

PBA Real Property, Probate & Trust Law Section

NEWSLETTER



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RPPT SECTION CHAIR REPORT

Chair's Ponderings

By Marshal Granor, Esq.

The evening before my election as RPPT Section chair, I stood on the stage at my local elementary school looking out on a sea of families of the third and fourth graders behind me. I was there to sing with about 30 other community members. We performed in four-part harmony and were backed by a five-piece professional jazz band. Then we sang with the school kids. The sound of human voices (young and old, women and men) blending in harmony is one of the most beautiful things I continuously encounter in my life.

Standing there with nearly 100 children and adults, I realized that no one singer really makes a difference. Only in working together do the notes blend and the sounds embrace everyone. The same applies to our section. It is the work of all of us together, whether on our governing Council or in the trenches, that helps each other and advances the legal profession.

The next morning in Lancaster, I was honored when you entrusted me with the chairmanship of RPPT – the Pennsylvania Bar Association's largest section. I appreciate the work each of our past chairs has performed and look forward to building on that solid foundation. As a member of Council for these past seven years, I have witnessed with significant awe the time and dedication each leader has contributed for the benefit of our section,



Marshal Granor

our profession and our clients. Special thanks to immediate past chair Mark Mateya for his efforts on behalf of all of us this year.

I am full of ideas (some may say I am full of other things, but we'll leave that for a conversation at the wine dinner in State College in August). Your Council, your officers and I will prioritize these and see how we can better serve you.

My hopes for the coming year are to implement the following ideas – plus those you bring to us:

1. Welcome/mentorship – Every one of our more than 1,700 RPPT Section members is important to us. We want to acknowledge each of you here and now and thank you for joining, as we implement a special welcome for each new member. Likewise, as part of a bar initiative, we continue to develop a mentorship program for those who wish to participate. Stay tuned for our request for you to volunteer to be a mentor or to ask for a mentor to be assigned to you.

2. Meeting more of you through your county bar associations – If your local association has monthly "lunch and learn" CLE programs or if you have a local real property or probate/estates meeting, please let us know and invite us to attend. We'd love to meet you in person and also share what the section is doing in the way of legislative initiatives. Most importantly, we want to hear what you'd like your RPPT Section to prioritize in this legislative session.

3. Bimonthly email to all members – For reasons we do not fully understand, many RPPT Section members have not subscribed to one or both of our Listservs (they're free!). The knowledge shared in these focused and short discussions will save you hours of research and may help prevent embarrassing errors in your

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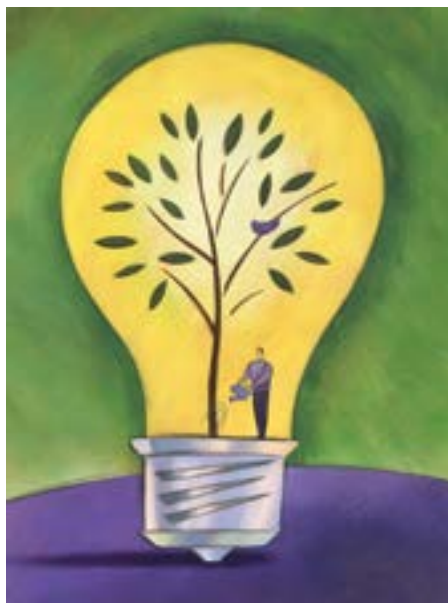
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Chair's Ponderings

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practice. To share highlights with all members and to inform you of section matters – all without cluttering your inbox – we are considering a periodic email to members between editions of our newsletter.

4. Ideas from members - If you have ideas, please let us know. For example, if you find an area of our practice that requires legislative attention, we can take that on with you. If you encounter an agency of state government that is not acting efficiently, we can work with you to coax it to be more helpful. I encourage and invite your comments, questions and concerns. Please email me at Marshal@Granorprice.com.



The PBA created sections and committees to study specific areas of concentration in the law. RPPT's two divisions are meant to inform our members and the PBA at large of developments in our fields. We are tasked with proposing changes or improvements to the law and, at times, to request that the PBA take a stance against proposed legislation. With the help of PBA's Leg-

islative Department, we work closely with legislators to achieve our goals.

Most importantly, your RPPT Section is here to serve you. Come and meet your leadership and your colleagues at the Section Retreat in State College, Aug. 7 – 9. The CLE sessions planned this year are fascinating and critical to your practice (including those important ethics credits). But it is the ability to put faces to names and to get to know your colleagues from across the commonwealth that makes this annual event one you should not miss. For less than the cost of 9 CLE credits elsewhere – only \$275 for section members who register early – you get those 9 credits PLUS a wine pairing dinner, two breakfasts, a second exceptional dinner, AND the opportunity to meet and mingle with some of the best “death” and “dirt” lawyers in Pennsylvania.

We have an exciting year ahead for our section. Alison Smith, vice chair of the Probate and Trust Division, and Erik Hume, vice chair of Real Property Division, will be working closely with me along with our other officers, Council members, past chairs and Listserv friends to bring you information, opinions, suggestions, ideas and friendship. Please invite your colleagues to join us in our section. Your participation will connect us to create the chorus of lawyers standing together to better ourselves, our practices and our clients.

See you at the RPPT retreat!

RPPT Section Chair Marshal Granor is the managing member of Granor & Granor PC in Horsham. He formerly served as the vice chair of the section's Real Property Division and executive editor of this newsletter. He is a member of the College of Community Association Lawyers and concentrates on condominium and homeowners association law.

It Can't Happen to Me

By Marshal Granor, Esq.

- My business is too small to be noticed by hackers.
- I don't use social media.
- I'm really careful not to open spam.
- My office rarely wires funds.
- I don't have personal financial information for anyone.
- I spend a lot of money for internet security programs.
- Cloud programs have great security.

Any and all of those thoughts probably have gone through your mind when you smile a little hearing about some big company's cyber breach and millions of private files and passwords getting hacked. But your law office? Nah, it'll never happen.

A bit of background. I've been using computers in my business since 1978, pre-internet. I understand technology fairly well and am an early adopter. I've had a title insurance agency since 1982, and have gone from hand-writing HUD-1 settlement statements and checks to completely computerized cloud-based settlement software. I brought an FBI agent to speak about internet security at an RPPT retreat a few years ago and I've attended cybersecurity continuing education classes every year.

As much as it pains me to delete emails without opening them, I know what looks fishy (or phishy) and I make the bad stuff disappear. Thus, when Wells Fargo Bank called my title officer to ask about a \$174,000 wire they received from a client of mine (we do not have an account at Wells), the alarm bells sounded.

Fortunately, and we have no idea why, Wells flagged these funds and returned them to my client's brokerage house that sent them. My client had no way of knowing the wiring instructions



we emailed her were hijacked, edited and faked. She dutifully followed the faked instructions and almost lost \$174,000.

Someone knew of her upcoming settlement, created a domain one letter different from ours, grabbed our actual instructions from the ether, substituted fake instructions with a fake phone number and emailed them to our client. That takes a lot of work but, more importantly, someone had invaded our system.

While this client had the unlikely fortune to recover 100% of her funds, that same day, our title officer received a request from another client for wiring instructions. Mike sent them to a spoofed email address (again, just one or two changed digits). The crook sent his own wiring instructions to the client. The crook also emailed me a very convincing note to say the client had to go to the institution to initiate the

If you do not have cyber insurance, get it TODAY. NOW! Stop reading this article and get to your insurance agent.

wire, so be patient for a day or two.

When I emailed the next day asking where the funds were, the client called to say he got MY thank you for the funds the prior day.

Uh oh!

Same attacker, only this time the money went to SunTrust (with whom we do no business) and out again to some foreign account.

Our outsourced IT people found a "rule" had been inserted in our title agent's Outlook email. I believe all email clients can do this. If, for instance, you'd like all RPPT mail to go into its own folder so you can read it tonight, you can create a simple rule for that. If all email from your best client needs to be shared with your paralegal automatically, you can keep those emails in your folder and also share with your staff. (Yes, I do have an

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It Can't Happen to Me

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RPPT folder, another for email from another Listserv, etc.)

Well, our criminal somehow got into our title agent's Outlook account and installed a rule to intercept and secretly read every single inbound email. After literally thousands of emails arrived, one said "wiring instructions" and that started the attack.

Fortunately, I had purchased cyber insurance. If you do not have any, get it TODAY. NOW! Stop reading this article and get to your insurance agent.

We will happily pay the deductible on this second theft of funds. The insurer also provided us legal coverage to investigate whether we had a loss of private information which would trigger having to notify our clients (how embarrassing would that be!?) and provide them with credit monitoring. The insurance also bought us a forensic investigation of our entire computer network and a review of the work of our outside IT company. It has cost me and my staff dozens of hours. We were handed a list of over 18,000 emails and over 6,000 email addresses we had to identify and review. The forensics company has had to scan all of these and look for key words like "credit card" or "SSN."

How did the crook get into our system? Our best guess is someone opened an attachment that looked very legitimate. But we cannot pinpoint the time of entry. Apparently, Microsoft Outlook and Office 365 has the ability to track all sorts of things, but most of the logs default to not being turned on.

