# Montgomery County Estate Planning Council

Charter Member

MCEPC Founded 1962

# NEWSLETTER

Winter, 2020, Issue 57


## *Greetings from the President*

Stephen A. Tulli, CFP®

Welcome to the Winter/Spring 2020 edition of our Newsletter! The Council Board is excited to share progress in several areas including Programs, Membership and Board Development.

An exciting Winter/Spring calendar includes our upcoming monthly meetings with content-rich presentations like "*Social Security*" and "*Ethical Concerns for the Estate Planner*". We are also planning our Annual Spring Networking event, details TBA with a possible venue change! Please register now for these upcoming events!

Our ***Annual Seminar date is set for Thursday, June 4, 2020*** and planning around the topic/speakers and venue are being finalized. We look forward to sharing the details with you soon!

I am happy to report that Jennifer Kosteva, Programs Chair, has put together a robust offering of Programs for the 2020-2021 year with unique and timely topics such as Substance Abuse Trusts, Life Insurance in a High Exemption Environment, Heckerling Update, and a potential Orphans' Court update.

The Council Board began outreach to the Trusts and Estate Chairs of Law Schools in the area to invite Law School students to attend events and join the Council under a new class of membership for young professionals and new entrants to our profession!

Finally, we have begun the process of Board selection for next year's Board members. We look forward to sharing the final nominating slate with you in the upcoming months.

If you are interested in sponsoring any of our events, please contact Gavin McMorrow. If you would like to be considered as a speaker/presenter of one of our monthly educational events, please contact Jennifer Kosteva, and if you would like to join our Council, and enjoy peer networking, educational content and growth of your respective practices as professionals, please contact Bode Hennegan. Their respective contact information can be found in this newsletter or on our website: https://www.mcepc-pa.org/

Please also consider becoming an advocate of our robust Social Media program. We are looking for everyone to "like", "share", post content, pictures and link to our activity through LinkedIn, Facebook and Twitter. Please JOIN our groups online and contact Mary Podlogar if you have any ideas or suggestions.

As always, I invite you to participate in your Council by contributing ideas, volunteering for Committees, becoming Sponsors and considering a future Board position. The vibrancy of our Council and its future rests with YOU! Thank you for being part of the Montgomery County Estate Planning Council and I look forward to working with all of you!

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## WELCOME NEW MEMBERS AND THANK YOU TO OUR REFERRING MEMBERS!!

**Bode Hennegan—Membership Chair**

We extend a warm welcome to our newest members as well as a big THANK YOU to our members who referred them! Please continue to spread the word about the great benefits of MCEPC membership – education, networking, camaraderie!

As a token of appreciation, all members who refer a candidate receive a bottle of wine. I look forward to personally thanking our referring members and welcoming all new members at the next meeting.

Janet Barrett, CHFC® - Strategic Wealth Partners, LLC
Mark Davis, Esq.—Law Office of Michael S. Connor
Jennifer Feist-Johns, CPA, MT, Tax Manager— LG Legacy Group, LLC
Brett Furman—Brett Furman Group at RE/MAX Classic
Matt Handwerk, EA- Advanced Accounting and Tax Solutions, LLC
Stephen Pappaterra, Attorney at Law - Earp Cohn P.C.
Austin J. Ventresca—Value Management Inc.
Michael Weber, CFP® - Your Planning Partners, LLC

### *New Member Spotlight*

**Meet new member Janet Barrett, CHFC®**

*As I understand it, you provide financial planning services. What do you like about that role in client relationships?*

As a Wealth Advisor to women in transition, whether through retirement, divorce or death of a spouse, I take great satisfaction in knowing that I am able to make a difference in their lives. Fear and uncertainty are often the major stressors in transition. Understanding my client's unique challenges and goals, allows me to create a personalized comprehensive financial plan that often calms their worries, thus providing my clients with clarity, peace of mind and financial empowerment. Not only do I enjoy seeing their financial lives improve but ultimately watching them fulfill their dreams.

*Why did you join the MCEPC?*

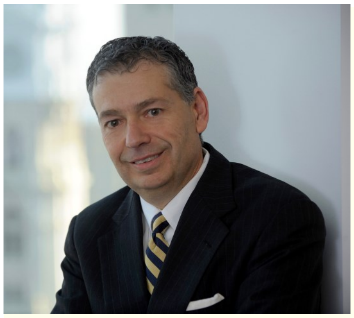
Because of its complexity, I find the strategies in estate planning to be one of the most captivating aspects in financial planning. I believe that by joining the estate planning council I can attain the personal goal of better educating myself to be a more complete advisor, establish a network of trusted sources and raise the level of service my clients need.

**Meet new member Mark Davis, Esq.**

Mark Davis is an attorney with the Law Office of Michael S. Connor, Esq., L.L.C., a Lafayette Hill firm that provides elder law, estate planning and administration services to seniors, people with disabilities, and their families. Mark has over twenty-five years' experience in the field of aging and disability services as a legal and public policy advocate. Prior to his work with the Connor law firm, Mark was employed as a long term care ombudsman with CARIE, an elder rights advocacy organization in Philadelphia.

Mark grew up in Philadelphia and graduated from Abington High School. He earned his J.D. degree from the Evening Division of the James E. Beasley Law School at Temple University in 2000. He also holds M.A. and B.A. degrees in History and, prior to practicing law, spent several years teaching high school social studies. Mark lives in Jenkintown with his wife and son.

## New Member Spotlight



**Meet new member Stephen Pappaterra, Attorney at Law**

*You are an estate planning attorney, but also have your own consulting practice?*

Yes, after 14 years as national director of wealth planning for PNC, I jumped at the opportunity to join Earp Cohn, a 24-attorney law firm that includes many of us who had previously practiced at Archer & Greiner. But having managed as many as 80 attorneys, CPAs, and CFPs at PNC, I still had a passion for coaching. So I started Syncopate Advisors, LLC where we help professional services firms (wealth management, law, accounting, etc.) and their practitioners in the areas of presentation, positioning, and performance. The mix has worked well for me and Earp Cohn.

*And you are a professional drummer?*

I started playing in an 18-piece big band at age 17 and dropped out of college for almost four years to study drums, xylophone, and timpani in New York City. I've been playing professionally ever since. For the last 15 years, most of my work has been with big bands and in the Philadelphia theaters.

*What do you most enjoy about your work?*

I started a podcast called *Unlocking You!* and have found the interviews and production process fascinating. My guests are eclectic people who have found creative ways to connect seemingly disparate skills and passions into professional success.

**Meet new member Michael Weber, CFP®**

*As I understand it, you provide financial planning services. What do you like about that role in client relationships?*

My client family is an extension of my nuclear family. My clients have my cell phone number to call me directly when a question, concern or opportunity arises. I see myself as the financial equivalent to the family's physician with the distinction of being for financial topics and planning. I act as the quarterback of a team of professionals that include estate planning attorneys, accountants and insurance agents. I most enjoy the trust given to me by my clients to look out for their best interest and pass the ball to another professional when needed.

*Have you always lived and worked in this area?*

Yes. I grew up in Quakertown, PA. I went to Penn State University graduating from The Smeal College of Business with a B.S. in Economics. I've been providing financial planning and investment management services in this area for 15 years.

*Why did you join the MCEPC?*

I joined MCEPC to expand my network of professionals to help benefit my clients.

*Tell us about your organization.*

Your Planning Partners, LLC is a fee-only, independent Registered Investment Advisor (RIA) that specializes in comprehensive financial planning and investment management for individuals and families. Financial planning is at the core of how we get to know, work with and help our clients achieve their personal goals. Always putting the client's interest first, avoiding all conflicts of interest and having a highly competent team is how we intend to build our business and make a difference in our communities.

# The Stretch IRA Has Been Snipped: Financial Planning Impact

*Richard J. Volpe, CFP®, CLU®, ChFC®*

The loss of the "stretch IRA" for non-spousal beneficiaries seems contrary to the underlying words in the acronym that Congress created: the SECURE Act. It stands for "Setting Every Community Up for Retirement Enhancement." The snipping of the stretch does anything but enhance the retirement for non-spousal beneficiaries.

