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IN THIS ISSUE

REPORT OF THE CHAIR

BY KATHRYN H. CRARY, ESQUIRE | GADSDEN SCHNEIDER & WOODWARD LLP

The Probate and Trust Law Section has had an exciting fall in which the work of our members and committees have touched on a wide range of issues from realty transfer tax to mediation to electronic estate planning documents. With my final column as the Section's Chair, I'd like to highlight in particular the excellent work of our Elder Law and Guardianship committee and several of our partner organizations (including SeniorLAW Center, Community Legal Services, and Disability Rights Pennsylvania) in their efforts to prepare and secure the adoption of a Philadelphia Bar Association Resolution in support of Senate Bill Number 1333, Amending Title 20, chapter 55 of the Pennsylvania Consolidated Statutes to Strengthen Due Process Protections for Incapacitated Persons and Alleged Incapacitated Persons.

Over the past several years, guardianships have come under increased scrutiny through high-profile examples of abuse of the guardianship process, both in Pennsylvania and elsewhere. As noted in the Resolution endorsed by the Probate and Trust Law Section and adopted by the Philadelphia Bar Association's Board of Governors on October 27, 2022, there are more than 19,000 active guardianship cases in Pennsylvania with court oversight of more than $1.8 billion in assets. Pennsylvania law does not presently guarantee a right to counsel for Alleged Incapacitated Persons (AIPs) and Pennsylvania is one of only six states nationwide in which appointment of counsel for an AIP is a discretionary action of the court. With some Pennsylvania Orphans' Courts requiring the appointment of counsel for AIPs and others not requiring such counsel, there is a systemic inequity in how AIPs are being treated in the Commonwealth.

PA Senate Bill 1333, Printer's Number 1894 was introduced in the PA Senate Judiciary Committee in September 2022, and provides that the court shall appoint counsel to represent the AIP in any matter for

continued on page 2

NEWSLETTER ARTICLES

Would you like to see something in future issues of the Probate and Trust Law Section Newsletter? Then, why don't you write it? If you are interested, please contact the editor:

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REPORT OF THE CHAIR, CONTINUED

which counsel has not been retained by the AIP, regardless of the ability to pay. The Bill also: 1) requires that counsel appointed to represent AIPs shall maintain a normal attorney-client relationship as far as reasonably possible and advocate for the client's expressed wishes consistent with the client's express instructions; 2) mandates that individuals serving as guardian of three of more incapacitated persons be certified in accordance with a process to be established by the Supreme Court of Pennsylvania; and 3) heightens the proofs required by the court to support a finding that less restrictive alternatives to guardianship are insufficient before ordering guardianship.

To address these ongoing issues of access to justice, in conformity with attorney ethical rules and to protect the legal and constitutional rights of AIPs, the Resolution passed by the Philadelphia Bar Association's Board of Governors, with endorsement from the Probate and Trust Law Section, adopts a position in support of Senate Bill 1333, Printer's Number 1894 and any similar legislation which provides for amendments to Title 20, Chapter 55 of the Pennsylvania Consolidated Statutes to strengthen due process protections for AIPs, and authorizes the Chancellor of the Philadelphia Bar Association to communicate its position to the members of the General Assembly of Pennsylvania, the Governor of Pennsylvania, the legal community, the media, and the public.

As noted above, the adoption of the Resolution Supporting Senate Bill Number 1333 and similar legislation was the culmination of significant efforts by organizations such as SeniorLAW Center with which the Section has enjoyed a long-lasting partnership, with input from many members of the Section and its Elder Law and Guardianship Committee. As I wrap up my service as the Chair of the Probate and Trust Law Section, I am filled with a deep and abiding sense of gratitude for our members, committee chairs, and officers who work so hard to make this Section an outstanding source of community and collaboration, and I look forward to a very bright future for the Section in which barriers continue to be broken down and real change is possible. I wish all of our members the best in 2023 and beyond.

TRUST UNDER WILL OF ASHTON: AN EQUITABLE INTEREST IN A TRUST, WITHOUT INJURY, CONFERS STANDING TO CHALLENGE THE TRUST

BY BROOK HASTINGS, ESQUIRE, | HASTINGS LAW

In an unanimous decision, the Pennsylvania Supreme Court recently held in *Trust Under Will of Ashton*, 241 A.3d 353 (Pa. 2021) that an annuitant had standing to challenge the actions of the Trustee as a result of her equitable interest in the trust corpus even when she could not demonstrate a loss personal to her.

