It is a great honor for me to serve as your new Section Chair. I want to express my thanks and gratitude to my predecessor, Eileen Day O’Brien, who led us through one of our most successful years as a Section. I also want to recognize and thank the many other Section members who work tirelessly to make our Section a success, particularly David Dembert and Mary Alice Smolarek (your Vice Chair and Secretary), and Jonathan Lasley, Michael Davis, and Anne Coventry, who work hard to promote and support our legislative efforts.

When I attended an orientation for section chairs this June, MSBA President Pamila Brown urged us to take time to do something for our practice, something for the community, and something for ourselves. That stuck with me over the summer, and got me thinking about ways that estates and trusts practitioners might embrace this challenge. This obviously is only one person’s non-exhaustive list, and I encourage all Section members to develop their own ways to help their practice, their community, and themselves.

Do Something for Your Practice

Of course, the very name we give our endeavors – “practice” – expresses the continuing effort lawyers put into learning and improving their craft. This is particularly true in an estates and trusts practice, given the range of subjects in which we must be conversant, and the diversity of client needs we address. Even though work on our practice is an organic part of our lives, it can be helpful from time to time to take more deliberate actions to improve our skills, such as:

• Learn new tricks (or polish existing ones). One of the wonderful (and, occasionally, scary) aspects of the estates and trusts practice is that there is a nearly limitless range of topics to learn. I believe that the best way to improve knowledge and skills is to learn from

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and interact with experts and peers. We are fortunate to have a wide variety of opportunities available, from the great educational programs that the Section and MSBA sponsor (see them at http://www.msba.org/cle/programs.aspx), to seminars provided by other organizations, to peer group discussions such as the Estates & Trusts Study Group (http://www.msba.org/sections/estate-trust/study-group.aspx). If you prefer self-study, there are a seemingly infinite number of newsletters, journals, blogs, and podcasts that we can access to improve our understanding of our practice area. Whether you are looking to consolidate or refresh your knowledge of a familiar subject area, or to branch out and learn something new, study will help you and your clients.

• Edit and update your forms. Whether we have sophisticated document assembly programs or just a few tried and true sample documents, we all rely on forms to draft wills, trusts, and the like. When was the last time you spent an hour or two going through those forms, to see whether you can update and improve them? Can you make them more flexible, and more readable and accessible for clients? Do they include updated references and provisions for some of the recent changes in Maryland law, such as the Maryland Trust Act? Has your approach to planning changed in the recent changes in Maryland law, such as the Maryland Trust Act? Has your approach to planning changed in the recent changes in Maryland law, such as the Maryland Trust Act? Has your approach to planning changed in the recent changes in Maryland law, such as the Maryland Trust Act? Have you changed your approach to planning in the recent changes in Maryland law, such as the Maryland Trust Act? Have you changed your approach to planning in the recent changes in Maryland law, such as the Maryland Trust Act?

• Think about succession planning. Transition of clients’ matters in the event of a lawyer’s death or incapacity can be complicated in the best of circumstances, and each of us has an ethical duty to ensure that our clients will be cared for in the event that something happens to us. For those who practice in firms, there may be some built-in succession, while those who practice solo or in small groups may need to think more deliberately about their plans. Whatever the right plan might be for you and your clients, time spent considering the details and logistics almost certainly will make the transition much easier. There is a lot of information available on succession planning for lawyers. MSBA has a great practice management site with tips on this and other important topics (http://www.msba.org/practicemanagement/default.aspx). A colleague also showed me some great resources on the South Carolina bar association website (http://www.scbar.org/Bar-Members/Practice-Management-PMAP/Lawyers-in-Transition).

• Develop relationships with lawyers in other sections. An estates and trusts practice touches on a wide variety of subjects, including tax, real estate, litigation, elder law, family law, and business. In many cases, we are one of the few (or even the only) lawyers our clients have ever engaged, and so they often turn first to us when they have a legal question. It can be invaluable to have connections with lawyers who practice in other areas, and who can help advise or assist our clients. It also can be rewarding, both professionally and personally, to interact with other lawyers whose practice areas give them a little different perspective.

Do Something for Your Community
Most of us already devote time to serving the community. Service does not need to be law-related; activities such as volunteering, teaching, and coaching are worthwhile and can make a difference (and it can be a relief to get away from the law!). As lawyers we do have special skills, however, and we have opportunities to use our particular talents to answer needs that others might not be able to address:

• Take on pro bono (or low bono) work. Estate planning is not merely something for the wealthy; death, disability, and family issues are a reality for everyone, and people of modest or even no means can have critical planning needs. The nature of an estates and trusts practice usually makes it possible to fit in clients who cannot afford to pay (or who can afford only a discounted rate).

• Serve on the board of a charity. Every charitable organization needs a vibrant, engaged board. As lawyers, we bring certain skills and perspectives that can be particularly useful to these boards, and that can help position the organization to perform its mission. Consider getting involved with a charity that interests you, and make it known that you are willing to serve on the board (odds are they are looking for good board members).

• Teach. You have special knowledge—share it! Whether that means giving a CLE or similar lecture to other lawyers, making a presentation on an estate or trust topic to a local community group, or teaching a subject unrelated to your practice, you can do a great service by educating others.

• Mentor a young lawyer. The practice of law can be overwhelming to a beginning lawyer, especially in a practice that has so steep a learning curve as estates and trusts. By sharing insights, answering questions, or simply being a sounding board, you can provide tremendous assistance to young lawyers starting out in our field.

Do Something for Yourself
For many of us, the most difficult thing is to take time for ourselves. With smart phones, wifi, e-mail, and the like, it is easy to be on the job 24 hours a day, and there is a temptation
Notes from the Chair . . .
(continued from page 2)

to think that we are doing the right thing for our practice and
our clients when we do so. In reality, however, a lawyer who
does not take care of himself or herself is a ticking time bomb;
without good health, rest, and refreshment, we cannot give
our clients the level of attention, thought, and service that we
would like. Make sure to carve out time for hobbies, interests,
faith, family, and friends, and to take care of your health. And
encourage your friends and colleagues to do the same.

If you or a colleague are struggling personally or profes-
sionally, keep in mind that the MSBA Lawyer Assistance
Program (LAP) (http://www.msba.org/committees/lawyer-
assist/default.aspx) can help. LAP is a free, confidential
program that assists lawyers, legal staff, and their families
who experience personal problems that interfere with their
professional (and personal) lives or their ability to serve as
counsel or officers of the court.