YOU NEED TO TURN ON ALL LOGS.



At our August retreat in State College, cybersecurity for both real property and probate/estates will be a major CLE topic. For the financial safety of your family, your assets and your business, you need to be there.

How do you protect yourself from the same error we apparently made? It is almost impossible to know and fend off every kind of attack. The crooks are very good at what they do, and the stakes are extraordinarily high.

You can encrypt your communications, but I've found most clients won't take the steps to open them.

You can revert to faxes, if your client has a fax machine that still works.

You can resort to telephones, but phone numbers can be spoofed just like email.

Two-factor security – using both email and phone or some other combination – is much better than relying on email alone.

At our August retreat in State College, cybersecurity for both real property and probate/estates will be a major CLE topic. For the financial safety of your family, your assets and your business, you need to be there.

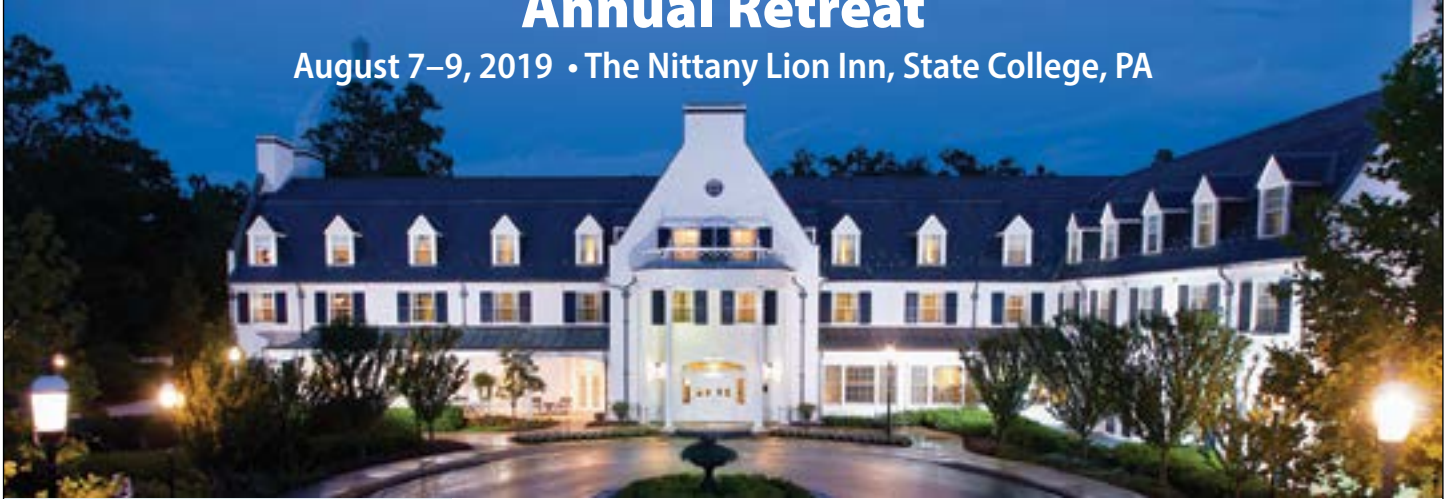
There is just no way it could have happened to me and my little business. But it did.

You could be next.

RPPT Section Chair Marshal Granor is the managing member of Granor & Granor PC in Horsham. He is a member of the College of Community Association Lawyers and concentrates on condominium and homeowners association law. He formerly served as the vice chair of the section's Real Property Division and executive editor of this newsletter.

Real Property, Probate & Trust Law Section Annual Retreat

August 7–9, 2019 • The Nittany Lion Inn, State College, PA



The retreat offers:

- Up to 9 hours of CLE credits, including 2 ethics credits
- A wine-pairing dinner on Wednesday
- Free time Thursday afternoon to enjoy a “Death vs. Dirt” Escape Room Challenge, golfing, shopping or visiting local wineries and distilleries
- Thursday dinner at Spats on the Grill and after-dinner “Dutch treat” activities
- Opportunities to meet the best “death” and “dirt” lawyers in Pa.!

To get the brochure and register online, go to the calendar at www.pabar.org

Register by July 12 to take advantage of the \$75 early registration discount!

PBA YLD members receive discounted registration fees, in addition to the \$75 early registration discount!

CLE Programs:

Wednesday, Aug. 7

- Privacy and Cybersecurity Essentials for Attorneys
CLE credits: 1.0 ethics, 1.0 substantive
- Why Lawyer Wellness and Happiness Are Important to Your Practice
CLE credits: 1.0 ethics

Thursday, Aug. 8

- Annual Update on Probate Law
CLE credits: 1.0 substantive
- Annual Update on Real Estate Law
CLE credit: 1.0 substantive
- Servicing Emotional Fairness in Housing and Other Accommodations – All’s FAIR in Love and Housing
CLE credit: 1.0 substantive
- Electronic Wills: Ready or Not, Here They Come ...
CLE credit: 1.0 substantive
- Forensic Genealogy for Death & Dirt Lawyers
CLE credit: 1.0 substantive

Friday, Aug. 9

- View from the Bench
CLE credit: 1.0 substantive
- Landlord-Tenant Litigation: Does Your Client Have an Enforceable Right? [Plus Landlord-Tenant Law Update]
CLE credit: 1.0 substantive
- Hit the Road Jack: Removing and Replacing Personal Representatives and Trustees
CLE credit: 1.0 substantive
- What You (May) Need to Know about Banking Laws
CLE credit: 1.0 substantive

 **#PBArpts19**



RPPT Section Presents Inaugural Trailblazer Award to Alexandra Sipe

By Alison T. Smith, Esq.

On May 17, 2019, the RPPT Section awarded its inaugural Trailblazer Award to Franklin County estates and trusts attorney Alexandra Sipe. The award recognizes a young lawyer who has demonstrated excellence in the practice of law and the highest ethical standards; professionalism through participation in the bar association or similar professional activities; and a commitment to pro bono legal services. In her nomination, friend and law school classmate Shandra Kisailus said Alexandra Sipe “has a unique skill set that combines the highest ethical and legal knowledge with the ability to deliver personal service to clients with various legal issues.” As evidenced by her accomplishments described in more detail below, Alexandra Sipe clearly demonstrates the excellence, professionalism and service components of the Trailblazer Award.

A native of Lancaster, Pa., Alexandra Sipe is a 2013 graduate of Penn State Dickinson School of Law, and she has been blazing trails ever since. Barely one year out of law school, she founded the Maxwell Sipe Law Offices LLC in Waynesboro with her mentor and former employer, Leroy F. “Tucker” Maxwell Jr. She began working as a law clerk for Tucker Maxwell in 2012 and then joined his firm as an associate upon graduation from law school. Approximately one year later, on July 1, 2014, she became a full partner, and Maxwell Sipe Law Offices was launched. Tucker Maxwell later retired, and Attorney Sipe operated the firm as a solo practitioner for a couple years. She subsequently connected with another of Tucker’s former law clerks, Samantha Wolfe, who was looking for



RPPT Inaugural Trailblazer Award recipient Alexandra Sipe (center) with Alison T. Smith, vice chair of the Probate & Trust Division, and Marshal Granor, RPPT Section chair.

an opportunity to return to her hometown to practice law. Initially hired as an associate, Samantha is now a partner in the firm.

Alexandra knew from a fairly young age that she wanted to be a lawyer. As the daughter of a doctor (Mom) and a lawyer (Dad), she initially considered both a career in medicine and a career in law. She ultimately chose law, and it’s been full steam ahead since. Going into law school, she knew that she wanted to practice law in the area of probate and trusts. “I like solving puzzles, and I like helping people. With estate planning, it’s the unique cross of working with numbers and working with people at the same time. You get the clearly analytical side and also the personal touch interacting with people on a daily basis.” In serving her clients, Alexandra relishes the opportunity to collaborate with practitioners in other practice areas. She points out that unlike other practice areas that have a

narrow scope, “estate planning is often influenced by family law, business law and real estate law,” and she has “great colleagues” that she can refer to. “I really like seeing the whole picture. It’s a holistic approach,” she explains.

Starting a law firm at such a young age would be daunting to many lawyers, even the most seasoned ones. For Alexandra, it was part of the plan. “I’ve always been an entrepreneurial spirit. It was a tough law market. A lot of classmates took jobs where they may have had more security, but I got a lot more enjoyment. I got experience, knowledge at a much younger age and got to learn how to run a business. That is invaluable. There is risk in every choice you make, and you have to decide whether the risk is worth the reward. I knew that this choice would make me more fulfilled.” Alexandra credits her mentors, including Tucker Maxwell, for contributing to her suc-

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Trailblazer Award

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cess. Her father, Nicholas Bybel, has also been a mentor. As a founder of Bybel Rutledge LLP, he has been able to provide guidance in the practice of law generally and in running a law firm. Vicki Trimmer, a law school professor and probate and trusts practitioner, is another mentor and actually was the connection to Tucker Maxwell that provided the opportunity that led to Alexandra starting her own firm. "She is so willing to help anyone who asks," says Alexandra.