The Senate attached the SECURE Act to the 2019 year-end spending bill with little floor debate, ostensibly due to the enormous bipartisan support it received when it passed the House in May with a nearly unanimous vote: 417-3. The Joint Committee on Taxation estimates that the new limits on stretch IRAs will raise nearly $16 billion over the next 10 years. What a windfall for the government.

Unfortunately, this windfall is likely coming directly out of the pockets of the folks whose retirement Congress was attempting to "enhance".

Background: Prior law provided that a non-spousal beneficiary could roll over an inherited IRA and then begin to take required minimum distributions (RMDs) over their life expectancy. For example, a 50-year old beneficiary has a 34 year life expectancy, according to the government table. Under prior law, the beneficiary would need to withdraw only 1/34$^{th}$ (roughly 3%) of the account in the first year, 1/33$^{rd}$ the second year, and so on. Taxable distributions would be "stretched" over 34 years.

What does the SECURE Act require? The entire inherited IRA balance must be distributed by the end of the 10$^{th}$ year.

In addition to removing the potential opportunity for long-term tax deferred growth, there will likely be significant income tax consequences for beneficiaries who inherit an IRA under the SECURE Act compared to the prior "stretch" rules.

To illustrate the impact, assume an IRA owner has a $1 million account balance and two adult beneficiaries who themselves are still working. At the death of the IRA owner, the beneficiaries will each inherit a $500,000 IRA. Assume they choose to spread the withdrawals evenly over the maximum of 10 years. That will add $50,000 of taxable income to their tax return each year for 10 years, plus or minus growth. This may push them into a higher tax bracket. If they are over age 65, it will likely cause them to pay much higher Medicare Part B premiums. Alternatively, they could choose to wait to take the entire amount, plus or minus growth, in year 10 and likely pay a huge income tax bill that year. Or they could choose any combination and timing of withdrawals, as long as all of the money is distributed from the IRA by the end of year 10. The result is a significant loss of family wealth to taxes, and a less "secure" retirement for the beneficiary.

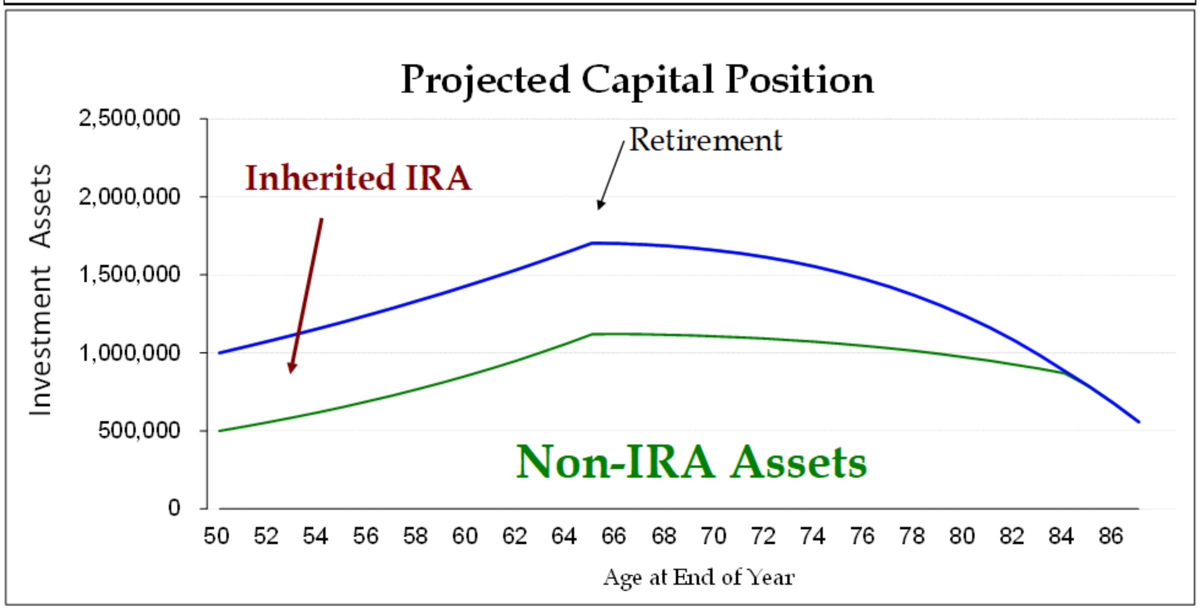
Based on the beneficiary example above, and using assumed rates of return, inflation, and other variables, the SECURE Act could reduce the future total wealth of this beneficiary by $250,000 on a $500,000 inherited IRA. This can be clearly seen in the accompanying graphs.

# Stretch IRA - cont

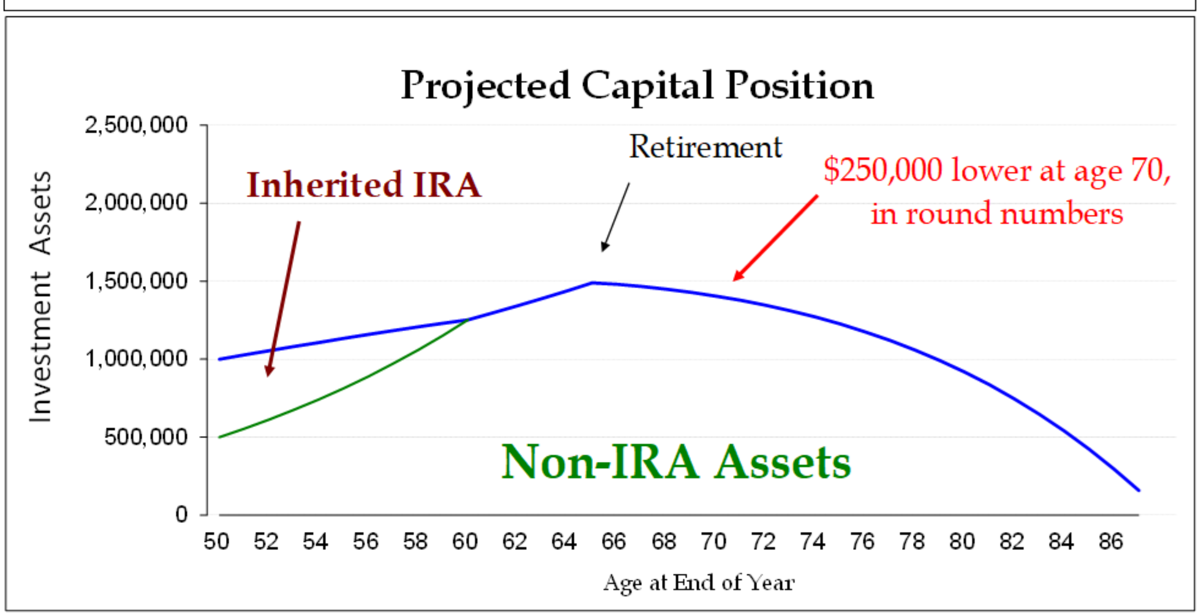
## SECURE Act Example

| Beneficiary Assumptions | | | |
|---|---|---|---|
| Year of IRA Owner's Death | 2019 | Non-IRA Assets | 500,000 |
| Current Year | 2020 | Inherited IRA Assets | 500,000 |
| Beneficiary age as of Jan 1, 2020 | 50 | Total Investment Assets | 1,000,000 |
| Married (M) or Single (S) | M | Assumed Rate of Return | 5% |
| Household Earned Income | 80,000 | Assumed Inflation Rate | 3% |
| Annual Expenses | 75,000 | Retire at Age 65 in the year | 2035 |
| Standard Deduction? | Yes | Social Sec Benefits (today's dollars) | 24,000 |

**Before** SECURE Act




**After** SECURE Act



# Stretch IRA - cont

Conclusion: Although the SECURE Act includes a number of modest enhancements to bolster the retirement savings for many Americans, for countless others, the snipping of the stretch IRA will eclipse what could have been a more secure retirement for many middle class families. The financial planning impact is significant.