I look forward to working with you this year to improve our
practices, our community, and ourselves.

- Charles S. Abell

SEARCHING THE MSBA ESTATE AND TRUST LAW EMAIL LIST ARCHIVES

For those persons wishing to review past messages
on the MSBA Estate and Trust Law Email List, they
are archived and can be accessed as follows:

1. Enter the following address in your Internet
browser: http://lists.msba.org/read/login/
2. Login using the email address used on the
listserv and click OK.
3. Click on reset password because this is not the
same as the one you use on msba.org.
4. Click on “email password”
5. A temporary password will be sent to your email
address. This is only good for one hour.
6. Chose a password which must be at least 8
characters in length and include at least one
uppercase character and one number and one
special character (i.e. &^*%+=)
7. This is the Lyris Archives password.
8. Enter the following address in your Internet
browser: http://lists.msba.org/read/login/
9. Enter your email address and your new Lyris
password.
10. You will then see listservs of those lists you
are subscribed to.
11. Choose the list you wish to view.
12. You will then see a list of recent messages.
13. To search past messages choose “search” from
the navigation menu on the left.
14. By using the advanced search options you
can search the archives for particular words in
the entire message, header, or body, and you can
exclude words from the search.
Authority of Agent Before Notice of 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 the 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 p.m. 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 Court addressed the basic principles of guardianship and agency law. The Court stated that “[u]nder 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 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.

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

Ms. Duvall’s three surviving children argued that the gifts to Dennis lapsed because he did not survive their mother, and therefore that all assets should be divided only among the three surviving children. Dennis’s son argued that the gifts to Dennis were not conditioned on survivorship, and that Maryland’s anti-lapse statute would operate to pass the interests to Dennis’s heirs. The Orphans’ Court ruled in favor of the surviving children, and the Court of Special Appeals affirmed, finding that the will’s provisions imposed survivorship as a condition precedent to receiving a gift, and that they manifested an intent to negate Maryland’s anti-lapse statute.

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

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Maryland Case Law Developments...
(continued from page 4)

pass the interest that would have gone to Dennis to his heirs.

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

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

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

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

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

Adverse Possession and Claims Against An Estate
The Court of Special Appeals considered the question of whether a claim for adverse possession could be barred against an estate in Nimro v. Holden, 222 Md. App. 16, 110 A.3d 805 (2015). The case involved property owned by Dan Westland in Anne Arundel County. Guy Nimro alleged that he and his predecessors in interest had used the property in a sufficiently open, exclusive, hostile, and adverse manner for more than 20 years, such that he had acquired the property by adverse possession.

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

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

“Duty To Account Theory” – Maryland Jurisdiction over 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 jurisdiction to

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prosecute an alleged theft and embezzlement offense when all of the acts comprising the elements of the offenses occurred, if at all, in the ancillary jurisdiction?

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.

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, 2015 WL 3725465 (Md. Spec. App. Sept. 30, 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 contract to extinguish the power of avoidance.” 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.”

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 and had a child conceived and born through this method. The father had undergone a vasectomy and declined to have it reversed. Both parties entered into the IVF program and signed the 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
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Keep an eye on the MSBA CLE catalog www.msbacle.org for all upcoming live programs. If you cannot attend the live program many are being webcast concurrent with the live program and you can find these programs available online, on-demand approximately 6-10 days after the live program. All video replays and online programming carry CLE credit just like the live programs. See below for details. For more information and to register go to: http://www.msbacle.org

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Registration is open for:
“Using and Drafting Trusts in Estate Planning” – February 23, 2016 | Columbia, MD | 8:30 am – 4:30 pm

VIDEO REPLAY SCHEDULE

“Using and Drafting Trusts in Estate Planning” – March 29, 2016, Baltimore, MD and March 31, 2016, Rockville, MD | 9:00 am – 4:30 pm

AVAILABLE ONLINE-ON DEMAND

“2015 Advanced Estate Planning Institute”
“2014 Advanced Estate Planning Institute”
“2014 Estate Administration Evening Series with Allan Gibber” (6-part series)
“2013 Recent Developments in Estate Administration”
“Asset Protection: Planning for At-Risk Clients from the Estate Planner’s Perspective”
“Being the Trustee: Understanding the Role and Responsibilities”
“Dealing with Digital Assets & Planning for Maryland Clients with Moderate Estates”
“Estate Administration Six-Part Series with Allan Gibber”
“Estate Planning Evening Series”
“Estate Planning in the New Era”
“Fiduciary Litigation: Contesting and Defending Wills, Trusts, and Inter Vivos Transfers”
“How Real Estate Law and Estate Planning Intersect with Family Law”
“New Maryland Trust Act 2014”
“Roth Conversions”
“Using and Drafting Trusts in Estate Planning”
“Will Drafting in Maryland”

PUBLICATIONS AND COURSE MATERIALS

Basic Estate Tax Planning, 2012 Revised Edition — Book and Forms CD
Gibber on Estate Administration, Fifth Edition w/ 2013 Cumulative Supplement
Using and Drafting Trusts in Estate Planning, 2011 Edition Book and Forms CD
Will Drafting in Maryland, 2013 Revised Edition — Book and Forms CD

2015 Advanced Estate Planning Institute Coursebook
2014 Advanced Estate Planning Institute Coursebook
Asset Protection: Planning for the At-Risk Client from the Estate Planner’s Perspective Coursebook
Being the Trustee: Understanding the Role and Responsibility Coursebook
Estate Planning in the New Era Coursebook
How Real Estate Law and Estate Planning Intersect with Family Law Coursebook
New Maryland Trust Act Coursebook

All are available for purchase from the MSBA’s CLE online catalog @ http://msba.inreachce.com/Search?mediaType=469f5e5db-08b6-46d0-b1d5-68a4e192523b&category=a63fa2a8-8718-4429-969d-17e19c0f2922&sortBy=.
JOIN THE ESTATE AND TRUST LAW E-MAIL LIST

The Estate and Trust Law Section offers an active e-mail list which is open to Section members. The e-mail list provides Section members the opportunity to post questions or comments concerning issues relevant to the practice of estate and trust law. Members may also use the e-mail list to communicate with other Section members on items of general interest to the membership.

To subscribe to the e-mail list, please call (410) 685-7878 and speak with the membership department.