Alexandra attributes her involvement in the PBA to former PBA president Forrest Myers. Forrest was the PBA president the year she was admitted to the bar. He is from Franklin County and attended the Franklin County Bar Association swearing-in ceremony for new lawyers. Forrest promoted the benefits of section involvement and the Listservs, which made an impression on her. As a result, Alexandra joined the RPPT Section first, primarily due to the Listservs, and subsequently joined the Elder Law and Solo and Small Firm sections. She also enjoys attending the various retreats sponsored by the PBA. She considers them a great opportunity to network with other lawyers and exchange ideas in a laid-back, casual environment that is conducive to learning and expanding knowledge. "Sometimes you forget that it's fun to talk to other lawyers," she says, adding that "once you get your foot in the door a little bit with the PBA, you realize how great it is and that leads to more doors."

When it comes to providing pro bono services, Alexandra's philosophy is simple: "It's very important that we,

as a profession, help. The more you give, the more you get. You'll end up making more revenue by giving back more. I truly believe that." Alexandra currently serves as the Franklin County director of the Wills for Heroes pro bono program. She first participated in the program during law school. "Given my interest in estate and trust law, I knew then that I wanted to get involved when I became a lawyer." After attending a few of the Wills for Heroes program events, Alexandra learned that the county director was stepping down and that Franklin County wanted a YLD attorney to be the next director. She agreed to assume the role and hasn't looked back. She coordinated her first event in Fall 2017, and her goal is

"Sometimes you forget that it's fun to talk to other lawyers Once you get your foot in the door a little bit with the PBA, you realize how great it is and that leads to more doors."

to coordinate two events each year in Franklin County. "Owning my own firm has allowed me the flexibility to take on the responsibility at an earlier age." Maxwell Sipe also has a firm policy to provide basic estate planning documents for free to first responders who reside in Franklin

County, so they don't have to travel to a Wills for Heroes event to get their estate planning documents prepared.

Having accomplished so much, what's next to conquer? Alexandra hopes to expand her firm's presence. "Begin with the end in mind," she says, citing a quote from Stephen Covey. "When I started practicing, my goal was to have an estate planning practice that spanned the I-95 corridor from Pennsylvania to South Carolina. While the laws may be different, the tools and the issues are frequently similar." To achieve that goal, Alexandra and her partner intend to start the process to become admitted to practice law in the states that touch the I-95 corridor, including Maryland, Virginia, North

Carolina and South Carolina. Alexandra plans to sit for the bar in South Carolina, and Samantha is looking to take the bar in Maryland.

When she's not practicing law and running her firm, or participating in PBA meetings or Wills for Heroes Events, Alexandra spends time with her family. She is married to her high school sweetheart, Daniel. She is the mother of two boys. Maximilian (who arrived two days after law school graduation) is six, and Henry is three. A third child, Charles, is anticipated to arrive in July 2019. She also likes to play tennis. She played in college and coached Dickinson College women's team from 2012-2016; she jointly coached the men's team in 2016. With so much on her plate, Alexandra says that she doesn't struggle with maintaining a work-life balance. "Tucker was very good at mentoring work-life balance. He always reminded me of my priorities, which for me are God, family and then work. That helped me embrace living the work-life balance. If you keep your priorities in check, it's easy to balance things. My husband is very supportive and assists with that work-life balance." Alexandra attributes good communication skills to her ability to manage a demanding and successful career with a busy home life. "Communication is key for everything – whether it's other attorneys, opposing counsel, co-counsel, the court, staff or your family. Having effective communication in all of your relationships – things function smoother."

The RPPT Section congratulates Alexandra Sipe as the inaugural recipient of the Trailblazer Award.

Alison T. Smith is senior counsel at PNC Bank NA. She provides internal legal support to trust accounts administered in the Pittsburgh wealth management market and to charitable trusts administered throughout the PNC footprint.

PROBATE & TRUST DIVISION

Probate & Trust Division Report

By Alison T. Smith, Esq., Vice Chair, Probate & Trust Division



As my first term as vice chair of the Probate and Trust Division of the Real Property, Probate and Trust Law Section comes to an end and the second term begins, I have had an opportunity to reflect upon the section's accomplishments over the last year. During the last year, the section developed the Trailblazer Award to recognize a young lawyer practicing in the area of real property or probate and trust law, provided input to other sections and committees regarding legislative initiatives in which this section and its members have an interest, and submitted its own report and recommendation to the Board of Governors and House of Delegates regarding the uniform interpretation of certain realty transfer tax exemptions available for transfers to trusts, just to name a few.

The Trailblazer Award was the outgrowth of collaborative efforts between the section and the Young Lawyers Division (YLD) to engage younger lawyers who practice in the area of real property or probate and trust law. The award was approved by the Board of Governors in November, and the section began soliciting nominations in late January or early February. There was a good response, and the selection committee received several outstanding nominations. I was honored to present the inaugural Trailblazer Award to Franklin County estates and trusts practitioner Alexandra Sipe during the PBA Annual Awards Breakfast in May. I then had an opportunity to interview Alexandra. If you would like to learn more about her career, motivations and accomplishments, check out the feature article that appears on page 6 of this newsletter. Next year, the Trailblazer Award will be given to a young lawyer



Alison T. Smith

practicing in the area of real property law, as the award will alternate between the section's two divisions from year to year. It's never too early to start thinking about nominations, so get started on your nomination list now! The collaboration between the section and YLD also resulted in the appointment of YLD liaisons to our section. The initial liaisons, Justin Brown and Heather Harmon Kennedy, were recently elected to the section Council, which is indicative of the contributions they made to the section during the last year and how engaged they were in those roles.

During the course of any given year, the section is asked to provide input for other sections' reports and recommendations, to the extent they touch upon the section's practice areas. From time to time, the section will make a decision to formally support another section's report and recommendation. In April, the section decided to formally support a report and recommendation of the Elder Law Committee supporting HB 706, which seeks to make available for Pennsylvania state income tax purposes the federal tax election that permits a trustee of a qualified re-

vocable trust to treat the trust as part of the settlor's estate for income tax purposes. Having the support of multiple sections is a strong factor that favors a formal PBA position on a particular issue. Providing such support to another section is another great example of collaboration within the PBA.

Of course, the RPPT Section has its own legislative priorities. A recent example is the section's report and recommendation on the status of realty transfer tax exemptions available for transfers to trusts. The report recommends such regulatory or legislative action as may be necessary to ensure consistent application of trust transfer tax exemptions across the commonwealth. This report was the direct result of PBA members seeking the assistance of section leadership to address the issue. Those members recounted several instances of Department of Revenue interpretation of certain provisions in a revocable living trust in a manner that disqualified the trust from the exemption available to "living trusts." This interpretation has created significant tax consequences to taxpayers who transfer their residence to a revocable trust. The section's report and recommendation regarding realty transfer tax exemptions was adopted as an official PBA position in May.

As much as the section has accomplished over the last year, there is still more to do, particularly in the area of diversity and inclusion. To that end, the section is proactively exploring opportunities to collaborate with the Minority Bar Committee and foster a more diverse section membership.

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Probate & Trust Division Report

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While attending the PBA Annual Meeting in Lancaster in May, I was able to brainstorm ideas with Minority Bar Committee Chair Tyesha Miley. Look for more information about the section's diversity and inclusion efforts as it begins to implement them.

Cybersecurity is another area that will continue to impact the members of the section. As data privacy becomes an area of primary concern and cybersecurity becomes an ever increasing threat, practitioners will need to have policies and procedures in place both to prevent a breach and outline a plan for responding to a breach. Given the amount and nature of financial information that practitioners receive from their clients, particularly in the probate and trust area, cybersecurity

should be a primary concern for all attorneys. Failure to properly plan for and respond to a cybersecurity attack may have malpractice implications. In recognition of the importance of cybersecurity concerns, the section will be conducting a CLE course on the topic at the section's annual retreat in State College, Aug. 7-9. The section retreat offers numerous opportunities to engage with your fellow section members and get to know section leadership. Take advantage of these opportunities by planning to attend.

These section accomplishments are the result of many hours of hard work, which in some cases occur over the course of several months. Building on those accomplishments will require more hard work and the participation of more people. Participation can take various forms, including reviewing a specific issue or piece of draft legislation, writing an article for the section

newsletter or participating in a section committee. Consider how you can become engaged in the section activities and participate in its accomplishments. If you have ideas about how the section can better serve its members or contribute to the profession, please share your ideas with section leadership. With the help of its members, the section can continue the past year's accomplishments and develop new avenues and opportunities to engage with its members, for the betterment of our profession and the communities we serve.

Alison T. Smith is senior counsel at PNC Bank NA. She provides internal legal support to trust accounts administered in the Pittsburgh wealth management market and to charitable trusts administered throughout the PNC footprint.

PROBATE & TRUST DIVISION

Timely Payment of Inheritance Tax

By Daniel Evans, Esq.

The 5% discount for inheritance tax paid within three months of death (§ 2142 of the Inheritance and Estate Tax Act, 72 P.S. § 9142) is often a significant benefit, and care should be taken to make sure that the payment is timely. So exactly when (and how) must the payment be made?