For clients who have included retirement asset and conduit trusts as part of their estate plan, the income tax consequences can be even more disastrous than illustrated above depending on the distribution provisions of those trusts and the well-known compression of trust tax brackets. Much has already been written regarding this issue, and more will certainly follow.

If ever there was a situation that could benefit from the multi-disciplinary team approach espoused by NAEPC, the snipping of the stretch IRA by the SECURE Act is it.

*Richard J. Volpe, CFP®, CLU®, ChFC® is the President and Founder of Asset Planning Services, Ltd.*

## The Montgomery County Estate Planning Council (MCEPC) has been recognized as a 5 Star Council by the National Association of Estate Planners & Councils


The Montgomery County Estate Planning Council (MCEPC) has been recognized as a 5 Star Council by the National Association of Estate Planners & Councils as a part of the Leonard H. Neiman and Walter Lee Davis, Jr. Council of Excellence Award program. This honor recognizes estate planning councils that have demonstrated a high level of achievement in areas critical to a successful membership experience.

# We're joining the NAEPC's Every Council Campaign!

As a member of the MCEPC you are entitled to many benefits offered by the NAEPC.

Members will receive:

- Annual NAEPC Advanced Estate Planning Strategies Conference registration brochure (hard copy) will be sent via US mail
- NAEPC News emailed six times per year (past issues of this newsletter can be found at www.naepc.org/events/news)
- NAEPC News will inform your council members about the following items of interest:
  - Existing and new member benefit discount programs (a current list can be found on the "Benefits" page of www.naepc.org)
  - The Annual NAEPC Advanced Estate Planning Strategies Conference
  - The Accredited Estate Planner®* & Estate Planning Law Specialist designations, the two NAEPC-Administered professional designations
  - Councils and/or members in the news
  - Timely and relevant items of interest to council leadership and members

*** Requirements for Accredited Estate Planner® Designation—find out more at http://www.naepc.org/designations/estate-planners**

- Active practice for a minimum of five years within the following disciplines: accounting; insurance and financial planning; law; philanthropy; and trust services
- Devote at least 1/3 of one's time to estate planning
- One or more of the following professional credentials: JD (active law license required if this is the only credential with which you are applying), CPA, CLU®, CFP®, ChFC®, CPWA®, CFA, CAP®, CSPG, CTFA, MSFS, and MST
- Three professional references from individuals with whom you have worked with on estate planning cases and assignments
- Current membership in an affiliated local estate planning council

**Additional Requirement for Applicants with 5 – 15 years of Experience**

- Two graduate courses provided through The American College

# How do Appraisers Value Property?

*by Leon Castner, ISA CAPP, Certified USPAP Instructor*

One common misconception about the valuing of property- whether it be real, personal, or business, is that the appraiser just “knows” the value, either based on their experiences in the field or their educational training, and possibility the ownership of a special “blue book.” Although there is a miniscule fraction of truth to that belief, it is altogether far simpler and yet far more complex than that.

An appraiser doesn’t guess, doesn’t usually use formulas, nor do they pull numbers out of a hat. Instead, they have a tool bag that contains three methodological aids that can be used in every assignment. They are like pathways or maps through a dangerous jungle which must be followed carefully to survive the pitfalls encountered on this journey.

The correct phrase for these tools is “approaches to value.” Every appraiser, every appraisal organization, and every appraisal course stipulate and will expound in great detail on these approaches, for they are our professional trail guides. No appraisal will be correct without using them and then disclosing them in any report (oral or written).

Fortunately, there are only three. Easy to remember and universally accepted. They are the cost, sales comparison, and income approaches to value.

The cost approach to value dictates that the appraiser seeks or find “price tags” or “cost estimates.” These are estimates of what it would cost to produce or reproduce a property or to purchase the identical or very similar item in a particular setting. Often an item can be replicated, either by an artist, craftsman, or builder at a set price to achieve both the look and function of the original piece. When a suitable equivalent can be found, that is defined as production, since it may not be identical to the original. Often these pieces can be found already made in retail markets. The prices listed for those items are used to enumerate appraised value.

The sales comparison approach to value uses actual sale transactions in the marketplace to analyze and evaluate the physical and value characteristics between the original and the discovered sales to determine a value. Basically, the appraiser seeks consummated sales, very often at auction, to contextualize and form a value conclusion. The key word is “sales”-meaning actual events that have occurred, not listings or estimates.

The third approach, the last, is called income. This is closer to an accounting process and bases the present worth of an item on future earnings or an income stream. This method is used for investment property, i.e. property held with the anticipation of generating income. This calculation is done through capitalization of the future annual net income expected to be earned during its remaining useful life. This approach does use a formula, called the “present worth formula,” one more familiar to business accountants and planners.

Each appraisal assignment has an intended use (what the client will do with the appraisal). These could include obtaining a charitable contribution, paying estate taxes, dividing up matrimonial property, scheduling property for insurance coverage, settling an insurance damage claim, etc. Each one of these uses a corresponding value or cost which the appraiser must use. (It is the appraiser’s responsibility to know which value or cost is appropriate for each individual function.)

For an estate tax or charitable contribution, the appraiser must provide FMV (fair market value) of the property. This is set by regulation. For insurance coverage, the appraiser uses replacement cost/value. For bankruptcy the value sought is called “forced sale or forced liquidation.” Using the improper value term and definition will invalidate the entire process.

Once the intended use is stated and the definition of value/cost chosen, the appraiser must then value the property. This is done through the correct employment of the approaches to value. An appraiser may use one, two, or all three approaches, depending on the property, the intended use, and whether their use will lead to credible results.

The choice is usually obvious. A replacement cost appraisal will usually use the cost approach. Whereas the determination of fair market or market value will use the sales comparison. Potential sale of an item, divorce property settlement, or bankruptcy will also use the sales comparison approach, although the marketplace selection for specific comparable sales will be different. An appraisal for stock of a rental company or damage claim on a lithographic stone will use the income approach.

There are many instances when two approaches might be necessary for credible results. It is the appraisers’ job to select and defend the proper choice. All three require research and analysis of market data and market events. The appraiser will use the choice in making a value determination and reporting back to the client. Their report will explain which approach was chosen and why and which approaches were not utilized and the reasoning behind the decision.

Appraisers value property in a logical and reasonable manner. It is not an art, but a science, a professional endeavor that relies upon education, training, and proper use of methodological tools.

*Leon Castner is the new Estates & Trusts Specialist for Alderfer Auction, a full-service Hatfield based national auction company with stellar reputation having held nearly 200 auctions in 2019, including real property, fine art and antiques, collectibles, and estate residue. Mr. Castner is also Senior Partner at National Appraisal Consultants and is a Certified Instructor of the Uniform Standards or Professional Appraisal Practice of The Appraisal Foundation.*

# Is Retirement Planning Getting More SECURE? Think Again!

*Alan Weissberger, Esquire*
*Daniel P. Geraghty, CFP*

The SECURE Act, a new retirement legislation that took effect on January 1, 2020, has far reaching implications for retirement planning. For years, estate planners and tax attorneys have recommended leaving tax-deferred retirement accounts, such as traditional IRAs, Roth IRAs and 401Ks, to a designated beneficiary who can stretch out the distribution payments for as long as possible, maximizing the tax benefits. However, the passage of the SECURE Act, which stands for Setting Every Community Up for Retirement Enhancement, has made achieving this goal much more difficult. It significantly shortens the payout period for many beneficiaries, reducing it from their entire life expectancy to a maximum of 10 years. This erodes the value of many carefully constructed estate plans, which were designed to pass along tax deferred assets from the owners of retirement accounts ("owners") to successive generations of children and grandchildren. In light of this change, we recommend reviewing your beneficiary designations to determine if they are optimal and if any adjustments are warranted.

In this article, we review the most salient points of the SECURE Act ("SECURE") and discuss how it might affect your thinking about retirement planning going forward.