Questions or comments about the e-mail list may be directed to the Estate and Trust Law Section care of Kimberly C. Aviles at kaviles@csalaw.com.
The personal representative of a decedent’s estate will need to read the decedent’s emails. This may not be something your clients (or perhaps even you) give much thought, but it’s true. We now get bank statements and bills delivered to us only by email. We have automatic, recurring payments set up from our checking accounts each month. Many of us have important information (or at least our photo collections) stored in the cloud. How can the personal representative properly marshal and inventory all assets, pay bills and taxes, report to the probate court and tax authorities, and distribute the estate without all relevant information and without authority to manage the decedent’s digital footprint?

Under current law, a personal representative is not allowed to read the decedent’s emails even if the decedent (and her estate planning attorney) very responsibly planned ahead and made a list of usernames and passwords for her fiduciaries. Not that such a list would help, anyway, when logins include security questions that only the decedent can answer (Will your PR know the first concert you attended; Your favorite movie; The name of your first-grade teacher?) or—yes, the future is now—the decedent’s thumbprint or retina scan. In fact, under current law, a personal representative is not allowed to read the decedent’s emails even if instructions in the decedent’s will expressly authorize her to do so. (Mind-boggling, isn’t it, that instructions in the will would not be sufficient to give the PR that power?) This is because access to one’s online accounts is governed not by the account owner, but by the very lengthy, very restrictive terms of service (TOS) agreement that she didn’t read when she clicked “Accept” at the time she opened her account, and that TOS agreement almost certainly says that nobody (not even her fiduciary) can access her account but her—and that she doesn’t have the right to share her username and password with anyone.

The Uniform Law Commission (ULC) has been hard at work over the past several years to create a model act that will govern fiduciary access to digital assets, working closely with internet service providers to craft a workable law that would address this increasingly pressing issue. The ULC issued its Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014. The 2014 (original) version of UFADAA was introduced in 26 states in the 2014-2015 legislative cycle—which may be a record for the first year of a new uniform act—but it failed in all 26 of them. Why?

The ULC and state bar associations (including our Section) advocating for enactment of UFADAA were vehemently opposed by internet giants like Google, Facebook, Yahoo! and AOL. Despite having been participants in UFADAA’s drafting efforts, the tech industry representatives ultimately did not support the resulting uniform act, and they hired lobbyists to oppose it in every jurisdiction and to enlist the ACLU and other interest groups to help them fight the bills in state legislatures. Their cited objections were:

- Sanctity of contract (UFADAA would have trumped the TOS agreements);
- Federal preemption (federal electronic communications privacy laws prohibit internet providers from disclosing the content of electronic communications except with the lawful consent of the user—these laws do not explicitly state that a fiduciary can provide the user’s lawful consent on his or her behalf); and
- Privacy (they successfully persuaded legislators that users would not want disclosure of their electronic communications to their personal representatives without express authorization from the user).

The tech industry put forward its own competing bill, Privacy Expectations Afterlife & Choices Act (PEAC Act), but the ULC and state bar associations opposed the PEAC Act because it (i) dealt only with decedents’ estates and not with guardianships/conservatorships, agents acting under powers of attorney, or trustees; (ii) required a court order in all instances, which would have put an undue burden on the judiciary; (iii) required estates (even modest ones) to indemnify mega-rich, multinational internet companies; (iv) dealt only with electronic communications (emails, texts, and social media posts) and not with other forms of digital property (files in cloud storage, Bitcoin, domain names, blogs, etc.); and (v) required an affirmative opt-in by the decedent in all instances. When less than half the population bothers to make a will at all, and only a very few of those would think to include in their wills an express authorization for managing digital assets, item (v) means the PEAC Act would help in only a very, very small number of cases.

The PEAC Act was adopted only in Virginia, and only in modified form; it does require court orders and an affirmative opt-in for disclosure of email contents, and it does address only decedents’ estates and only electronic communications, but it does not require estates to indemnify tech companies.

After battling to a stalemate in the states, the ULC and the tech industry went back to the negotiating table over the summer of 2015 and reached a compromise that is sup-

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ported by both sides. That compromise is Revised UFADAA (RUFADAA). RUFADAA deals with not only decedents’ estates, but also trusts, agents acting under powers of attorney, guardianships and conservatorships. It deals with electronic communications and other forms of digital property. It makes the user’s express instructions paramount, and allows users to provide those instructions in their traditional estate planning documents, via some other record, or via use of an online tool, such as Facebook’s Legacy Contact feature or Google’s even more robust online tool: the Inactive Account Manager (see discussion of online tools, below). RUFADAA protects users’ privacy—the content of electronic communications will not be disclosed to a fiduciary without an affirmative opt-in from the user—but unless the user directs otherwise, RUFADAA does allow the fiduciary to get a catalog of electronic communications and to marshal the user’s other digital property.

The ULC is aware of 31 states that will likely introduce RUFADAA this coming legislative cycle. California is of particular importance, because many online service providers’ TOS agreements invoke California law for dispute resolution. The California legislature will take up a pending bill in January, 2016—modeled on the PEAC Act. All interest holders acknowledge the advantage of a uniform law on this issue. Early adoption of RUFADAA in jurisdictions that have year-round legislatures (e.g., D.C.) would be very helpful in improving the chances that California will consider RUFADAA-influenced amendments to their pending bill and ensuring RUFADAA’s success nationwide.

Our Section Council will lead the effort to get RUFADAA enacted in Maryland in the 2016 legislative season. You can help by contacting your legislators to urge them to support RUFADAA. If you (or your clients) have war stories about problems caused by a fiduciary’s inability to access digital property, please make sure the state legislators hear them!

### Online Tools Governing Fiduciary Access to Digital Assets under RUFADAA

RUFADAA honors the user’s express instructions regarding whether or not a fiduciary should have access to the user’s digital assets. Users can provide those instructions in their traditional estate planning documents, via some other record, or via use of an online tool. In the context of fiduciary access to digital assets, an “online tool” is an account-specific feature the online service provider offers to its users to enable a user to express his or her wishes regarding that account. An online tool will be a question or series of questions posed by the online service provider and answered by the user. At present, we know of only two online tools—Facebook’s Legacy Contact and Google’s (even more robust) Inactive Account Manager.

Facebook’s Legacy Contact permits a user to designate another Facebook user to serve as a limited agent after his or her death and memorialization of his or her Facebook page. The designated Legacy Contact can respond to new friend requests, write a pinned post for the deceased user’s profile, update the deceased user’s profile picture, and download a copy of what the deceased user shared on Facebook. The Legacy Contact cannot log in to the user’s account or read messages the deceased user sent to individual other Facebook friends.

