequent judicial probate or appointment of a personal representative. If a different will is offered subsequently for probate, a petition to caveat the later offered will may be filed at a time within the later to occur of:

- (1) Three months after the later probate; or
- (2) Six months after the first appointment of a personal representative of a probate will.”

Green appealed the Circuit Court’s decision and asked the Court of Special Appeals to consider “Whether the Circuit Court incorrectly determined, as a matter of law, that the Petition to Caveat was untimely filed”. 2016 WL 1704666 at 1. Green argued that his caveat was either timely filed under ET § 5-207 or that public policy should allow the late filing of his petition to caveat. Green advanced four major arguments to support his position that either (i) the Register of Wills made a mistake of fact in granting the administrative probate of the 2003 will; or (2) the judicial probate of the 2009 will voided the appointment of the personal representative under the 2009 will.

The Court of Special Appeals noted that it reviews of a court’s statutory interpretation *de novo*. The court examines the plain language of the statute, the statutory purpose, and the consequences of the statutory interpretation. The court noted that the purpose of Maryland

probate law is “to simplify the administration of estates, to reduce the expenses of administration, to clarify the law governing estate of decedents, and to eliminate any provisions of prior law which are archaic, often meaningless under modern procedure and no longer useful.” ET § 1-105. Further, the law promotes the prompt probate of wills and speedy administration and settlement of estates. *Carney v. Kosko*, 229 Md, 122, 118, 182 A.2d 28 (1962).

The Court rejected Green’s first argument that the 2003 will should not have been admitted to administrative probate. The Court stated that putting a will on file with the register does not give the register constructive notice in all administrative proceedings and does not render another will materially incomplete or incorrect.

The Court also rejected Green’s second argument that the period to contest the 2003 will was voided when the Court revoked the appointment of the 2003 PRs. The Court noted that ET § 5-207 specifically addresses the possibility of a later judicial probate and a change of personal representatives. The language of the statute shows that the legislature choose not to extend the time for caveat in such a situation.

The Court rejected Green’s third argument that the 2003 will was a “later offered will” because it was not “effectively” probated until the 2009 will was ruled fraudulent. Again, the Court found that the plain language of ET § 5-207 cannot be given such a reading.

Finally, the Court rejected Green’s last argument that the “purpose of the Estates and Trusts Article, public policy and sound logic demands an exception to the statutory deadline be made in this case.” 2016 WL 1704666 at 7. Again, the Court cited that a purpose of Maryland testamentary law is to promote the prompt probate of wills and the speedy administration and settlement of estates. The Court noted that six years had passed since the initial appointment of the 2003 PRs. Green had notice of the filing requirements for caveating the 2003 will. A caveat within six months of that appointment would have resulted in a prompt resolution. Allowing a caveat three years later would not be consistent with the purposes of Maryland testamentary law.

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