## Understanding the SECURE Act

Congress passed the SECURE Act with the intention of modernizing existing retirement legislation and encouraging retirement savings. Among other changes, the new law:

*1) Increases the Required Minimum Distribution Age*

It raises the starting age for required minimum distributions (RMDs) from retirement plans to age 72 from age 70½, acknowledging that Americans are living and working longer.[1]

*2) Eliminates the Maximum IRA Contribution Age*

Individuals can now make contributions to traditional Individual Retirement Accounts (IRAs) at any age, whereas previously it was not allowed beyond age 70 ½.

*3) Allows Penalty-Free Retirement Withdrawals for Birth or Adoption Expenses*

It permits penalty-free withdrawals up to $5,000 for qualified birth or adoption expenses. This applies on an individual basis, so a married couple may receive a penalty-free withdrawal up to $10,000.

*4) Changes the Kiddie Tax*

It repeals the kiddie tax rules so that a child's unearned income will now be taxed at the parents' tax rate. Under the Tax Cuts and Jobs Act, passed in December 2017, a child's unearned income had been taxed at the trust/estate rates.

*5) Eliminates the Stretch Retirement Plan*

It requires that beneficiaries of a defined contribution plan, traditional IRA or Roth IRA withdraw the entire balance of the account by the end of the 10th year following the owner's death. This new 10-year payout rule applies for beneficiaries who inherit retirement accounts from an owner who passes away after January 1, 2020, when the law went into effect.[2]

While these changes are all meaningful, by far the most impactful provision of SECURE for estate planning is the last one. Under the prior legislation, the beneficiary of a 401K or IRA had their entire life (based on life expectancy calculations) to benefit from the tax deferred status of the retirement account. It was common practice for an owner to designate younger successors, including children and grandchildren, as beneficiaries, recognizing that they have longer life expectancies and therefore are able to defer taxes for a longer period of time. These beneficiaries could take the required minimum distribution each year and let the rest of the money compound tax deferred for years.

This estate planning strategy no longer makes sense under the new legislation because most designated beneficiaries can only benefit from the tax deferral for a maximum of 10 years after the owners' death. For example, under the prior law, if you inherited a $1 million traditional IRA from your parent or grandparent when you were 35 years old, based on the current IRS life expectancy table, you would have 48.5 years over which to spread out distributions. Upon receiving the IRA, you would start taking a minimum required distribution each year, calculated by dividing the account balance as of the end of the previous year by your remaining life expectancy. The first withdrawal would be $20,619 ($1,000,000/48.5 years) and this amount would be taxed at your current tax rate as ordinary income. Future annual distributions would vary depending on the investment return and your age.

Under the new law, distributions from the inherited $1 million IRA can only be spread out over a maximum of 10 years. However, it is important to note that there is no minimum required distribution; the beneficiary can choose to have entire balance of the IRA distributed at the end of the 10th year following the owner's death. This option may be appealing to a beneficiary who wishes to maximize the tax benefits of the

# SECURE—cont

IRA and let it grow tax deferred for 10 years. In that case, the beneficiary would receive a lump sum of $1,000,000 plus any investment return in Year 10 – and a very hefty tax bill!

Of course, a beneficiary who wishes to avoid such a large tax bill in Year 10 can opt to spread out the distributions from the IRA. If the distributions are spread out evenly over the full ten years, the first annual withdrawal would be $100,000 ($1,000,000/10 years). While this option reduces the tax bill compared with taking a lump sum, this distribution is still significantly higher than under the prior law.

The bottom line is that under the new regime, deciding when to take distributions is much more complicated. Planning will involve more complex modeling to understand how to maximize the tax benefits for each individual beneficiary.

## Exceptions to the 10-Year Rule

The law makes some noteworthy exceptions for a category of Eligible Designated Beneficiaries (EDBs) who are still able to take annual distributions over their life expectancy and are not subject to the 10-year payout rule. EDBs are limited to: 1) the owner's surviving spouse, 2) the owner's minor child (after the child turns the age of majority, the 10-year rule takes effect)[3] 3) a disabled beneficiary (upon his or her death, the 10-year rule takes effect), 4) a chronically-ill beneficiary (upon his or her death, the 10-year rule takes effect) or 5) a beneficiary who is less than 10 years younger than the owner (most likely a sibling or a friend).

Even taking these exceptions into account, the SECURE Act significantly changes the incentives to pass down retirement assets to future generations.

## Implications of the SECURE Act

The SECURE Act upends the conventional approach to planning for retirement and makes many current estate plans less tax effective than originally intended. Owners should seize this opportunity to review their plans, especially their beneficiary designations, to understand how they will be affected. Below we review some thoughts and strategies to consider as you undertake this review.

### *Look to the Youngest Generation of Minors*

Under SECURE, the qualification of minors as EDBs means that they have the greatest ability to stretch out the tax deferral of the retirement account. Assuming that your child is no longer a minor, a better option may be to leave your retirement account to your minor grandchildren. A newborn beneficiary will have a full 28 years (10 years after turning 18) for the account to compound tax-free. This is still significantly less impactful than their lifespan, but an improvement over the 10-year limit for many other beneficiaries.

### *Weigh the Tradeoffs of Paying Taxes Now vs. Later*

Following the passage of SECURE, it is even more important that any planning strategy consider the tax tradeoffs of paying taxes now vs. having a beneficiary pay them in the future. For some beneficiaries, such as a young adult without substantial earnings, the compressed 10-year distribution period, and subsequent higher annual income, will force them into a higher tax bracket. If you are in a lower tax bracket today, you may want to consider a full or partial conversion from a traditional IRA to a Roth IRA. By converting and paying taxes today, the beneficiaries of your Roth IRA avoid paying taxes on future distributions. In addition, the payment of income taxes during your life reduces your gross estate value for estate tax purposes and therefore reduces your future estate tax bill. Moreover, as the Roth IRA owner, there is no required annual distribution so the account compounds tax-free as long as you are alive.

It is worth noting that the SECURE Act also applies to Roth IRAs, so one downside is that the 10-year payout limits the time for the retirement income to grow tax-free after the owner's death. Therefore, it may only make sense if you think that your current tax rates are lower than they will be in the future and/or are lower than your beneficiary's tax rate is likely to be.

### *Think Twice About Putting an IRA in a Trust*

The SECURE Act makes certain types of IRA trusts less appealing. Conduit (or "see through") trusts have long been a popular planning tool because the beneficiary receives the annual RMDs outright (similar to a traditional IRA), but the underlying principal of the IRA has an added layer of asset protection because it remains in the trust. The trust, as the "conduit" to the beneficiary, insulates the assets from any imprudent behavior on the part of the beneficiary and from any claims from a creditor or divorcing spouse.

Under SECURE, a conduit trust would effectively blow up after ten years (assuming the IRA is the only asset in the trust), and the entire account would pass to the beneficiary outright. This would have negative tax consequences for the beneficiary of the trust, making him subject to greater income tax as a result of receiving the IRA distributions over 10 years rather than over his life expectancy. It would also limit the timeframe of the trust's asset protection. At the end of the 10-year period, the funds would pass from the care of the trustee to the beneficiary, making them available to creditors or to potential squandering.

Instead of using a conduit trust, owners might consider an

# SECURE—cont

accumulation trust. With an accumulation trust, annual distributions from an IRA are accumulated within the trust structure. Under SECURE, distributions still must be paid out to the trust within ten years of the owner's passing, but the assets can remain in the trust for as long as the trust terms dictate, preventing them from being distributed outright to the beneficiary. Although the accumulation trust will likely be subject to a higher tax bill, the creditor protections can extend for a longer period of time.[4]

*Consider Naming a Charitable Trust as Beneficiary*

If you are charitably inclined, it may make sense to name a charitable entity, such as a charitable remainder trust (CRT), as a beneficiary. The treatment of CRTs is not affected by the SECURE Act and it can somewhat replicate the effect of a stretch IRA. Upon the death of the owner, the CRT receives the IRA and can make annual distributions (generally a minimum 5% payout is required) to certain designees, such as children or grandchildren, for a term (limited to 20 years) or for the remainder of their lives. This strategy must be evaluated on a case-by-case basis as the actuarial value of the charitable remainder interest must be at least 10% of CRT's initial funding value. After the beneficiaries pass away, the remainder goes to a charity (or charities) that you have designated. The CRT is tax-exempt, and therefore, similar to a traditional IRA, the assets can be paid (and grow within) to a CRT without triggering an immediate income tax event. In addition, the CRT will generate an estate tax deduction – your estate is reduced by the charitable deduction and therefore you pay less in estate tax.