Google’s Inactive Account Manager is more robust. It allows a Google user to notify up to ten other people (trusted contacts) when the user’s Google accounts have been inactive for a period of time specified by the user (although it cannot be less than 3 months). The user may also instruct Google via this online tool to grant access to one or more of the user’s Google accounts to one or more of those trusted contacts, and/or to send an automated email response to incoming emails—all or only those from people in the user’s Contacts list.

At present, a user has to go searching for an online tool in order to set it up. Facebook and Google do not require users to use them. However, if RUFADAA is widely enacted in the states, not only will there be more incentive for other internet companies to devise online tools, but there will also be more incentive for internet companies to make their use mandatory for users. The online tools will be favored by the technology industry, as preferable to users leaving instructions in their estate planning documents, because following instructions created by the internet company via its own online tool will be cheaper for them than staffing in-house compliance departments with trust experts who can read and interpret estate planning documents for every deceased user.

**RUFADAA provides that the user’s expression of intent via an online tool will trump the same user’s expression of intent in his or her estate planning documents.**

Certainly, broad enactment of RUFADAA would be a good thing. It would give individual users the ability (which they do not have now) to direct what should happen to their digital property in the event of their death or incapacity, and it can give fiduciaries access to the information they will really, really need in order to carry out their fiduciary duties. Taking proper advantage of the benefits of an
Digital Assets . . .
(continued from page 10)

enacted RUFADAA, however, requires a little consciousness-raising education for your clients. Consider:

• Your clients’ estate planning documents are carefully drafted by you, an experienced estate planning attorney who understands the nuance and effect of the language you employ. Your client reviews drafts of the documents, carefully contemplates their terms in consultation with you, his or her attorney, and makes thoughtful, informed decisions about what those documents should say.

• In contrast, the online tool for any given internet account may be written by an intern at a start-up tech company, with zero legal training and no idea how estate administrations are conducted. In addition, your client may be confronted with an online tool when she is trying to open an account late at night, not thinking about her estate planning at all, eager to click through whatever the computer is asking her so that she can get to the next page (and certainly not consulting you, her wise and careful estate planning attorney, before answering!).

Consequently, it is very important that our clients understand what online tools are, that they be able to recognize one when they see it, and that they realize the need to consider carefully what instructions they provide via that online tool. Expect to see internet companies asking users what they want to happen to their accounts when they die or become incapacitated. Still worse, expect to see the query posed as a leading question, such as, “Do you want us to keep your emails private?” I hope that is an exaggeration, but certainly some online tool queries will be slanted to encourage users to choose the option that costs the internet company the least in compliance, and they will not first provide users with expert estate planning advice before they respond.

You spend a significant amount of time and effort, and your clients a significant amount of money, to ensure that a comprehensive, thoughtful estate plan is put in place, tailored to the client’s needs, that will ensure that fiduciaries are empowered to act on the client’s behalf in all the ways they will need to do so when the time comes. Be prepared, and prepare your clients, to ensure that they do not undermine that effort with a few impulsive clicks. Be ready for online tools, encourage your clients to use them wherever they are available to ensure that your clients’ instructions will be carried out, but educate your clients to be mindful that their personal representatives will need to read their emails.

2015 Maryland Case Law Developments...
(continued from page 6)

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.

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.
The 2015 Advanced Estate Planning Institute of the Maryland State Bar Association held a day-long continuing legal education seminar on Tuesday, May 5, 2015 to discuss a variety of issues relating to estate planning.

Maryland Legislative Developments
The day began with a presentation by Charles S. Abell, of Furey, Doolan & Abell, LLP, on trusts and estates legislation in 2015. Abell’s discussion centered on a number of bills passed by the General Assembly of interest to trusts and estates practitioners.

In 2014, the General Assembly passed the Maryland Trust Act, which went into effect on January 1. A goal of the Maryland legislature was to codify existing Maryland trust law with few changes, but also to ensure certain protections for trust beneficiaries. In the 2015 legislative session, the General Assembly added two provisions to add clarification to the Act. First, there had been some confusion over when and how creditors could assert claims against the assets of a revocable trust after the settlor’s death. In response to this confusion, the General Assembly passed HB666/SB417, which revises §14.5-508(a) of the Estates & Trusts Article to provide revocable trusts with a creditor claim period similar to the period that is applicable to probate estates. Second, HB703/SB419 added a definition of the terms “incapacity” and “incapacitated” to §14.5-103(a) of the Act. The statute defines incapacity as “the ability of an individual to manage his or her property or financial affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance.” Rather than starting from scratch, the statute utilizes the same definition as used in the context of guardianships and powers of attorney, evidencing the continuing attempt to provide consistency and uniformity in the law of trusts and estates.

Refinement of the Maryland Trust Act was clearly not the only thing that kept the General Assembly busy. The General Assembly, continuing a trend of making estate administration easier and more streamlined, also tweaked the modified estate administration procedures. First, in response to growing concerns that slow sales of real property would cause estates to be pushed out of modified administration, the General Assembly amended §5-703 of the Estates & Trusts Article to allow the Register of Wills to grant an additional extension of up to 90 days. Currently, §5-703 of the Estates & Trusts Article allows a personal representative in modified administration to obtain a single, 90-day extension of time to file a final report, with the consent of all interested persons. The additional extension of up to 90 days will also require the consent of interested persons.

Also, the General Assembly passed HB 624 to revise the provisions for payment of funeral expenses under §8-106 of the Estates & Trusts Article to (1) increase the default limit for funeral expenses to $15,000 (from $10,000) and (2) provide for approval of payment of funeral expenses in modified administration without seeking a court order.

Other pieces of legislation also manifested the trend toward administrative efficiency, including in the area of the funding of special needs trusts. For example, SB 217 clarifies that §14.5-1002 of the Estates & Trusts Article, part of the Maryland Trust Act that generally restates certain provisions of the law regarding special needs trusts, does not require a court order for funding a special needs trust. The policy of the State, as set forth in §14.5-1002 of the Estates & Trusts Article, is to encourage the use of a special needs trust or supplemental needs trust by an individual of any age with disabilities to preserve funds to provide for the needs of the individual not met by public benefits and to enhance quality of life. Passing SB 217 reflected an important attempt to strengthen, supplement, and coordinate efforts in furtherance of that policy.