Timely Mailed is Timely Filed

Typically, prepayment of inheritance tax is made by mail to the register of wills as agent for the Department of Revenue, with a cover letter providing the name of the decedent, the date of death and Social Security number of the decedent, and the register's file number (if one has been assigned). It



is customary for the cover letter to state that the payment is intended to qualify for the 5% discount, but the statement should

not be necessary because the discount is automatic.

Pennsylvania has a "timely mailed is timely filed" rule for inheritance tax purposes at § 2166 of the Inheritance and Estate Tax Act, 72 P.S. § 9166. So, a letter transmitting a payment that is received by the department and is postmarked by the U.S. Postal Service on or before the due date shall be deemed to be in compliance with the due date.



Daniel B. Evans

"For the purposes of this article [of the Tax Reform Code of 1971], presentation of a receipt indicating that the report or payment was mailed by registered or certified mail on or before the due date shall be evidence of timely filing and payment." Notice that a return receipt is not needed, just the

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Timely Payment of Inheritance Tax

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receipt for the deposit of the certified mail (USPS Form 3800).

Computing the Three-Month Period

As stated above, the inheritance tax discount applies to tax that is paid within three months of the decedent's death. Section 1910 of the Statutory Construction Act, 1 Pa.C.S. § 1910, says that when a statute measures a period of time in months after or before a certain day, the period is measured counting the months from the month of the certain day to the same day of

the future (or past) month, and the period includes that day. So three months from Oct. 6 is Jan. 6, and a payment of inheritance

tax on or before Jan. 6 qualifies for the discount for a decedent dying on Oct. 6.

That much is unsurprising, but what may be surprising is what happens if there is no corresponding day of the month in the future (or past) month. If there are not enough days in the month, then the period ends with the last day of the month. So if the date of death is Nov. 30, the due date is Feb. 28 (or Feb. 29 in a leap year) because there is no Feb. 30.

[There is a similar federal rule, but it is an interpretation of the statute by the Internal Revenue Service rather than a statutory rule. See Treas. Reg. §

20.6075-1 (due date for federal estate tax return); Rev. Rul. 74-260, 1974-1 CB 275 (alternative valuation date).]

Saturdays, Sundays, and Holidays

But when is the final day for payment when the three-month period ends on a weekend or holiday?

The general rule for measuring periods in days (not months) is that, when the last day of a time limit falls on a Saturday, Sunday or legal holiday, “such day shall be omitted from the computation.” 1 Pa. C.S. § 1908. But the rules of § 1908 apply “except as otherwise provided in ... section 1910 of this title (relating to computation of months),” which is what would apply to the three-month discount period.

Unfortunately, § 1910 doesn't say what to do when the period that is measured in months ends on a weekend or holiday. Following the procedure of § 1908 (that the day “shall be omitted from the calculation”) is not helpful in the context of § 1910 because that would seem to push the date to an earlier day of the month instead of a later day, especially if the due date is the last day of the month.

This issue was addressed in an opinion of the Office of Chief Counsel, published as “Calculation of Inheritance Tax Discount Period,” 28 Fid. Rep.2d 249. The opinion discusses these same statutes and reaches a similar conclusion, which is that “Section 1910 of the Statutory Construction Act does not contain a provision that allows for the extension of time to the next business day, similar to the provi-



sion contained in Section 1908 of the Statutory Construction Act.”

But the opinion then goes on:

“However, in light of the Department's prior position on this matter, as well as the Commonwealth's obligation to construe tax laws in a light most favorable to the taxpayer, it is the Inheritance Tax Division's position that a payment qualifies for the discount provided the payment is received or postmarked on the first business day occurring immediately after the conclusion of the applicable three month period and provided that the Register of Wills office was not open to receive payments on the preceding day.”

So for a decedent dying June 30, 2018, the discount period should end on Sept. 30, 2018, which is a Sunday, but the payment can be made (or mailed) on Oct. 1, 2018. And this is really by the grace of the Department of Revenue and not because of any clear statutory authority.

(The federal rule is simpler and clearer, because section 7503 of the Internal Revenue Code says that whenever the last day for performing “any act” falls on a Saturday, Sunday, or legal holiday, “the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday.” That language clearly provides that a payment that is due on Sunday would be timely if made on Monday, regardless of how the due date was determined.)

Daniel B. Evans, of Evans Law Office, has over 35 years of experience in estate planning, estate administration, trust administration, small business planning and charitable planning.

PROBATE & TRUST DIVISION

Donate Life PA Act: Organ Donation and Beyond

By Lisa A. Shearman, Esq

In October 2018, the Donate Life PA Act was signed into law by Gov. Wolf. Act 90 of 2018 amends Section 5471 and portions of Chapter 86 of Title 20, the Probate, Estates and Fiduciaries Code (PEF Code) to expand the scope of organ and tissue donation and anatomical gifts.

The Donate Life PA Act permits an individual to grant his or her agent the authority to donate body parts and extremities beyond those traditionally donated, such as organs, eyes and tissues. These other body parts include hands, limbs, facial tissue and vascularized composite allografts (VCA). VCA are defined to include: a human hand, facial tissue, limbs and other parts of the body that require blood flow by surgical connection of blood vessels to function after transplantation and which contain multiple tissue types, recovered from a human donor as an anatomical or structural unit, minimally manipulated, for homologous use, not combined with another article such as a device, susceptible to ischemia and susceptible to allograft rejection.

The new act distinguishes between anatomical gifts and VCA for purposes of consent. Authorization to make an anatomical gift can be given via driver's license, power of attorney, other written documentation or can be authorized by a close family member or relative who has the power to give such consent.

In fact, 8613(e) of the PEF Code provides that once an individual indicates his or her agreement to be an organ donor on his driver's license, ID card, advance health care directive, will or other document of gift, a family member or an agent cannot override an

individual's direction. The only exception is in the case of an advance health care directive if the agent is given explicit power to override the principal's directions.

Donation of VCA, on the other hand, can only be authorized by a specific direction in written form (such as a will, advance health care directive or other written form of gift). In the absence of such written direction, a surrogate decision-maker may, under certain circumstances, consent to a gift of VCA. The organ donor designation on a driver's license or ID card is not sufficient to authorize the gift of VCA.



The new act provides for the creation of the Donate Life PA Registry to maintain the names of those individuals who have designated their desire to be an organ donor on their driver's license or on an ID card issued to them. This does not include VCA donations. This database will be accessible by organ procurement agencies to determine if a deceased individual, or one whose death is imminent, has consented to organ donation.

New Section 8654 of the PEF Code requires a specific, explicit and separate authorization for the donation of



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hands, limbs, facial tissue and other VCA. The authorization may be made in a will, living will, health care power of attorney, power of attorney or other written document that is witnessed by two other individuals and which explicitly and specifically states that the individual authorizes the recovery of the individual's hands, facial tissue, limbs or other vascularized composite allografts. The authorization must be provided separately from an anatomical donation direction.

Without a written authorization, the act does permit a surrogate decision maker to authorize the donation of hands, limbs, facial tissue and VCA, provided there is no written designation directing otherwise or knowledge of a contrary intention made while the individual was competent. A surrogate decision-maker, in order of priority, includes:

- (1) An agent of the decedent at the time of death if the agent is expressly authorized to make the gift
- (2) The spouse of the decedent, unless an action for divorce is pending
- (3) An adult child of the decedent

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Donate Life PA Act

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- (4) A parent of the decedent
- (5) An adult sibling of the decedent
- (6) An adult grandchild of the decedent
- (7) A grandparent of the decedent
- (8) Any other person related to the decedent by blood, marriage or adoption.

In the case of a minor, a parent or legal guardian can authorize the donation of hands, limbs, facial tissue and other VCA, provided they do not have any notice of opposition by the other parent or by the minor themselves.

Due to the potential disfigurement that can occur with the donation of hands, limbs, facial tissue and VCA, the new act provides for reconstructive surgery for the deceased individual for burial purposes. However, the person who is agreeing to the donation of VCA needs to be aware of the possibility that they may be unable to have an open casket and that the donation may delay funeral arrangements. This is particularly important for those individuals who are of certain religious traditions that require burial within a certain time frame after death.

The act amends Section 5471 to add sample forms and provisions to living will and health care power of attorney forms. The proposed language is extensive and would add a few pages to standard documents. The direction of gift for VCA could be contained in a separate document that stands alone, amends or appends current documents. It is important to note that if a client is adamantly against donation of his hands, limbs, facial tissue or VCA, that opposition should be stated in a written form. In the absence of such written opposition, a surrogate decision-maker could consent to a gift of organs and/or VCA.



The act directs that there be pamphlets printed providing more information about VCA donation and information on the Department of Transportation website regarding this expanded gift opportunity. I am hopeful that these resources will be available shortly to enable clients to learn more about organ donation and make informed decisions.

The act does identify certain circumstances when organ donation, including VCA donation, cannot be fulfilled, particularly when the death is suspicious and there is a criminal investigation.