*Consider Splitting Up the Primary Beneficiary*

Typically, owners name their spouse as the primary beneficiary and children or grandchildren as the contingent beneficiary. Under the SECURE Act, it may make sense to name both your spouse (or another EDB) and children as primary beneficiaries so that they split the distributions, and therefore get smaller distributions each year. The children can start taking smaller distributions at the death of the first parent and then will start the second half at the death of the second parent. As a result, they are stretching their distribution for up to twice as long and may pay less in taxes.

## Concluding Thoughts

With 2020 ushering in a new era for retirement planning, we strongly encourage you to conduct a thorough review of your estate plan to understand whether it is affected by the SECURE Act. Planning factors that were important pre-SECURE, such as the age and tax status of owners and beneficiaries, deserve even more scrutiny to plan effectively post-SECURE. Many of the best practices that were widely accepted up until this year may no longer make sense.

*1 Individuals who turned 70 ½ prior to December 31, 2019 will not be able to take advantage of this new minimum distribution age and will still be required to start taking minimum distributions at 70 ½.*

*2 Beneficiaries of a retirement account that was inherited from an owner who passed away prior to January 1, 2020 are grandfathered in and are not subject to the change in regulation.*

*3 The age of majority, or the age at which you become an adult, varies by state although it is 18 in a majority of states.*

*4 Trusts are subject to the highest marginal tax rate at $12,950 in income for 2020.*

*Alan Weissberger, Esquire is the Senior Tax and Estate Planning Solution Specialist with primary responsibility for the financial, estate and tax planning for individual clients at Hirtle Callaghan.*

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# Transfer on Death Accounts - OR – How to Destroy an Estate Plan

*Alan J. Mittelman, Esq.*

The following is a scene that may be common in Pennsylvania. An attorney arrives in the office and learns that a client died over the weekend. The attorney gets the deceased client's documents from the Will safe and reviews them carefully. Everything seems to be in place. The client, a recent widower, left his assets in trust for his children and grandchildren. There is a Special Needs Trust for a child with Down's Syndrome and a special trust for a child who has a substance abuse problem. The assets will be protected from the creditors of the beneficiaries for at least two generations and governmental benefits will be preserved for the Special Needs grandchild. The family will be relieved to know that the child with a substance abuse problem will not have easy access to money. Everything looks good.

Later that week, the attorney meets with the family. The attorney is given a list of the decedent's assets and the attorney notices that a significant portion of the decedent's investments non-IRA assets have been moved to one of the large mutual fund companies but does not think anything about it. The family arranges to probate the Will and the executor gives the attorney the authorization to communicate with the mutual fund company. And then the problems began to unfold.

To the attorney's great chagrin, when the decedent's assets were moved to the mutual fund family, a not uncommon conversation occurred. The entire transaction was handled by telephone and the mail between the decedent and a representative of the mutual fund family. At the end of the conversation between the decedent and the fund rep, an apparently innocent question was posed to the client. "Who do you want to name as your beneficiary?" The decedent asked why he needed a beneficiary and the mutual fund rep said, "Doing so will help you avoid probate saving your estate a lot of money." Since the decedent had heard of all the myths surrounding probate, this seemed like a great idea. So the decedent named his children as beneficiaries, making a mental note to contract his attorney to discuss what he had done. The decedent did not understand the implications of making a TOD beneficiary designation. The conversation with the attorney never took place. And then the decedent died.

As a result, the decedent's estate plan collapsed. The investments at the mutual fund company, most of the decedent's money, became payable directly to the decedent's children. None of the assets held at the mutual fund company would pass through probate and therefore would not be able to pass to the various trusts the decedent, with the attorney's guidance, had created. No assets would go to the Special Needs Trust. No assets would go into the trust for the substance abusing child. Governmental benefits would be lost. The substance abuser would have access to money without any limitation, a real disaster. The beneficiary's creditors would have a bonanza and the generation skipping plan of the decedent was destroyed.

One asks how this can happen? The mutual fund rep is not an attorney. The mutual fund rep and the mutual fund company are not supposed to practice law. Can this possibly be legal? The answer appears to be - YES!

The designations in question are referred to as either (i) Transfer on Death ("TOD") designations or (ii) Payable on Death ("POD") and are described in Chapter 64 of the Probate, Fiduciary and Trust Code of PA (There are comparable statutes in most other states. For the remainder of this article, both shall be referred to as TOD.). These designations are for transfer of death securities registration (for stocks and bonds), although they are similar to In Trust For ("ITF") designations with banks for depositary accounts. ITF accounts are described in 20 PA §6303(b). ITF accounts at banks have been around for years and are commonly known as a "poor man's will" because they can serve as a will substitute. ITF's sometimes create problems in an estate plan but they are a very small problem compared to TOD accounts. This is because bank accounts and certificates of deposit tend to be relatively small by comparison to the value of securities accounts. The words "securities accounts" include brokerage accounts and mutual fund accounts at the numerous financial institutions. This is where the money is. A TOD designation is a relatively new statutory creation. PA's law on TOD registration was promulgated in 1997. Before then, one could not have a TOD registration for a securities account.

A TOD account is different from the designated beneficiary designations on IRAs and other retirement plan investments. A "Designated Beneficiary" is a requirement for beneficiaries to be able to take the Required Minimum Distribution for an Inherited IRA when the retirement plan participant dies. But a TOD has nothing to do with retirement plans. They enable the investment account to be "Non-Testamentary" as provided in 20 PA §6409 and enable the account owner to avoid probate. In effect, the security account of the owner will bypass the decedent's Will or Living Trust and pass directly to the person(s)

# How to Destroy an Estate Plan—cont

named as beneficiary under the TOD designation - often defeating an estate plan that was designed with much expense and foresight.

The development and use of TOD designations with the large mutual fund companies is perceived by professionals as a more serious problem than the TOD designation for an investment account at a brokerage firm. With a typical brokerage firm, the client may be more likely to know and have met the investment advisor. There tends to be more interaction among the "estate planning team," the client's attorney, tax advisor, CPA, insurance and investment advisors. The likelihood of significant errors in titling of assets and making beneficiary designations is thought to be lower. However, today, many clients deal directly with the large mutual fund companies. This group markets mutual funds and ETF's directly to consumers and are some of the largest financial institutions in the world. In the author's experience, it is rare for one of the large mutual fund companies to initiate a contact with the client's attorney to discuss whether it makes sense to have a beneficiary designation on a securities account or whether doing so will undo a carefully designed estate plan. Clients often do not understand the significance of making a TOD beneficiary designation and sometimes have no recall of doing so. Asking a client whether the client has made a TOD designation without getting independent verification often is worthless. Clients just do not know or recall what they have signed.

The cynic among us may suggest that financial institutions use beneficiary designations to enhance their chances of retaining the money when a client dies. Oddly, 20 PA §6408(c) discharges the registering entity (the mutual fund) from liability if registered in compliance with 20 PA §6407. This suggests that even if the mutual fund company ruins the client's estate plan, they will not be held liable. Imagine if an attorney or other professional interfered with or designed a poorly crafted estate plan. They would be exposed to liability from the disgruntled beneficiaries of the estate or trust.

Fortunately, 20 PA §6111.2 revokes the TOD designation of a spouse if the account owner divorces or dies pending the divorce. Imagine the bad feelings that would erupt if the person getting divorced changed his/her will and then died but the TOD designation was not changed, too.