The bills relating to execution and revocation of advance directives were of particular interest. One bill, HB 293, revises §5-604 of the Health General Article to allow individuals to waive the right to revoke an advance directive if they become certified incapable of making an informed decision. The bill addresses certain concerns raised by the Continuity of Care Advisory Panel convened by the Governor, including the concern that there are instances when advance directives are not implemented due to statements an individual may make when he or she is incompetent. The advisory panel noted

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that, despite the execution of an advance directive for mental health treatment, an individual has the right to revoke the individual’s advance directive at any time, even when the individual is incapacitated and in need of treatment. Under these circumstances, an advance directive for mental health services that is developed when an individual is competent may never be honored if that individual chooses to revoke the advance directive when the individual becomes incompetent.

Abell noted that significant bills did not pass. Most significant was the Maryland Fiduciary Access to Digital Assets Act. The bill would have confirmed the rights of fiduciaries to access a deceased or disabled individual’s “digital assets.” Those include online accounts, files in cloud storage, and email. Only a minority of states have enacted legislation on fiduciary access to digital assets. Online providers, however, fought the bill, and it did not pass either house.

Abell closed his presentation on an optimistic note. Despite questions that still linger regarding the drafting of fiduciary access to digital assets legislation in an era of increasing privacy concerns, Abell noted that the Estates & Trust Law Section is working with other stakeholders (including the online providers) to craft a bill that the General Assembly can enact in the 2016 legislative session. With digital access becoming increasingly important, a Maryland law giving an executor the right to access on-line accounts to ensure that valuable digital assets are preserved for heirs (without violating federal law) would be welcomed by many people who are uncomfortable with the status quo.

**Drafting Charitable Gift Clauses and Gift Agreements**

Christine W. Hubbard, of the Law Offices of Christine W. Hubbard, gave the day’s second presentation on the subject of drafting charitable gift clauses and gift agreements, and she began by discussing the law pertaining to the enforce-ment and deductibility of restricted gifts to charity and best practices for drafting gift instruments that are likely to be enforced and achieve the donor’s desires.

Gift restrictions have performed an important role in charitable giving. Restricted gifts have been made to address social issues, establish schools and libraries, and heighten awareness of disease and health issues. Now that many state courts across the country permit law suits for breach of gift restrictions by donors, however, there have been an increasing number of donor intent law suits.

Regardless of the underlying subject matter at issue, an attorney must provide competent representation to a client. In an increasingly litigious society, however, it is not only prudent but necessary for an attorney representing a client who wants to make a restricted gift to charity to truly appreciate the issues giving rise to these law suits for breach of gift restrictions. Developing such an understanding and learning how to effectively design and draft restricted gifts may better equip an attorney to advise their donor clients to ensure that restrictions are honored and anticipated charitable deductions are achieved. On the other hand, advising donor clients without such a firm understanding could cause restrictions to be set aside and charitable deductions to be reduced or eliminated altogether.

Hubbard explained that when representing a client who wants to make a restricted gift to charity, the first step is to understand and prioritize the client’s objectives. Some donors are willing to give up all or a portion of the charitable deduction in order to implement the exact type and degree of restriction that the client desires. Other donors will want the restriction but only so long as it does not jeopardize the charitable deduction. The significant challenge for the attorney is managing the donor’s expectations.

Before addressing the techniques for ensuring deductibility of a restricted charitable gift, Hubbard reviewed the methods for drafting enforceable gift restrictions that effectively reflect a donor’s intent. Certain cases provide insight as to why types of restrictions are either enforced or rejected in court. Hubbard discussed the ruling in *Newell v. The Johns Hopkins University*, 215 Md. 217, 79 A. 3d 1009 (Md. App. November 21, 2013), which involved a restricted gift of a large family farm in Montgomery County to the Johns Hopkins University pursuant to a bargain sale. The following language restricting the use of one of two parcels involved in the conveyance was contained in the contract of sale and deed: “agricultural, academic, research and development, delivery of health and medical care and services, or related purposes only, which uses may specifically include but not be limited to the development of a research campus in affiliation with one or more divisions of [Johns Hopkins].” Hopkins’ initial plans were consistent with the vision of the donor, a woman renowned for her opposition to development in the county and specifically with respect to the family farm. Years later, however, when zoning restrictions were lifted, Hopkins filed a request to substantially expand its development of the family farm. Judge Ronald Rubin, of the Montgomery County Circuit Court (affirmed on appeal), ruling over the opposition of the family of the donor who argued that the scale and density of Hopkins’ plans violated the terms of the contract of sale and deed, reiterated that the deed language restricted the use of the subject parcel for agricultural, academic, research and development, delivery of health and medical care and services, or related purposes.
only. The absence of any restriction concerning scale or density ultimately sealed the fate of the family farm, leaving a valuable lesson to be learned about effectively designing and drafting restricted gifts.

Hubbard highlighted other educational cases and next addressed some practical problems that arise with restricted or earmarked gifts when circumstances change. The Uniform Management of Institutional Funds Act, of which Maryland has its own version, permits a charity to remove or release a restriction, in whole or in part, under certain circumstances. Hubbard identified the following circumstances (but then went on to advise that in 2006, the Commissioners on Uniform State Laws approved the Uniform Prudent Management of Institutional Funds Act to replace the old law): (a) With written consent of the donor, the governing board may release, in whole or in part, a restriction imposed in the applicable gift instrument on the use of investment of an institutional fund; (b) If written consent of the donor cannot be obtained by reason of his or her death, disability, unavailability or impossibility of identification, the governing board may apply in the name of the institution to the appropriate court for release of the restriction imposed by the applicable gift instrument on the use or investment of the institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part; (c) A release under this section may not apply a fund to be used for purposes other than the educational, religious, charitable or other eleemosynary purposes of the institution affected; and (d) This section does not limit the application of the doctrine of cy pres.

The new law approved by the Commissioners on Uniform State Laws permits charities to seek court approval to modify gift restrictions within a gift agreement under certain circumstances but also allows the charity to make changes without court approval if the fund’s value is less than $25,000, the fund has been in place for more than 20 years, the restriction is “unlawful, impracticable, impossible to achieve, or wasteful,” 60 days have passed since the charity notified the state attorney general’s office of the proposed change, and the change is consistent with the charitable purpose addressed in the gift instrument. There are important take-aways for drafting gift restrictions and advising a donor in connection with same. The value of clearly drafting the donor’s specific charitable intent cannot be overstressed. To this point, Hubbard notes that depending on donor intent to be established by extrinsic evidence is a big mistake.