The act also carefully identifies procedures to be carried out in the procurement of organs and VCA, eligible donees to receive the organs and VCA, and other limitations.

A few takeaways to keep in mind about organ donation and expanded VCA donation:

- Designation on a driver's license serves as consent to donate an individual's organs (heart, lung, liver, kidney) and tissues *but not hands, limbs, facial tissue and vascularized composite allografts* and cannot be revoked by anyone other than the individual who initially gave consent.
- Consent in a written document to organ donation does not include the extended VCA donation.

- Donation of hands, limbs, facial tissue and VCA requires a separate written authorization/direction.
- A client who does not wish to consent to traditional organ and tissue donation or to VCA should specifically state that in a written form to notify his or her agent and family of his or her wishes.
- A client who may be interested in VCA should be made aware of the potential delay in funeral arrangements and the possibility of not being able to have an open casket.
- The discussion of organ donation and VCA donation, while sensitive, needs to be had during an individual's lifetime, so that family and legal decision-makers have knowledge of a person's wishes.
- Attorneys should encourage their clients to thoroughly discuss their wishes and directions with their family and with the individuals they designate as their agents.

More information about organ donation can be found at the following website: <https://www.donatelifepa.org/>

Lisa A. Shearman is a partner at Semanoff Ormsby Greenberg & Torcia LLC. Her practice focuses primarily on trust and estate planning, estate administration, and estate and gift taxation. She is admitted before both the Pennsylvania and New Jersey bars and is a member of the Pennsylvania Bar Association (PBA). Lisa is treasurer of the PBA Real Property, Probate and Trust Section and is a member of the Commission on Women in the Profession. She is a member of the Montgomery Bar Association, an officer of the MBA Probate Section and co-chairs the MBA Women in Law Committee. She is a frequent lecturer on estate planning and administration-related topics and has authored several articles in this area.

Pending Estate and Trust Legislation

By Daniel B. Evans, Esq.

The following are brief descriptions of bills pending in the Pennsylvania Legislature that might be of interest to section members and may have some chance of passage. Some bills are being followed or tracked by the legislative staff of the PBA. (For a more complete list of pending estate and trust legislation, and links to the texts and histories of bills, see <http://resources.evans-legal.com/?p=2738>.)

- **HB 262** would set an inheritance tax rate of 0% for transfers to children under 21. Has passed the House and is currently in the Finance Committee of the Senate. (See S.B. 342.)
- **HB 706** would allow revocable trusts to be treated as part of estate for Pennsylvania income tax purposes. Has passed the House and is currently in the Finance Committee of the Senate. (Tracked by PBA)
- **HB 987** would implement “Pennsylvania orders for life-sustaining treatment” (POLST). Currently in Health Committee of House. (Tracked by PBA; see S.B. 142.)
- **HB 1222** would consolidate the Solicitation of Funds for Charitable Purposes Act and the Institutions of Purely Public Charity Act into Title 20 Pa.C.S. Currently in Finance Committee of House.
- **SB 28** would phase-out the 4.5% inheritance tax for descendants. Reported by the Finance Committee and has received its first consideration by the Senate.
- **SB 142** would implement “Pennsylvania orders for life-sustaining treatment” (POLST). Currently in



- Health and Human Services Committee of Senate. (Tracked by PBA; see **HB 987**.)
- **SB 187** would create a statewide registry of living wills. Currently in Judiciary Committee of Senate.
 - **SB 320** would enact the Revised Uniform Fiduciary Access to Digital Assets Act. Currently in Judiciary Committee of Senate. (Tracked by PBA.)
 - **SB 342** would set an inheritance tax rate of 0% for transfers to children under 21. Currently in Finance Committee of Senate. (Tracked by PBA; see H.B. 262.)
- The following bills have not yet been formally introduced, but legislators have circulated memos seeking co-sponsorships:
- **SCO 253** would enact comprehensive reforms of guardianship procedures. (Will be tracked by PBA.)

- **SCO 388** would adopt the 2018 recommendations of the Advisory Committee on Decedents’ Estates Law of the Joint State Government Commission, which proposed changes to powers of attorney relating to possible abuse and judicial relief for interested persons, creditors’ rights in powers of appointment, the possible division of powers among personal representatives and trustees, and the power of guardians to settle or compromise claims. (Will be tracked by PBA.)

The above bills are pending and the status is current as of May 10, 2019.

Daniel B. Evans, of Evans Law Office, has over 35 years of experience in estate planning, estate administration, trust administration, small business planning and charitable planning.

Real Property Division Report

By Erik M. Hume, Esq., Vice Chair, Real Property Division



As I write this, I am a mere two weeks into my new role as vice chair of the Real Property Division. Being selected by your peers for a leadership role is exciting, and I look forward to the challenge.

Early on in my career, I did not appreciate the benefits of involvement in professional organizations. In those years, having been blessed with great mentors at the office, I did not feel the need to devote time to being active in a section or the bar association in general. We get plenty of professional development from our mandatory annual 12 hours of CLE, right? Spending time I did not have educating or socializing with my competitors did not seem like a worthwhile pursuit.

Fast forward a few years, and my attitude started to change. While I was more “seasoned” (a term my marketing department loves but makes me feel like a steak) and becoming more confident in my abilities, I also felt it was time to try new things for my professional development. I decided that if I was going to spend the next 20, 30 or maybe even 40 years in this profession, I want to get the most out of it.

I spent a lot of time studying how our profession is changing and where it is headed. I read about and learned how some of the happiest and most successful attorneys were maintaining and developing their practices. And, while there is no magic formula for career happiness, one thing was clear: many of these lawyers are active in



Erik M. Hume

their bars, their sections and their communities. As Seth Godin would put it, they invest in their “tribe.”

I have found being active in our professional organizations one of the most rewarding and enjoyable aspects of practicing law. During my term as vice chair, it is my hope and goal to increase the level of involvement of

our real property members. There are so many ways to become involved – post on the Listserv, attend our annual retreat, present a CLE, serve on a committee, submit an article for our newsletter or serve in a leadership position. Volunteer to be a mentor to a new attorney or recruit someone to join the section. I think you will find the time well spent and fulfilling.

Pennsylvania Supreme Court Looks at Real Property Issues

Since the start of the year, the Pennsylvania Supreme Court has issued several high-profile decisions affecting the dirt lawyer:

- ***Slice of Life LLC v. Hamilton Township Zoning Hearing Board***, 2019 Pa. Lexis 2363, 2019 WL 1870562 (Pa. 2019). The Pennsylvania Supreme Court addresses short term rentals for the first time and elects to abandon the precedent set by the Commonwealth Court in ***Marchenko v. Zoning Hearing Board of Pocono Township***, 147 A.3d 947 (Pa. Cmwlth. 2016) and its progeny, holding that the transient nature of short terms rentals

is incompatible with single-family residential uses.

- ***MERSCORP Inc. v. Delaware County***, 2019 Pa. LEXIS 2365 (Pa. 2019). A divided court holds that 21 P.S. §351 does not mandate the mandatory recording of mortgage assignments.
- ***JP Morgan Chase Bank NA v. Taggart***, 203 A.3d 187 (Pa. 2019). The court determines that a mortgagee must provide a new pre-suit foreclosure notice for a second foreclosure suit after the first suit was dismissed.

As this issue goes to press, the court just issued opinions in ***Schock v. City of Lebanon*** (addressing the Neighborhood Improvement District Act) and ***EQT Prod. Co. v. Borough of Jefferson Hills*** (addressing the admissibility of testimony in a conditional use hearing from individuals in other municipalities regarding the impacts of a similar use). So far, the Pennsylvania Supreme Court has had an active year for the real property practitioner.

Legislature Continues to Address Dirt Law

Last year’s legislative session ended with a flurry of activity, including Act 84 (which I wrote about in the last issue) and Act 118 (addressed by Steve Williams elsewhere in this issue). While the new session is off to a slower start, there is legislation pending to amend the Landlord and Tenant Act of 1951, the Uniform Condominium and Planned Community Acts, Title 57 (Notaries Public), the General Road Law and Title 48 (Lodging and Hotels), as well as other matters. It is an important charge of our section that we

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Real Property Division Report

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monitor, and when appropriate, comment on pending legislation that affects our practice areas. If you become aware of a bill that our section should be looking at, please let us know.

I hope that in the coming year I

have the opportunity to meet and work with many of you. Please reach out to me with any comments or suggestions at eh@saxtonstump.com.

Erik M. Hume is a shareholder at Saxton & Stump in Harrisburg and is chair of the firm's Real Estate Group. He handles a variety of matters, including commercial and residential real estate transactions,

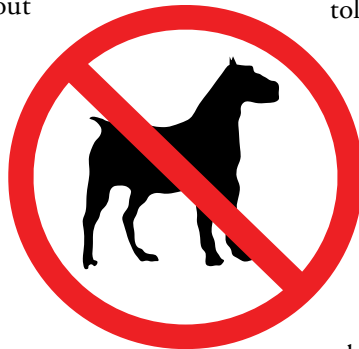
land development, commercial loan origination and counseling of clients on complex condominium and planned community matters. Erik regularly works with builders and developers, financial institutions and lenders, engineers, realtors, buyers and sellers, underwriters, property owners, retailers, property managers, community associations and investors. Erik can be reached at eh@saxtonstump.com

REAL PROPERTY DIVISION

Relief in Sight for Dealing with Fraudulent Requests for Assistance and Service Animals in Pennsylvania

By Steven M. Williams, Esq.