The TOD account is still subject to PA inheritance tax and federal estate tax. It is not a tax planning device. However, unless one makes a Will with a tax clause that allocate inheritance tax liability to the TOD account beneficiaries, other parties may wind up bearing the burden of the inheritance tax for the TOD beneficiary. The author believes that the most common death tax clause in a Will requires that death taxes be paid from the residue of the estate, not from specific assets. The need for a coordinated estate plan is more important now than ever.

The creation of the TOD account puts more pressure on the attorney and other advisors to make sure that the estate plan will work. Why pay thousands of dollars for a plan that is easily ruined by a client "accidentally" making a TOD designation? Common estate planning tools like Living Trusts, Generation Skipping Trusts, Estate Tax Saving By-Pass Trusts, Disclaimer Trusts, Special Needs Trusts, etc. all can be impacted or made useless by the TOD account.

One solution for the attorney preparing an estate plan is to ask the question and then demand proof that there are no TOD designations. The monthly brokerage statement or mutual fund statement does not provide this information. The question should be repeatedly asked because clients may change investment advisors or investment companies without consulting their attorneys.

Another remedy is to include a power to modify or eliminate the TOD designation in a client's Durable General Power of Attorney. Just having such a power in the Power of Attorney can stimulate discussion with clients about the risks of the TOD designation. And, having such a power will enable the conscientious Agent under the General Power of Attorney to fix the situation if a parent/client becomes incapacitated.

Illustrating the problem is a pending Pennsylvania case (Fontunato v. CGA Law Firm and Driscoll, No.. 1:17-cv-00201, U.S. District Ct., M.D. Pennsylvania). This lawsuit concerns a law firm that prepared a Will that was partly defeated by a TOD designation created on an account at a large national brokerage firm. This as yet unresolved case involves some of the intended beneficiaries under a Will who received substantially less than intended under the decedent's Will because of the TOD designation. The case does not state whether the financial advisor was sued, too. Even if the law firm eventually prevails, the cost, time, pain and reputational impact of an extended law suit can be terrible.

The best advice - BE AWARE, ASK QUESTIONS AND GET RELIABLE ANSWERS

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# Lions [Johnson] and Tigers [LaRocca] and Bears [Orphans' Courts], Oh My!

*Joel S. Luber, Esq.*

I assume I'm not that much different than most of my attorney colleagues practicing in this chosen slice of the profession, wherein we attempt to keep abreast of the latest developments in the law by reading not only the newly enacted statutes, regulations, rulings and other administrative pronouncements, but also the decisions coming out of the various courts, both Federal and State, that are called upon to resolve disputes that arise from time to time between taxing authorities and taxpayers, or between private persons, inter se, when interpretation of documents becomes the subject matter at issue, or regrettably when beneficiaries become un-enamored with the manner in which fiduciaries have carried out the duties they have voluntarily assumed. It is this latter category of disputes, played out mostly in the Orphans' Court Divisions of our Commonwealth's Common Pleas Courts, with which I find myself unusually attracted, primarily because it is almost always in this particular milieu where our bread and butter (fees) is highly scrutinized and tested under that all elusive criteria of "reasonableness". Thus, this very recent decision from Judge Herron did not escape my eye, which included this statement: "…how did a relatively straightforward estate administration turn into an attorney-fee-generating machine?" *Jones Est.*, 9 Fid. Rep. 3d 321 (O.C. Div. Phila.). At first I shuddered, but then quickly regrouped and vowed to myself (again) to avoid ever being the target of such excoriation from any Orphans' Court Judge. [See, also, Footnote 2.]

Perhaps easier said than done. I am certain that almost, if not all of our members are aware of the fact that in Pennsylvania we are blessed (or cursed depending on your perspective) that there does not exist a published Court-approved fee schedule for either attorneys or fiduciaries. Instead, since 1983, all who assume the mantle of counsel or executor [or trustee or guardian] are obligated to comply with decision law, and for lawyers, too, the Rules of Professional Conduct, to determine the fees to be charged for their services, with the one and only guidepost (for executors and attorneys) being a fee schedule mentioned in and adopted by Judge Wood of the Chester County Orphans' Court in the matter of *Johnson Estate*, 4 Fid. Rep. 2d 6 (O.C. Chest. 1983). Some years later, in *Nix Estate*, 8 Fid. Rep. 2d 179 (O.C. Chester 1988), Judge Wood clarified his thoughts on his own opinion in *Johnson*, with the following:

"I have found the guidelines,.., to be helpful, and to establish a sort of *prima facie* criteria. If a fee is charged above the guidelines, that operates as a red flag and tells me to look into the fee a little more closely. If the fee is below the guidelines, I don't look into it unless a question is raised. I also start with the proposition that the guidelines establish the appropriate maximum fee for the routine estate."

What is essential to understand is that the *Johnson* fee schedule is only a starting point in evaluating fiduciary fees and commissions and counsel fees. It establishes no mandatory rules. The fact is that Orphans' Court Judges have tremendous discretion to approve or disapprove fees sought by fiduciaries and counsel. And once a matter has entered the court system, the fees of fiduciaries and their counsel are always subject to court approval and revision—whether or not any interested parties have objected to them. This leads to Lesson #1: Stay out of court!

The case law in Pennsylvania that has addressed the issue of fees is staggering just in terms of the number of cases that have come before the Courts. I do not intend to offer here any synopsis of same, other than to describe below a few of more recent vintage. Instead, I would refer all to a very comprehensive compendium (123 pages) that was included as Chapter M of the materials produced for the 22nd Annual Estate Law Institute sponsored by PBI, which was authored by Margaret Sager, Esq. and Martin Heckscher, Esq. In addition, for the stout of heart, I refer you to a 212 page Adjudication, dated March 7, 2017, by Judge Mark Tunnell of the Chester County Orphans' Court, in the matter of the *Estate of Sir John Rupert Hunt Thouron*, an estate valued at $46 million, that includes numerous citations of precedent, and described by the publishers of Fiduciary Review as a "treasure trove" for counsel dealing with issues involved in the two estates that were the subject of that adjudication, which included executors fees and attorney fees.

On the other hand, I would be remiss if I did not re-publish here, for the convenience of our members, the ten factors cited specifically by our Supreme Court in *LaRocca Estate*, 431 Pa. 542, 246 A.2d 337 (1968), which circumscribes any inquiry of reasonableness of counsel fees in estate practice in Pennsylvania:

1. the amount of work;
2. character of the services;
3. difficulty of the problems involved;
4. importance of the litigation;
5. the amount of money or value of the property in question;
6. the degree of responsibility incurred;
7. whether the fund was "created" by the attorney;
8. the professional skill and standing of the attorney;
9. the results the attorney was able to obtain; and
10. the ability of the client to pay a reasonable fee for services

# Fees—cont

rendered.

Accompanying this list, and not to be ignored, are the eight factors in Rule 1.5(a) of the PA Rules of Professional Conduct for lawyers that are to be considered in determining whether a particular fee is "excessive". They are:

1. Whether the fee is fixed or contingent.
2. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly.
3. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The time limitations imposed by the client or by the circumstances.
7. The nature and length of the professional relationship with the client.
8. The experience, reputation, and ability of the lawyer or lawyers performing the services.

What does all of this mean for us attorneys in setting our fees; and will our written engagement letter, mandated by our Rules of Professional Conduct [Rule 1.5(b)], in which our fees must be included, be sufficient if our fees are later challenged? Should we be setting fees based on a flat amount for each task, a percentage of the value of the estate, or one based strictly on time multiplied by an hourly rate? Will it make a difference to a Court, or will a Court look more favorably on a fee based on one method versus another? From only the small sampling of the plethora of cases that I have reviewed over the many years of my practice, I cannot offer an opinion that one method is preferable over another. As first stated above, the bottom line will always be compliance with the polestar test of "reasonableness". The following are a very few recent decisions which I proffer in order to shed some light.