Drafting gift restrictions in a manner that preserves a donor’s charitable income tax deduction requires careful planning. Hubbard concluded her portion of the seminar by discussing certain legal guidelines pertaining to the deductibility of restricted gifts and related issues. A contribution is deductible only if it is made “to or for the use of” a charitable organization under IRC Code Sec. 170(a), and for a charitable purpose of the organization. A donor may earmark a contribution to charity for a particular use without jeopardizing the charitable deduction. This is so, however, provided the restriction does not prevent the charity from freely using the transferred assets or, at a minimum, the income therefrom, in furtherance of its charitable purposes.

For example, Hubbard advised that the language “My contribution of $50,000 to ABC private non-profit school shall be used for the sole purpose of providing a salary and bonus enhancement to John Doe because of his excellence in teaching, demonstrated commitment to the school and the fact that he and his family are currently suffering from financial hardship as a result of recent health problems suffered by John Doe” would not qualify for a charitable deduction. That is so because contributions are only deductible if they are “to or for the use of” a charitable organization. The language designates instead an individual who may be involved with the charity. Simply put, a donor cannot make distributions to a charity, earmark them for a particular person, and get a charitable deduction.

Challenges Facing Trusts Holding Real Estate
Jeffrey D. Renner, Esq., of Miles & Stockbridge, PC, the third speaker of the day, summarized certain challenges facing trusts holding real estate.

The first challenge Renner discussed was that, although expressly permitted by statute, a trustee who holds title to real estate could still fail to satisfy its general duties to trust beneficiaries, including the investment standards a trustee must meet.

The second challenge was that, even if owning real estate does not violate the investment standard that a particular trustee must reach, there are other duties that a trustee must consider before investing in real property. For example, if the trust’s terms either require income distributions or permit the trustee to make income distributions, the trustee has a duty to invest the trust assets in a manner so that income is actually produced. While investing in shares of a REIT may satisfy the duty to produce income, a trust that owns a personal residence would not on its face satisfy the duty.
Also, since in most circumstances no income is derived from unimproved land, it would be unwise for a trustee to own such property.

Other challenges are associated with transfers to and from trusts. For example, some counties require certain language to be included in the trust. That language would, for example, state that the trustee(s) and beneficiary(ies) of the trust are the same person as the settlor(s) in order to maintain the tax-exempt nature of the transfer.

Yet another challenge concerns “due-on-sale clauses”. Most promissory notes secured by a mortgage or deed of trust contain a “due-on-sale clause”. While, under federal law, lenders may not trigger the due-on-sale clause on transfers of residential real property containing less than five dwelling units to revocable trusts, lenders may trigger the due-on-sale-clause:

- On transfers of non-residential real property to revocable trusts;
- On transfers of residential real property to revocable trusts; and/or
- On transfers of non-residential real property to irrevocable trusts.

Fifth, while in 2006 the American Land Title Association (ALTA) updated its forms to, among other things, include the trustee of a trust as an insured “if the grantee is a trust or beneficiary of a trust created by a written instrument established by the [original insured] for estate planning purposes,” prior to the 2006 update, the term “insured” did not include trustees of any trust, including revocable trusts. Consequently, if a transfer was made to the trustee of a trust prior to 2006, title to that property is likely not insured unless some remedial measures have been taken.

Sixth, a trustee must always factor in the trustee’s duties and investment standards when deciding whether to borrow and pledge trust assets and there are challenges confronted by lender issues (e.g., a complete analysis of the trust assets will be performed to determine whether the trust assets are sufficient to carry the loan and if the trust does not have sufficient assets to carry the loan, then the bank will need an individual to serve as the co-borrower or to guaranty the loan).

While there are still challenges facing trusts holding real estate, legislation was enacted to address certain challenges. Specifically, until October 1, 2010, married Marylanders had to choose between transferring their real property to their revocable trusts and losing the tenants by the entirety or keeping the tenants by the entirety protection and having their real property become part of their probate estate. The Maryland statute now codified in Md. Code Ann., E&T Art. §14.5-511 grants the same immunity from the claims of creditors to real property (and proceeds from the same of such property) that was held as tenants by the entirety immediately prior to the conveyance to the trustee of the trust as that property would have if the spouses still owned the property as tenants by the entirety provided certain conditions are met.

**Income Tax Essentials for Estate Planners.**

Mark W. Schweighofer of Stein Sperling Bennett De Jong & Driscoll, PC discussed income tax essentials for estate planners.

Schweighofer began by focusing on offshore asset disclosure. An FBAR (Form 114) is used to disclose interests in foreign accounts. The filing threshold is more than $10,000 (in the aggregate) at any time during the calendar year.

Foreign assets must be reported if a U.S. person has more than 50% interest in an entity. Also, if a U.S. person has signature authority, but no beneficial interest, a report may be required. Schweighofer suggested that, when determining what is reportable, err on the side of over-reporting.

Schweighofer then discussed the following forms:
- Statement of Specified Foreign Financial Assets – Form 8938 – is used to report “specified foreign assets” including foreign stock or securities not held through an account;
- Interests in Foreign Trusts/Receipt of Foreign Gifts – Form 3520 – must be filed by any U.S. Person who is considered the owner of a foreign trust; any U.S. Person who received a distribution from a foreign trust; or any U.S. Person who received a gift or bequest of over $10,000 from a foreign individual or a foreign estate; and
- Interests in Foreign Trusts/Receipt of Foreign Gifts – Form 3520A – must be filed by a foreign trust with a U.S. Person who is treated as an owner of any portion of the trust under the grantor trust rules.

Importantly, failing to report an interest in or distribution from a foreign trust can keep the statute of limitations on the entire return open.

Following the identification of these relevant forms, Schweighofer discussed significant revisions to the offshore compliance initiative announced by the Internal Revenue Service by way of Fact Sheets 2014-6 and 2014-7. Schweighofer said that these initiatives reflect efforts spanning back to 2009.

Schweighofer then highlighted several key features of ... (continued on page 16)
the Traditional Offshore Voluntary Disclosure Program (“OVDP”). To make an offshore voluntary disclosure, the taxpayer must submit to pre-clearance. Notwithstanding, pre-clearance does not guarantee a taxpayer acceptance into the Offshore Voluntary Disclosure Program. Schweighofer also noted that the Traditional OVDP can be a lengthy process.