Your community has a no-pet policy. When John was moving in, he inquired about the pet policy and was told that no pets are allowed. Several weeks after John moved in, your community manager saw John walking a dog in the community. When confronted about the no-pet policy, John said that the dog was his girlfriend's,



and he is simply watching it for the weekend. After your manager told John that pets are not allowed to visit, he then claimed that the dog was an emotional support animal (ESA) needed to accommodate his disability. To prove his case, John showed your manager a certificate, which he obtained from an internet website, stating that John's dog



Steven M. Williams



is a certified ESA. Does this scenario sound familiar?

Is John really disabled, and is his dog really an emotional support animal that he needs to accommodate his disability? If yes, then you must allow John's dog to reside in the community with him. But, could it be that John is just trying to get around your no-pet policy?

On Oct. 24, 2018, Gov. Tom Wolf signed into law the Assistance and Service Animal Integrity Act, Act 118 of 2018 (House Bill 2049), which took effect on Dec. 23, 2018. The act is

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Assistance and Service Animals

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designed to assist communities (condominiums, planned developments, and rental communities) in evaluating a resident's claim that he or she requires an assistance or service animal (which by law are not "pets") as an accommodation for a disability. The act recognizes the struggles that communities have faced recently in dealing with fraudulent requests by residents who are not disabled but simply want to avoid having to comply with pet rules.

The act defines an assistance animal as an animal, other than a service animal, that qualifies as a reasonable accommodation under federal, state or local laws, and it expressly includes emotional support animals. Under the act, a service animal is an animal, other than an assistance animal, that qualifies as a service animal under federal, state or local laws. In short, the act covers any service, emotional support,

companion or therapy animal, *whether or not specially trained or certified*, that accommodates a disabled person in a way that allows him or her to enjoy housing to the same extent as a non-disabled person.

Importantly, the act accomplishes four things:

It confirms that communities are entitled to ask for, and receive, written verification of a resident's disability and disability-related need for an assistance or service animal (unless the disability or need is obvious).

It requires that the person verifying the disability or disability-related need for the animal have "direct knowledge of the person's disability and disability-related need for the assistance animal or service animal." This requirement should reduce the number of fraudulent internet verification forms that are currently presented to landlords and associations.

It creates criminal penalties for violations of the act by residents and their verifiers. First, the act provides that a person who misrepresents a disability or need for an assistance or service animal commits a misdemeanor of the third degree, punishable by up to one year in prison and a fine of up to \$2,500. Second, a person who misrepresents an animal as being a service or assistance animal commits a summary offense, punishable by a fine of up to

\$1,000. Finally, a person who fits an animal that is not an assistance animal or service animal with a harness, collar, vest or sign indicating that the animal is an assistance animal or service animal commits a summary offense, punishable by a fine of up to \$1,000.

It provides associations and landlords immunity from liability for injuries caused by a person's assistance animal or service animal that is permitted on the property as a reasonable accommodation for a disabled person.

When residents who do not have a legitimate need for an assistance or service animal fraudulently state that they do, it creates burdens for associations, landlords and disabled residents who do need assistance or service animals. It is hoped that the enactment of Act 118 will limit the number of false requests, allowing associations to focus on legitimate requests by disabled residents.

To prepare for the implementation of Act 118, associations and landlords may want to consider revising their current disability accommodation request forms to include information regarding the act.

Steven M. Williams provides a full range of legal services to help his clients avoid and resolve legal problems and maximize the success of their businesses. He concentrates his practice in the areas of real estate law, landlord and tenant law, condominium and homeowner law, commercial litigation, employment law, construction, and business and corporate law. Steve is a frequent writer and speaker on an array of real estate, business and employment topics.



Real Property Case Law Updates

By Frank Kosir Jr., Esq. and Alison Andronic, Esq.

In *Medlock v. Chilmark Home Inspections LLC*, 2018 Pa. Super. LEXIS 952 (Pa. Super. 2018), the Superior Court addressed the issue of whether a homeowner was required to disclose a material renovation to the residence at the time of sale. The Gitnomers had renovated the basement of their residence in 2004 but failed to disclose the renovation at the time that they sold the home to the Medlocks in 2014.

After the Medlocks moved in, they discovered extensive water damage, mold and rotting wood above the ceiling panels in the finished basement. They then filed suit against the property inspection company, arguing that it should have discovered the defects while conducting the property inspection. The inspector joined the Gitnomers as additional defendants, asserting that they had violated the Pennsylvania Real Estate Seller Disclosure Law (RESDL) by failing to disclose that they had remodeled the basement. The inspector subsequently settled with the Medlocks, who in turn assigned their rights in the litigation to the inspector. The inspector then proceeded against the Gitnomers. At trial, the court entered a verdict for the defendants, concluding that they did not know nor should they have known about the ceiling water damage behind the panels. The trial court also determined that the Gitnomers' failure to disclose the 2004 basement renovation was not "actionable" as a violation under the RESDL and that, even if it was, the parties failed to prove actual damages as a result of the violation.

On appeal, the Superior Court found that that trial court did err in concluding that the Gitnomers' failure to disclose the 2004 renovation did not constitute a violation of the RESDL.

Having concluded the Gitnomers failed to fulfill their affirmative duty of disclosing the 2004 renovation, the Superior Court then turned to their liability for the violation. The Superior Court noted that for the Gitnomers to have liability under the RESDL, the Superior Court noted that (i) the Gitnomers must have been, at the very least, negligent in failing to disclose the renovation, and (ii) the Medlocks must have suffered actual damages as result thereof. Since the Medlocks failed to establish that they had suffered actual damages as a result of this violation, the trial court's decision was affirmed.

In *Rufo v. Board of License & Inspection Review*, 192 A.3d 1113 (Pa. 2018), the Pennsylvania Supreme Court upheld the constitutionality of a "windows and doors" land use ordinance adopted by the city of Philadelphia. Vacant property owners within the city challenged these provisions of the city's property maintenance code (the code) that required owners of vacant buildings that are of "blighting influence" to secure all spaces designed as windows with working glazed windows and all entryways with working doors. Vacant property owners were cited for violating the windows and doors ordinance. They thereafter brought suit against the city, arguing that the ordinance violates the constitutional principles of substantive due process and was an unconstitutional exercise of the city's police power. At a hearing before the city's Board of License and Inspection Review (the board), the city's policy and communications director testified that it had been determined through numerous studies that properties with boarded windows and doors without actual



Frank Kosir Jr.



Alison Andronic

operable windows and doors contributes to blight within the neighborhood. The board rejected the property owners' constitutional arguments and affirmed the city's notice of violation and order. The property owners appealed to the trial court, which reversed, finding there to be no evidence in the record that putting functioning windows and doors on the subject property would make it safer and that the ordinance appeared to be more concerned with aesthetics rather than blight, safety and security. The Commonwealth Court affirmed.

On appeal, the Supreme Court reversed, finding that the lower courts had improperly placed the burden on the city to prove the constitutionality of the ordinance rather than placing the burden on the property owners to establish that the ordinance bore no rational connection to a legitimate governmental purpose. The court noted that the challenger "must demonstrate that the legislative enactment at issue clearly, palpably, and plainly violates the Constitution" to meet its heavy burden of proof. Furthermore, the city established "the basis for its use of its police powers, its rationale for passing the ordinance, and the result it trusted the ordinance would achieve in the fight against blight." As such, the property owners failed to sustain their burden of proving that the ordinance was unconstitutional.

In *McConaghy v. Bank of N.Y.*, 2018 Pa. Super 194 (Pa. Super. 2018), the Pennsylvania Superior Court re-

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cently addressed the liability of a spouse whose estranged husband forged her signature on several residential mortgages and used a portion of the proceeds realized from those mortgages to pay off a prior mortgage entered into prior to the couple's separation. The court held that the spouse was still liable to the lender of the new mortgage for the benefit that she received from the payoff of the prior mortgage. In 2004, Dana McConaghy (McConaghy) and her spouse, Matt McConaghy (decedent), obtained a \$324,250 residential mortgage loan from First Franklin Financial Corporation (FFFC), secured by a mortgage (FFFC mortgage). Both McConaghy and decedent signed the FFFC mortgage. McConaghy and decedent separated soon thereafter, and McConaghy moved out of the home. In August 2006, decedent alone obtained a \$175,000 loan from First Commonwealth Bank (First Commonwealth loan). In October 2006, decedent alone obtained a \$200,000 loan secured by a mortgage on the home from IndyMac Bank (IndyMac mortgage) to pay off the First Commonwealth loan. In November 2006, decedent alone obtained a \$543,000 loan secured by a mortgage and a \$101,600 loan secured by a mortgage from Countrywide Home Loans (Countrywide mortgages) to pay off the FFFC mortgage and IndyMac mortgage. Following these payoffs, the Countrywide mortgages purported to take the place of the FFFC Mortgage and IndyMac mortgage as the first and second liens on the home. The Countrywide mortgages were assigned to BNY. In January 2007, McConaghy learned that decedent had forged McConaghy's signature on the Countrywide mortgages. In April 2008, decedent committed suicide, making

McConaghy the sole owner of the home encumbered by the Countrywide mortgages and recipient of many collection notices.