In *Lesser Est.*, Pa. Super. No. 1295 EDA 2016 (non-precedential decision), the Superior Court affirmed the reduction (by the Montgomery County Orphans' Court) of attorney fees, from $45,000 to $10,000, notwithstanding the written fee agreement between attorney and executors, which was "based…at least partially" on the *Johnson Estate* schedule, which was 3% of estate value. The estate was valued at about $1,450,000. The Superior Court opinion is of interest in that it described the ebb and flow over more than three decades of references to *Johnson Estate* since its appearance in 1983, but also stated, however, that the "true test is always what the services were actually worth and to award a fair and just compensation therefor". The panel deciding this case also cited "the factors to be considered" from *LaRocca's Trust*.

In *Naugle Est*., (O.C. Div. Franklin), 6 Fiduc. Rep. 3d 149, which was an estate involving numerous charitable beneficiaries, the Attorney General objected to an executor's fee of $183,443.24 in an estate with date of death value of $11,544,598.15, or about 2.4%, which was determined to be reasonable. Because this judicial district had not "adopted" a fee schedule, the Court did not apply the *Johnson* schedule. Instead, Judge Meyers quoted PEF Code §3537, which allows for compensation to the personal representative of an estate that is "reasonable and just", and turned to *Reed's Estate*, 462 Pa. 336, for the proposition that as a prima facie matter, a 3% executor's fee was an acceptable administration fee. Further support for the decision came from his "consider [ation of] approximately twenty-two published opinions issued by fellow Orphans' Court jurists across the Commonwealth and published in the Fiduciary Reporter, if only to get a sense of how fellow Orphans' Court judges may be viewing and deciding these same issues."

In *Keller Est*., (O.C. Div. Montg.), 7 Fiduc. Rep. 3d ___, the Montgomery County Orphans' Court adjudicated both counsel fees and executors' commissions, finding a "flat fee" for "routine services" by counsel was "reasonable in view of the large size of the estate [about $9.7M], the responsibilities attendant thereto, and the skill exhibited by the lawyers"; and ruling further that the *Johnson Estate* schedule is <u>not</u> binding, albeit a "useful tool for setting parameters as to what is reasonable". An executor commission of $70,000 was also found to be reasonable for one of three fiduciaries (the other two waived fees to increase their shares as beneficiaries of the estate without adding to their taxable income), and rejecting an objection based on an allegation that this executor had agreed to serve without compensation, stating it would be unusual for a fiduciary who is not a beneficiary to serve without compensation.

In *Susick Est*., (O.C. Div. Phila.) 6 Fiduc. Rep. 3d August; affirmed by Pa. Super., No. 1518 EDA 2015, May 11, 2016, an estate valued at $102,000, of which the decedent's residence accounted for $96,000, an attorney's fee of $34,848 was reduced to $18,000, and the executor was surcharged $16,848. This was Judge Carrafiello, who sounded very much like Judge Herron in the Jones Est. case cited above, and just as annoyed, noting that the fee charged would have been appropriate under the *Johnson Estate* schedule for a million dollar estate. Of particular interest to the court was $4,877 billed for 24 hours of time involving a $4,500 automobile in which the decedent had only a one half interest. The Superior Court, in its opinion on appeal upholding the reduction of counsel fees and the surcharge of the executor, also included this eye-popping exchange between counsel and the trial court, whose response to the question as to why his fee was 34% of the estate said "the math is what it is", the trial court's retort was said answer was "indicative of his posture throughout the proceedings."

### Lessons to be Learned [In addition to Lesson #1]

# Fees—cont

1. As counsel, if engaged by the executor of an estate, make sure your fee agreement is specific, whether flat fee per project, or fee for service based on hourly rates, or a percentage tied to *Johnson Estate* schedule. Personally, I have never done the latter. My feeling is that a fixed percentage will always be detrimental to either the client or counsel. But, then, when all is said and done, I will test the total fee against the *Johnson Estate* schedule, being prepared to adjust same if it is too far off (assuming no unusual matters arose during the administration), especially if there is going to be a formal accounting, or any inkling that there are beneficiaries lying in wait to pounce on the executor.

2. If counsel is designated as an executor under a client's Will, and intends to serve as counsel to the estate as well, while not forbidden, per se, be very careful to document the tasks performed in separate capacities and the time spent performing each. J. Brooke Aker, an expert, noted that in a "normal" estate "one would expect an attorney who is also an executor to charge approximately one and one-half times counsel fees and dispenses with executor's compensation." *Crowers Est*., 26 Fid. Rep. 2d 518 (O.C. Phila. 2006).

3. As counsel to an estate, make certain to advise your executor-client to keep meticulous records of the services he or she is providing, both by description of activity and time spent. Both will be examined if a dispute arises about the executor's fees, and having no records of one or the other will not bode well in front of an Orphans' Court.

4. The fee of an accountant engaged by the estate should be paid out of the executor's commission, although courts have deducted it from the attorney's fees; preparation of the account is the executor's responsibility and the cost thereof is included in his fee.

5. Counsel fees for substantiating the executor's "right to keep or receive a commission" is payable by the executor and not by the estate.

6. Counsel who is not able to discharge all of the tasks required of counsel for a personal representative e.g., preparation of tax returns, is not entitled to a full attorney's fee. Counsel fees should be reduced by a reasonable fee paid to an accountant.

7. Counsel has the burden of establishing the right to compensation. When paid without prior court approval it is "at the risk the fees will be found unjustified and disallowed upon adjudication".

8. Fees incurred after objections to an account are filed, to defend the accounts, oppose surcharge requests and defend fees and challenge discovery that do not benefit the estate are subject to disallowance.

### The Bottom Line.

Each and every one of the cases decided by an Orphans' Court where executors' commissions and attorneys' fees are at issue should be considered a cautionary tale to all who administer estates, whether large or small, to be examined closely on where anybody "went wrong". And, lastly, do not assume that fees for planning will not also come under the strict scrutiny and wrath of the courts. In Judge Herron's Adjudication in *Jones Est*. cited above, he openly inquired as to why the law firm drafted a twenty-nine page Will for the Decedent when her estate consisted of one asset, opining "[t]o call this overkill is an understatement. Alas, one would hope such a lengthy will would at least be well-drafted, but it was not." Oh my!

*1 With apologies to the producers of that classic 1939 film "Wizard of Oz".*

*2 In the Adjudication by Judge Herron cited above, he included "eleven factors" from the LaRocca case, but on careful examination of the LaRocca opinion, #5 is counted twice, albeit with the added prefatory words at #11 "very importantly". More to the point in this opinion from Judge Herron, as further expression of his displeasure with all counsel, he added that "…neither side prepared testimony that addressed all, or even most, of the … factors. By their own admission, the attorneys on both sides did not read LaRocca or its progeny." Yikes!*

*3 Reasonableness is also a statutory requirement when it comes to fees for a trustee, if there is neither in the trust instrument nor in a separate written agreement signed by the settlor or another authorized to specify compensation. See, PEF Code §7768(a). Nonetheless, even if one of these two instruments exists, a court may allow reasonable compensation that is more or less than that specified. §7768(b). And in §7768(d), a number of factors are listed that a court may consider in determining reasonable compensation.*

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# More Choices Than Ever for Specialty Trust Situs

*Timothy S. Egan*

Just a few years ago, if a practitioner wanted to create a trust with special features – such as investment direction, silent trust provisions, or self-settled asset protection – there were a handful of choices for situs: Delaware, Nevada, South Dakota, Alaska, perhaps Wyoming. These states became magnets for trust formation, leading financial institutions to establish state-specific trust companies to take advantage of local situs. Delaware and Nevada were the primary beneficiaries of this system.

Now, as more states pass statutes permitting directed trusts and self-settled asset protection trusts, codify non-judicial methods of trust modification such as decanting, and repeal or greatly extend the rule against perpetuity, practitioners have more situs choices than ever.

## Directed Trusts

In 1986, Delaware passed the first directed trust statute in the country, permitting division of fiduciary powers between multiple advisers and trustees. Since then, most other states have authorized some form of directed trust, with varying provisions to limit the liability of the direction adviser and the trustee. This is most commonly used to designate an individual to direct the trustee on investment decisions, but in many states that permit directed trusts, the power can also be used to direct distributions or other discretionary matters.