An alternative to the Traditional OVDP is the Streamlined Disclosure process. Although the advantages of the Streamlined Disclosure process include no pre-clearance, this process results in no closing letter and no protection against further audit or criminal prosecution.

For U.S. estates and trusts with foreign beneficiaries, withholding issues can also arise. The general statutory rule requires withholding on distributions to foreign persons of 30%. As the “withholding agent” for U.S. tax purposes, the trustee or administrator can be liable personally for failing to withhold. Schweighofer noted that applicable withholding must be done on each distribution.

Schweighofer noted that treaties can sometimes work to reduce the amount of withholding required on certain types of income. Form W8-Ben is used both for identifying information and for a beneficiary to claim treaty benefits. Form W8-Ben must be completed by the beneficiary. The trustee or executor may, however, rely on any representation in the W8-Ben. To give context, Schweighofer noted that the U.S./U.K. Income Tax Treaty reduces the necessary withholding on bank interest and most dividends to zero. Schweighofer further noted that treaty benefits vary from country to country. For a trust or estate with a foreign beneficiary, it can be worthwhile to review applicable U.S. treaty provisions with the applicable beneficiary’s foreign country.

Schweighofer concluded the presentation with a brief discussion on succession considerations and choice of entity. He explained that when weighing the relevant considerations, income tax issues can be very pronounced. It can pay off to give serious consideration to factors including the level of tax of each entity type – for example, an S corporation is said to be more “tax efficient” than a C corporation because, in the case of a C corporation, tax is imposed at both the corporate and shareholder level. Any advantages, however, of an entity type must be balanced against the drawbacks of selecting that entity type.

When it comes to class of ownership interest, the differences can be meaningful. For example, because C corporations and limited liability companies are permitted to have classes of ownership interest, Schweighofer noted, there can be important planning opportunities that may result from use of such entity types. On the other hand, an S corporation can have only one class of stock. It can, however, have both voting and non-voting shares.

Yet another factor for consideration is the payment of self employment taxes. With a C corporation, a shareholder will be subject to employment taxes on compensation for services rendered. With an S corporation, self-employment taxes are also relevant as applied in the context of compensation, but Schweighofer noted there may be ways to obtain more favored tax treatment in the S corporation context.

Estate planning attorneys who advise clients with succession considerations and choosing the most appropriate entity for the client’s needs must be aware of the main forms of entity structures and the advantages and disadvantages of each entity type, as applied in each client’s individual circumstance.

Powers of Appointment and Trust Protectors
Frank S. Baldino, of Lerch Early & Brewer, Chtd., gave the day’s final presentation on the topics of powers of appointment and trust protectors. The two types of powers of appointment are (1) general powers of appointment and (2) non-general powers of appointment (often referred to as special or limited powers of appointment).

General powers of appointment are exercisable by the donee in favor of at least one of four possible appointees: (a) the donee; (b) the donee’s estate; (c) the creditors of the donee; or (d) the creditors of the donee’s estate. As Baldino explained, under Maryland law, a “general power of appointment” is not considered a general power of appointment unless it specifically provides that the donee of the power may appoint to himself or herself, creditors, or the creditors of his or her estate – merely describing a power as a “general power of appointment” is insufficient. Also, if (a) a power can be exercised to discharge estate tax or any other taxes, debts, or
Dance to the Music – Is Anyone Really Listening?

How we listen to music has changed markedly since the advent of recording and broadcast technology. Here is a quick survey. Check the source(s) of music that you have used:

- Acetate cylinders
- 78 RPM Records
- 33 1/3 RPM Records
- 45 RPM Records
- Cabinet Radio
- Portable (Transistor) Radio
- Car Radio
- Closed Circuit (Carrier Current) Radio
- Cassettes tapes
- Compact Discs
- MP3 Files
- A Walkman or other portable cassette player
- An iPod or other portable MP3 player
- Streaming broadcast on the Internet.
- Sirius FM
- Spotify or Pandora or similar music service
- Concerts/Performances
- Pono
- Tidal

With the exception of the first and last two, I have lived long enough to have experienced all of these. I personally have some recordings in at least three different formats. I once had a standing cabinet radio with vacuum tubes that played records, including 78 RPM records with a steel needle. It had been my grandfather’s entertainment center.

The New York Times reported that 2014 represented a sea change in the way we listen to music:

“The American market for recorded music was flat in 2014, but income from streaming services like Spotify and Pandora has quickly grown to become a major part of the business, eclipsing CD sales for the first time, according to a report … by the Recording Industry Association of America.”

Several observations can be made here.

It is self-evident that we want to listen to music on the go. Since broadcast radio went mobile with the car radio and the transistor radio, we have not stopped the progression of wanting to take music with us where we go. On a clear night in central New York in the 1960s, I could listen to WCLF-AM (The Voice of Labor) from Chicago. In college, the airwaves were filled with the new progressive FM radio (“no static at all”). I spent time as a DJ on a carrier current station in a college dormitory, where you could ask listeners to call with requests, put on “Careful With That Axe, Eugene” and be assured that no one would call.

The transformative social impact of wireless communications has been noted by writers far more eloquent than this scribe:

But it was not only the earth that shook for us: the air around and above us was alive and signaling too. When a wind stirred in the beeches, it also stirred an aerial wire attached to the topmost branch of the chestnut tree. Down it swept, in through a hole bored in the corner of the kitchen window, right on into the innards of our wireless set where a little pandemonium of burbles and squeaks would suddenly give way to the voice of a BBC newsreader speaking out of the unexpected like a deus ex machina. And that voice, too, we could hear in our bedroom, transmitting from beyond and behind the voices of the adults in the kitchen; just as we could often hear, behind and beyond every voice, the frantic, piercing signaling of Morse code.

- Seamus Heaney - Nobel Lecture December 7, 1995

Soon Moore’s Law began to take hold. Transistors became smaller and smaller and became computer chips. We moved
from portable cassette and CD players to iPods and Zunes. The Internet changed everything again, slowly at first, then ever faster. Streaming radio came along. Worldwide broadcasting became a reality over the Internet. Bands and musicians at first found a way to reach large audiences online.

Streaming music followed, with iTunes and Amazon selling music files. Social media sites like MySpace gave new artists exposure. YouTube brought music videos.

Now, we have streaming music services -- Spotify and Pandora -- that have changed things again. It is fair to say that there never has been so much music available so easily to so many people from so many sources.