In November 2012, McConaghy filed a quiet title action asserting that the Countrywide mortgages were unenforceable. BNY sought an equitable lien on the home created by BNY's satisfaction of the FFFC mortgage and reimbursement for paying insurance and real estate taxes for the home since 2006. After a non-jury trial, the trial court ruled for McConaghy and held that the Countrywide mortgages were unenforceable. The court denied BNY's claims for equitable relief because it found that BNY had unclean hands. The Superior Court reversed the trial court and found that BNY was entitled to equitable subrogation and an equitable lien for its satisfaction of the FFFC mortgage. Its finding was based on the fact that a portion of the proceeds from the Countrywide mortgages was used to pay off the FFFC mortgage, which was signed by McConaghy and was binding on her. The court found that when the FFFC mortgage was satisfied, it removed a \$336,000 obligation from McConaghy, and she would be unjustly enriched if allowed to retain the windfall.

In *Barak v. Karolizki*, 2018 Pa. Super. 258 (Pa. Super. 2018), the Superior Court vacated a lower court's order striking a lis pendens. In doing so, it held that an order striking a lis pendens is immediately appealable and that the trial court applied the wrong legal test in reviewing the lis pendens. The Superior Court remanded the case back to the trial court so it could apply the correct lis pendens test. Golan Barak owned a piece of real property in Wilksburg (the real estate), which he agreed to sell to Alon Rimoni. At closing, after Barak signed the deed, he learned that Rimoni did not bring the money to pay for the real estate. The attorney facilitating the closing (the attorney) agreed to hold the signed deed in escrow until Rimoni produced

the funds. Barak filed a lis pendens in the Allegheny County Department of Court Records against the real estate. A few days later, at Rimoni's direction, the attorney attached the signature page to a new deed purporting to transfer title from Barak to Eyal Karolizki and Gal Zeev Schwartz (collectively, Karolizki). The attorney recorded the fraudulent deed in the Allegheny County Department of Real Estate. Barak received no compensation for the transfer and filed a Praecipe for Writ of Summons in Equity – Index as lis pendens and a complaint in quiet title against Karolizki to regain legal title to the real estate. At the hearing on the lis pendens, Karolizki argued that Barak needed to meet the preliminary injunction standard to maintain the lis pendens in the court's records. Ultimately, the trial judge signed an order removing the lis pendens and ordered that any proceeds from a sale of the real estate would be held in escrow pending the end of the quiet title action. Barak appealed the order to the Superior Court. On appeal, the Superior Court held that an order striking a lis pendens is immediately appealable because it qualifies as a final order under Pennsylvania case law. Alternatively, such an order also meets the definition of a collateral order, which Barak may appeal as of right under Pennsylvania Rule of Appellate Procedure 313(a). The court explained that the correct standard for whether a lis pendens notice should be stricken is a two-part lis pendens test. Under this test, the court should first ascertain whether title is at issue in the pending litigation. If the first prong is satisfied, the trial court should then balance the equities to determine whether (1) the application of the doctrine is harsh or arbitrary and (2) the cancellation of the lis pendens is harsh or arbitrary. The Superior Court found that the first prong was satisfied but remanded the case to the trial court to determine whether the lis pendens

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should be maintained as a matter of equity under the second part of the *lis pendens* test.

In ***Johnson v. Phelan Hallinan & Schmieg LLP***, 2019 Pa. Super 11 (Pa. Super. 2019), the Superior Court addressed the definition of “residential mortgage” as defined in the Pennsylvania Loan and Protection Law (Act 6), namely, whether the 2002 or 2009 version of the definition applies. In 2002, the Johnsons executed a mortgage and an associated note in the amount of \$74,000, which mortgage was secured by a property located in Pittsburgh. The mortgage was subsequently assigned to the Bank of New York Mellon Trust Company (Mellon). In 2008, after the Johnsons defaulted on the mortgage, Mellon, through its counsel, Phelan Hallinan & Schmieg LLP (Phelan), filed a complaint in mortgage foreclosure asserting, among other things, that the Johnsons owed \$1,300 in attorney fees. Judgment was entered in favor of Mellon, and the Superior Court affirmed that judgment.

In 2012, while the foreclosure action was pending, the Johnsons initiated a class action against Phelan, asserting that Phelan violated Section 406 of Act 6 by pursuing an award of attorney fees in the mortgage foreclosure action that were not actually incurred. Relying on Section 502 of the act, the Johnsons asserted that they and the other similarly-situated mortgagors were entitled to treble damages for excess attorney fees assessed by Phelan. Phelan demurred, arguing that Section 406 applies solely to “residential mortgage lenders” and not to foreclosure counsel. The trial court sustained Phelan’s preliminary objections, and the Johnsons appealed. The Superior Court affirmed the trial court’s order and determined that a

“residential mortgage debtor” can only maintain a cause of action under Section 406 against a “residential mortgage lender” and not against his foreclosure counsel.

The Pennsylvania Supreme Court reversed the Superior Court’s decision, holding that a borrower may recover from any entity that collects excessive attorney’s fees in connection with a foreclosure under Section 502 of Act 6 – not solely a residential mortgage lender. On remand to the trial court, Phelan again filed preliminary objections, this time asserting that the Johnsons were barred from pursuing relief under Act 6 because the \$74,000 mortgage did not qualify as a “residential mortgage” under Section 101 of the act, as the mortgage exceeded the \$50,000 statutory limit in effect at the time it was executed in 2002. The Johnsons maintained that the court should apply the version of Section 101 in effect in 2009, the time the foreclosure action was commenced, which raised the limit for a “residential mortgage” from \$50,000 to \$217,873. The trial court sustained Phelan’s preliminary objections, finding that the version of Section 101 that applied was the version in effect at the time the mortgage was executed. The Superior Court affirmed on appeal, concluding that the mortgage was not a residential mortgage protected by Act 6 because it failed to meet the 2002 definition of “residential mortgage.”

In ***Porter v. Chevron Appalachia, LLC***, 2019 Pa. Super 31 (Pa. Super. 2019), the Superior Court upheld the trial court’s grant of a preliminary injunction in favor of Chevron Appalachia LLC (Chevron). The Porters own a 76-acre parcel of real property (property) in Lucerne Township, Fayette County, which is subject to an oil and gas lease between the Porters and Atlas America Inc. (Atlas), Chevron’s predecessor-in-interest. Atlas drilled multiple conventional vertical wells on the prop-

erty that produced oil and gas from the property. In 2017, Chevron notified the Porters it intended to use the property for an unconventional well pad site. In response, the Porters filed a complaint asking for a declaration that Chevron could not use the surface of the property for a well pad or access roads and also requested preliminary and permanent injunctions. While those injunctions were pending, Chevron notified the Porters it intended to enter the property for geotechnical testing and staking of the property in order to obtain a DEP permit. When Chevron personnel arrived at the property, the gate to the property was locked, preventing vehicle access. The Chevron personnel left the property after being threatened by the Porters. Chevron then sought injunctive relief to enjoin the Porters from preventing its access to and development of the property. The trial court held a hearing on Chevron’s preliminary injunction motion and granted the requested relief. The Porters appealed, and the Superior Court affirmed, finding that the deprivation of Chevron’s contractual right in land supported a finding of an irreparable harm.

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Probate and Property Case Law Updates

By Daniel Forrest, Esq.

The following offers an in-depth look at new case law and other interesting court decisions on both the “death” and “dirt” sides in Pennsylvania so far this year.

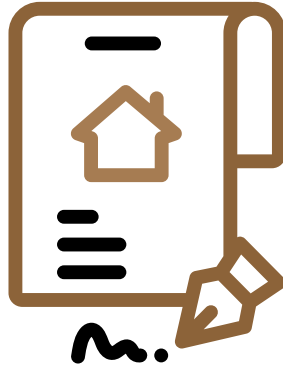
PA Supreme Court

MERSCORP Inc. v. Del. Cnty, 2019 Pa. LEXIS 2365 (Pa. 2019)

The Pennsylvania Supreme Court took on this case to determine whether 21 P.S. §351 (Deeds and Mortgages) creates a mandatory duty for a county recorder of deeds to record all mortgages and mortgage assignments occurring in that county.

Mortgage Electronic Registration Systems (MERS), collectively with its bank members (MERSCORP), is a national database for promissory notes attached to mortgages that are secured by real estate. When property is transferred between members, the system allows for recording to take place within the MERS database. Notice requirements are therefore satisfied within the system, even when transfers are not recorded in the county recording offices. The benefit of this electronic recording is that county fees can be avoided when transfers are processed electronically through this system.