Delaware, Nevada, Alaska and South Dakota popularized the so-called "strong" directed trust statutes, where the trustee has either no liability or is held to a willful misconduct standard for following the direction of an adviser, and a number of other jurisdictions (such as New Hampshire and Tennessee) have enacted similar provisions. Because the standard of liability is limited, these jurisdictions are attractive to corporate fiduciaries.

In 2017 the Uniform Law Commission finalized the Uniform Directed Trust Act (UDTA), which has since been enacted in Arkansas, Colorado, Connecticut, Georgia, Indiana, Maine, Michigan, Nebraska, New Mexico, and Utah. Legislation to adopt the UDTA has been introduced, but not enacted, in Virginia, Rhode Island, West Virginia, and Washington. The UDTA differs from the older Uniform Trust Code (UTC) approach in providing a more expansive direction power, and setting a limited standard of liability for trustees when acting at direction, similar to the statutes of Delaware, Nevada, and others.

Twelve jurisdictions, including Pennsylvania, have adopted a form of directed trust under Section 808 of the UTC, which requires a trustee to act at the direction of a designated adviser, unless the direction is "manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of fiduciary duty." Under this approach, the trustee must determine whether to follow the direction, and therefore retains some liability even when acting at direction – making this arrangement more like delegation than true direction. The other jurisdictions that have adopted this approach are Alabama, the District of Columbia, Kansas, Maryland, Massachusetts, Mississippi, Montana, Oregon, South Carolina, Vermont, and West Virginia.

Iowa has not adopted the UTC, but has a similar statute based on the Restatement (Second) of Trusts, where the trustee "shall act in accordance with an exercise of the power unless the trustee knows the attempted exercise violates the terms of the trust or the trustee knows that the person holding the power is not competent."

Just six states – California, Hawaii, Louisiana, Minnesota, New York, and Rhode Island – have not enacted some form of directed trust statute.

## Self-Settled Asset Protection Trusts

Seventeen states now permit self-settled asset protection trusts: Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. Trust assets are protected from creditors, and the settlor of the trust may also be a beneficiary, as long as the statutory requirements are followed.

## Decanting

In recent years, non-judicial methods of modifying existing trusts have proliferated. Perhaps the most well-known is "decanting" – modifying a trust by transferring the assets of an irrevocable trust into a new irrevocable trust with more desirable provisions. Thirty-two states have decanting statutes on the books, with Pennsylvania and New Jersey being notable exceptions.

The mechanics of decanting differs widely between jurisdictions. In 2015 the Uniform Laws Commission finalized the Uniform Trust Decanting Act, which codified a number of requirements and procedures to formalize the process. The Uniform Trust Decanting Act has been enacted by Alabama, California, Colorado, New Mexico, North Carolina, Virginia and Washington. It has been introduced, but not enacted, in Massachusetts and Nebraska.

## Silent Trusts

Alaska, Delaware, New Hampshire, Nevada, Ohio, South Dakota, Tennessee, and Wyoming permit various mechanisms for

# Trust Situs—cont

withholding trust information (including, in some cases, governing instruments and account statements) from beneficiaries.

### Dynasty Trusts

South Dakota was the first state to allow perpetual trusts in 1983, followed by Delaware a dozen years later. Six additional states have repealed the rule against perpetuities for trusts entirely (including Pennsylvania and New Jersey), while several others have enacted a very long fixed period – 365 years in Nevada, or 500 years in Arizona. A number of states which nominally retain the standard rule against perpetuities (an interest must vest within a life or lives in being plus 21 years or within 90 years) now have opt-out provisions under various conditions.

Many states have one or two of the special features listed above, but there are fewer that offer all of them. Ohio, New Hampshire, and Tennessee do – and they are growing in regional popularity for the Midwest, New England, and Southeast, respectively, if not yet attaining the national profile of Alaska, Delaware, Nevada, South Dakota, and Wyoming. The latter states have long-established track records at the forefront of trust law and administration. Delaware in particular has an attractive combination of a receptive legislature, sophisticated judiciary, settled case law, and a talent pool for law firms and corporate trustees. Nonetheless, there are more options than ever for practitioners seeking the right trust situs for their clients.

*Timothy S. Egan is a Relationship Manager and Wealth Advisor at The Glenmede Trust Company, N.A.*

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# October Meeting


Speaker Don Petrille, Esq.

New Evergreen club members (25+ yrs) Ross Schriftman, John Richter, John Caprara, William Brams

# November Meeting


Virginia Frantz, CEO of our meeting sponsor Montgomery County Foundation, Inc.

Bernie McLafferty Sr. and Katharine Lidz


Speaker Ben Farina, Freeman’s

Michael Moyer and Board member Jennifer Kosteva

# November Meeting—cont.

Board members Gavin McMorrow, Bode Hennegan, Lisa Shearman

Board member Amy Parenti, Laura Weiner, Past Presidents Eileen Dougherty, Cindy Diccianni and Virginia Frantz

Board member Jeff Helphrey, David Goldenberg

Dennis Mahoney

Ross Schriftman, Speaker Ben Farina, Robert Gerhard III

Past president Alan Katz, Lana Pinkenson, Mark Moran

President Steve Tulli, Board member Jeff Helphrey

# January Meeting

Past President Virginia Frantz, Speaker Ed Boehne, Past President Cindy Diccianni

Speaker Ed Boehne and President Steve Tulli

Board members Bode Hennegan and Amy Parenti

Board member Mary Podlogar

# February Meeting

Speakers Jennifer Kosteva and Adam Gusdorff


Past President of the MCEPC and the NAEPC, Eileen Dougherty, presenting NAEPC Council of Excellence award to President Stephen Tulli

Cindy Diccianni, Mary Spencer, new member Brett Furman

Guests Elena M Sickles, Terri McDermott

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* If you are new to these activities, ask at the next meeting, for a demonstration when you check in!

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Phone: 484-532-7387 / Fax: 610-897-8957
Email: execoffice@mcfoundationinc.org

**The Montgomery County Foundation, Inc. is a 501(c)3 nonprofit public charity. Your donations are tax deductible as allowable by law [WWW.MCFOUNDATIONINC.ORG](http://WWW.MCFOUNDATIONINC.ORG).** The official registration and financial information of The Montgomery County Foundation, Inc. may be obtained from the Pennsylvania Department of State by calling toll-free, within Pennsylvania, 1-800-732-0999. Registration does not imply endorsement. The Pension Protection Act of 2006 requires that we notify you that The Montgomery County Foundation, Inc. has exclusive legal control over the contributed assets.

## MCEPC MEETINGS

*Programs held at The William Penn Inn unless otherwise noted*

### MCEPC Meeting Schedule 2019-2020

- **March 23, 2020—Social Security—***Jay Burgman, CFP®, AEP®, Northwestern Mutual*
- **April 27, 2020—Ethical Concerns for the Estate Planner,** *Jay Wagner***—***Joint meeting with BCEPC hosted by MCEPC*
- **June 4, 2020—Annual Seminar**

Charter Member

**Montgomery County Estate Planning Council**

PO Box 853
Spring House, PA 19477

**Phone & Fax:**
(215) 646-4261

**Email:** admin@mcepc-pa.org

*www.mcepc-pa.org*

**Administrator's Corner….**

If you have moved or will be making any changes to your membership information (address, email, phone, fax, professional designations, etc.) please notify the office as soon as possible.

**More information about the website…** We have received a few requests from our members for their "access code" to the MCEPC website. To view and access information on the Council website : http://www.mcepc-pa.org, you **DO NOT** need a login name or password. We currently do not have privileged information on our site and browsing it does not require a login name or password. Only administrative access is password restricted.

Feel free to browse and access the website for information, form downloads, meeting dates and information, and database. You can also pay for meetings and membership.

E-Mail: admin@mcepc-pa.org
Website: www.mcepc-pa.org