There have been compromises and short-comings along this pilgrimage, however. If you remember long-playing phonograph records, you will recall the annoyances of scratches and analog hiss. Compact discs seemingly offered a better solution. They were more durable and did not have to be handled with as much care. Streaming music seems even better. You can take it practically everywhere and have only to keep the player dry and in one piece (and have a connection!).

Unfortunately, along the way, in the shift from analog music to digital music, the quality of the music suffered. The dynamics of digital music are not nearly as rich as the old analog recordings. The convenience of compact discs and digitized music online lured us away from our records by offering convenience, but quality arguably diminished. We seemed content to accept the convenience and sacrifice the quality.

When was the last time that you listened to an analog recording on a record? How about your transistor radio? Have you been out for a stroll with your Walkman recently? Technological change has made earlier formats obsolete (with the exception of audiophiles who still maintain turntables and other earlier play-back devices). This change has relegated the music that we purchased in those formats obsolete. I have hundreds of records and two turntables and have not played any records in several years. I also have hundreds of CDs and only play them occasionally now in my car CD player (when I do not have my iPod plugged in).

As we adopt the next wave of technology, we end up having to acquire the music in that new format. We may be buying new music, but we also may be buying (again) old favorites that we still want to play.

One alternative might be “streaming” music services, like Pandora or Spotify. I have both on my mobile devices (ancient iPod and iPhone 6). I like both, but prefer Spotify. Both provide streaming music if you are connected via Wi-Fi or the Internet. There are “free” options, with premium upgrade for a fee. I pay for the premium Spotify service, which makes the streaming available pretty much anywhere you can connect and allows you to download tracks so that they are available on your device when you do not have a connection. These services allow you to create playlists and provide a degree of background information on the artists and different “channels” that simulate themed radio broadcasts. Remember Hearts of Space? It’s still around and available for different devices. Pandora and Spotify are like big box stores for themed programing.

As we are flooded with so much digital music so “freely” available, do we care about the quality of what we are hearing? Many do not seem to know that better quality is possible. If you have taken the time to actually listen to digital recordings, however, you understand that such recordings vary widely in quality. Some of this comes from the time and care taken in producing the original recording and its translation into digital format. An artist or a producer may have insisted on better quality. (Examples that come to me immediately -- music recordings produced by T. Bone Burnett and the Radiohead catalog.) As consumers, we need to be wary of digital reissues that promise to be better than the original analog recordings we knew and loved (and still may own). Often, it is just a carnival huckster’s sales pitch to get you to buy the music all over again.

Through all of this, some artists have not gone quietly down the path of mediocrity. Two examples are Neil Young and Jay-Z. Neil Young has long spoken out about the inferior quality of digital sound. Finally, he did more than talk about it. He created a new digital music device with superior sound quality. It is called Pono and you can find more information about it online. You can buy the PonoPlayer and digital music at the Pono (or pono) store. “Cousin” Neil starts his explanation this way:

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charges which are enforceable against the donee’s estate or (b) the power can be exercised to make a payment that would discharge a legal obligation of support of a dependent of the donee, then the power is a general power. There are three exceptions, however, to the definition of what constitutes a general power of appointment: (a) if the power can be exercised only in conjunction with the donor of the power, (b) if it must be exercised in conjunction with another person who has substantial interest in the appointive property that is adverse to the exercise of the power or (c) if the exercise of the power is subject to or limited by an ascertainable standard relating to the health, education, maintenance or support. A non-general power may not be exercised in favor of the donee, the donee’s estate, or creditors of the donee’s estate.

The decision to grant a power of appointment should be well thought-out. Baldino pointed out that powers of appointment can be used to allow changes to be made to a trust after the trust was created, creating an “opportunity for a second look.” Moreover, non-general powers of appointment can also be used in making gifts to trusts incomplete. Incomplete gifts can be helpful for income tax purposes. Finally, it may make sense to include a spouse of a donee in the class of permissible appointees in order to satisfy a client’s interest in permitting his or her child to continue a trust for the benefit of the child’s spouse.

Baldino also discussed modification of a trust to accommodate changes in circumstances in the context of exploring the nature of the role of a trust protector. Of course the position of a protector, as Baldino highlighted, is relatively recent and the nature of the role and how it is regarded by the courts and the legislature in those jurisdictions where it is currently utilized is in the process of development. The question to what extent a trust protector may act in a nonfiduciary capacity is subject to debate. That being said, where the trust is silent on whether the protector is a fiduciary, and no local statute applies, courts that have addressed the issue have been consistent in concluding that the position of a protector is a fiduciary. It is fairly certain, however, that the debate over whether the protector is a fiduciary will continue as they become more commonly used in the domestic trust context.

In his presentation, which involved a thorough discussion of certain powers that may be granted a protector as well as criteria to be considered in selecting a protector, Baldino reiterated that, in this evolving area of the law, legislatures will likely pass more comprehensive trust protector statutes and practitioners are well advised to pay attention to the evolution so as to address clients’ needs.

Pono means righteous. It is a Hawaiian word, the one, the pureness. On behalf of Pono, we thank you for helping us give music a voice. You have helped to set the stage for a revolution in music listening. Finally, quality enters the listening space so that we can all hear and feel what the artists created, the way they heard and felt it.

The PonoPlayer comes in only yellow and black and costs $399, and you still have to buy the music (again). The Best of Kiss runs $16.49. Elvis Costello & The Attractions - This Year’s Model runs $20.99 for the entire album. R.E.M. - Document is $14.29 for the entire album. Individual tracks from any of these are $2.29 each. Once again, you are buying the music in a new format.

Meanwhile, Jay-Z (the artist otherwise known as Mr. Beyoncé) has launched Tidal. It is a digital streaming service attempting to offer superior sound quality and equitable compensation of artists. It has attracted an interesting alignment of artists. Prince can still be found on Tidal. So can such seemingly different artists as Lana Del Rey and David Gilmour. Tidal appears to be targeting Spotify in the competition for world dominance. It is a subscription service that comes with featured artists, videos, suggested playlists, and functions that allow you to create your own playlists and stable of artists and recordings. Tidal’s pricing in the US is $9.99 per month for “Hi-Fi” and $19.99 per month for “Premium”.

These are steps in a direction to bring improved quality to listeners and perhaps reclaim a market lulled into acquiescence by abundant availability.
### 2015-2016 Section Council Committees

Listed below are some of the Section Council Committees for which Section members may wish to volunteer their time. Please contact the individuals listed below or the Section Chair if you have suggestions or are interested in helping out.

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