The recorders of deeds in Delaware, Chester, Bucks and Berks counties brought this appeal based on their reading of 21 P.S. §351, which reads in part, “All deeds, conveyances, contracts, and other instruments of writing ... shall be recorded in the office for the recording of deeds in the county where such land, tenements, or hereditaments situate in this Commonwealth ...” The parties were therefore in dispute over whether the act of recording with the county recorder was required.



The Supreme Court sided with MERSCORP in this case. “Contrary to the Recorders’ preferred reading, the words ‘shall be recorded’ in Section 351 must not be read in isolation to require every conveyance (or mortgage or mortgage assignment) be recorded, but rather viewed in context to provide a mortgagee with instructions in the event it intends to safeguard its interest by recording in the county. The process of recording a conveyance, as it has developed in this commonwealth, is essentially a *service* purchasers and mortgage holders have a right to accept or decline.” As such, there is no mandatory duty for a county recorder of deeds to record all transfers occurring in that jurisdiction.

Slice of Life LLC & Kleyman v. Hamilton Twp. Zoning Hearing Bd., 2019 Pa. LEXIS 2363, 2019 WL 1870562 (Pa. 2019)

The court considered here whether the transient use of a house constitutes a “single housekeeping unit” for residential purposes under the 1985 Hamilton Township Zoning Ordinance.

Slice of Life LLC is an investment company that purchased a house in the Poconos in Hamilton Township (Monroe County). The property was income-generating; it was acquired for

the purpose of renting to individuals bringing in large groups (often 15 or more) for short-term stays, usually a few days to a week at a time.

In 2014, after receiving multiple noise complaints from nearby residents, Hamilton Township brought an enforcement action against Slice of Life LLC. The township authorities asserted that Slice of Life LLC was in violation of Zoning District A, which prohibits rentals of single-family residential dwellings to transient tenants.

Zoning District A permits use of “single family detached dwellings, accessory uses and essential services.” The term “dwelling” does not include a hotel, motel, rooming houses or tourist home. A “dwelling” requires one or more family units in residence, and the



term “family” is further defined as requiring the presence of a “single housekeeping unit.” However, the definitions in the ordinance stop there – there is no definition of “single housekeeping unit.”

The appeal in this case was filed to determine whether Slice of Life LLC’s use of the property meets the definition of “single housekeeping unit.” If so, its use is permissible under the Hamilton Township ordinance as a single-family residential use.

After careful review, the court held that the common definition of “single housekeeping unit” requires “the person or persons residing throughout the

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home to function as a family and to be sufficiently stable and permanent ... not purely transient.” It further pointed out that Zoning District A “clearly and unambiguously” excluded purely transient uses by defining family as requiring a “single housekeeping unit.” Given the short stays of the property’s tenants, the transient nature of the tenants was somewhat self-evident. Slice of Life LLC’s use of this property was therefore ruled unlawful under the Hamilton Township ordinance.

J.P. Morgan Chase Bank NA v. Taggart, 203 A.3d 187 (Pa. 2019)

This case concerned whether 41 P.S. § 101-605 (PA Loan Interest and Protection Law) (Act 6) requires a pre-foreclosure notice to be provided to a mortgagor when a second mortgage foreclosure action is filed, the first foreclosure case having been dismissed.

Here, Mr. Taggart borrowed \$120,000 from Chase Bank but later defaulted on the loan. In April 2010, Chase Bank issued him a pre-foreclosure notice. The bank later brought suit in September of that year for foreclosure judgment on the property, but the case was later dismissed after Chase failed to file a timely response to several of Mr. Taggart’s preliminary objections. Ownership of the mortgage was then assigned several times, eventually ending up as the property of Great Ajax, who later sought judgment on the foreclosure in 2015. However, no new pre-foreclosure notice was ever provided by Great Ajax to Mr. Taggart. The issue regarding whether new notice was required was then raised on appeal.

Act 6 requires a lender to provide pre-foreclosure notice at least 30 days before “accelerating the maturity of any residential mortgage obligation,

commencing any legal action including mortgage foreclosure ...” The parties differed here on the meaning of the statutory requirement in the text. Mr. Taggart asserted that the word “any,” as used in this context, requires a new notice to be provided for each foreclosure action. By contrast, Ajax argued that “any” only refers to the type of action for which the pre-foreclosure notice is required and that a prior notice satisfies the requirement.

The court found in favor of Mr. Taggart in this case. It held that “Act 6 requires a new pre-foreclosure notice each time the lender initiates a mortgage foreclosure action. It is not sufficient for the lender to recycle a stale notice that preceded a prior action, regardless of how that action was finally resolved.”

Superior Court

Estate of Powell, 340 EDA 2018, 2019 Pa. Super. 140 (Pa Super. 2019)

The decedent died in 2012, leaving behind a will that bequeathed her estate to multiple beneficiaries. Her will contained a no-contest provision providing that any person who challenged the will would be prohibited from receiving any part of her estate. In January 2013, one of her heirs, Myrna Dukat, challenged the validity of the will, alleging that undue influence and fraud had been perpetrated upon the testator and that the will was therefore null and void.

In June 2015, the Philadelphia County Orphans’ Court held a hearing to evaluate Ms. Dukat’s claims. Her claims were found to be without merit. Her petition to nullify the will was therefore denied, and the estate was probated shortly thereafter.

Co-executors Helen Kessel and Karen Powell then filed a petition to enforce the no-contest provision against Ms. Dukat’s interest. However,



the Orphans’ Court limited its presentation of evidence on that issue to only that which was presented at the hearings on Ms. Dukat’s petition. The court ruled that Kessel and Powell had waived their right to present additional evidence by not presenting it during the previous hearing on Ms. Dukat’s claims. The court also denied Kessel and Powell a new hearing on the no-contest issue. In January 2018, their petition was denied, and so they filed an appeal.

The Superior Court considered whether the Orphans’ Court abused its discretion by limiting the presentation of Kessel and Powell’s evidence on the will contest issue. It also considered whether their procedural due process rights were violated.

The court recognized that “there is no corresponding Orphans’ Court rule delineating when or how the proponent of a will may enforce a forfeiture clause.” The court further held that the forfeiture issue in this case was an entirely separate action from the will contest issue and that it would not be ripe until the status of the will contest became known. Accordingly, Kessel and Powell were not required to present evidence related to the will contest or forfeiture during the hearings on Ms. Dukat’s petition, and their right to present evidence in support of their

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petition was therefore not waived.

The court also found that the failure to conduct a hearing on the forfeiture issue violated Kessel and Powell's right of procedural due process because they stood to potentially lose property, an interest protected by due process, depending upon the outcome of the proceedings.

Maisano v. Avery, Hamlet Visas LLC, 204 A.3d 515 (Pa. Super. 2019)

The facts of this case are heavily grounded in contract law, but this case is nevertheless worthy of review because of its application of the doctrine of specific performance to the recovery of the purchase price in real estate transaction disputes.

The setting for this case was Chester County. There, Marsha Avery owned approximately 21 acres just north of a neighboring family, the Maisanos. As time went on, Ms. Avery wished to acquire land from the Maisanos. In December 2004, the parties executed a sales agreement by which Avery agreed

to purchase the Maisanos' residential real estate for almost \$1.4 million. Per the terms of the agreement, Ms. Avery made a \$150,000 down payment at the time of execution, with the remaining due at the time of settlement, which was to take place in December 2006.

Ms. Avery had difficulty accumulating the necessary funds to make the purchase, so the settlement date was pushed back several times – all the way to 2012. When the date finally arrived, Ms. Avery had transferred title of her own property to her mortgage company, Hamlet Visas LLC, and, at that time, she notified the Maisanos that she would not be going through with the purchase.

The Maisanos sued for damages, and at trial Ms. Avery was found to have breached the agreement. The Maisanos were awarded \$150,000 in damages. However, they sought specific performance of the full purchase price, which they were denied because the court reasoned that specific performance was only available when there was no adequate remedy at law. The Maisanos then appealed to determine whether specific performance of the full purchase price was an available

remedy in this case.

The court noted that specific performance, as it relates to an agreement for the sale of real estate, is essentially an attempt to recover the purchase price of the property and that nothing in the law prohibits the non-breaching party from seeking to recover the full purchase price associated with the breach. In this fashion, specific performance in this case becomes an adequate remedy at law.

In summary, the court concluded that “[t]o the extent the trial court declined to award the purchase price as damages because, under general principles of law, specific performance is not available where damages are ascertainable, the court committed legal error.” The judgment of the Court of Common Pleas was reversed, and the matter was remanded to the trial court to hear further arguments concerning price damages.

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Melissa L. Dougherty
Executive Editor

Interested in contributing to the next RPPT Section newsletter?

We welcome updates on committee activities or projects or on matters affecting our practice areas. We seek equality between our divisions and need commitments for material from each division. We ask our officers, council members and committee chairs to submit or recruit material or to recommend material to reprint with permission. Please email your article and a brief bio in Word format, as well as a high-resolution (300 dpi) author photo, to the executive editor, Melissa Dougherty, at MelissaDougherty@cohenlaw.com.

The deadline to submit articles for the next issue is Oct. 31, 2019.

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