The Trust was originally funded in 1952 with $2,638,798.23 after the death of Augustus T. Ashton. The Trust was to pay specified annuities from net income to certain family members for their respective lives and then to their children and grandchildren born in their lifetimes. These payments took priority over other distributions. If net income over and above the annuities was available, Augustus directed that the balance fund "Ashton Scholarships" for the benefit of students in the graduate and engineering schools of the University of Pennsylvania, with the University responsible for choosing the scholarship recipients. Upon the termination of the annuity payments to family members, the Trust was to fund the Ashton Scholarships in perpetuity.

Over the years, the Trust saw astounding growth, reaching over $72,000,000 in December 2017. In January 2018, Trustee, PNC, filed a Fourth and Interim Account ("Account"), covering the period from November 1983 through December 2017. At that time, only three of the eight annuities were still active, aggregating $11,400 a year. It was uncontested that all required annuity payments were fully and timely paid. The average income distributions in the three years preceding the Account for the Ashton Scholarships were approximately $1,357,000 per year.

PNC also filed a Petition for Adjudication ("Petition"), which included two questions. First, PNC proposed a division of the Trust into two separate trusts - one for making the remaining annuity payments funded with $5,000,000, and a second solely for the Ashton Scholarships in order to take advantage of charitable tax benefits. Upon termination of all of the annuities, the balance of that trust would be added to the scholarship trust. Second, PNC sought approval of increased fees (to be more in line with its institutional fee schedule, at a discount) and a one-time retroactive commission of $730,000.

With the filing of the Account and Petition, PNC, as required, put all beneficiaries on notice, including the Attorney General. Two of the annuitants, one with a current interest (Reed) and one with a contingent interest (Sullivan), objected to the Account. Those objections included allegations of self-dealing and breaches of the trustee's duty of loyalty, objections to PNC's request for increased fees and retroactive commissions, objections to the proposed division of the Trust, and a request to appoint a Co-Trustee. Neither the Attorney General nor the University of Pennsylvania, objected to PNC's filings.

In response to the objections, PNC filed detailed preliminary objections arguing that neither annuitant had a cognizable interest in the outcome of the objections and thus, lacked standing to bring the objections. In particular, Trustee argued that the annuitants' objections were not related to their respective interest in their respective annuities, but rather, challenged aspects that affected only the charitable beneficiary.

Reed opposed Trustee's objections at length, and on July 9, 2018, the Honorable Matthew D. Carrafiello issued an order sustaining in part and overruling in part PNC's preliminary objections as to Reed. Specifically, the Court held that

continued on page 4

TRUST UNDER WILL OF ASHTON, CONTINUED

Reed had standing to challenge the financial management by PNC, the fees charged by PNC, and the proposal to divide the Trust. The Court also held that Reed had standing to request the appointment of a Co-Trustee. The Court, however, found that Reed did not have standing to challenge reporting failures, the administration of the Ashton Scholarships and the ownership of Stock Exchange membership. The Court further granted all of PNC's objections as to Sullivan on the basis that she was not a current annuitant. An opinion in support of the decree was not issued.

PNC timely requested that the Orphans' Court certify the July 9, 2018 Decree to the extent that it overruled Trustee's objections, to permit immediate appeal, which was denied. PNC then timely filed a Petition for Review with the Superior Court seeking an interlocutory appeal on that portion of the July 9, 2018 Decree that overruled Trustee's objections. The Attorney General and University of Pennsylvania both joined in Trustee's Petition and in December 2018, the Superior Court granted the Petition for Review. An Opinion Sur Appeal was then issued by the Orphans' Court.

In a detailed opinion dated February 25, 2019, Judge Carrafiello asked that PNC's Appeal be denied and the Orphans' Court decision affirmed. In support of said position, the Orphans' Court stated that it had properly found that: (1) Reed had standing as a current, vested income beneficiary, (2) Reed had standing to seek the appointment of a successor Co-Trustee, (3) Reed had standing to challenge the new Trustee fee agreement and retroactive fee increase as well as the Trustee's administration of the Trust, and (4) Reed had standing to challenge the proposed division of the Trust into two separate and distinct trusts.

In finding that Reed had standing as a current, vested income beneficiary, the Orphans' Court relied on statutory definitions of current beneficiary, income interest, and income beneficiary and found that Reed was a specifically named, current, vested income beneficiary and therefore, had automatic, ordinary standing with respect to the administration of the Trust. Additionally, because Reed had an interest in ongoing payments for her life, the Orphans' Court found that "the viability of payments that could go for many years is not yet ascertainable," and therefore, Reed had "an interest in the Trust as a whole and [had] a real financial interest in her annuity being paid in the future." According to the Orphans' Court, Trustee's financial management and compensation agreements were "issues that directly impact the fiscal health of the Trust and therefore [Reed's] interest in it."

As to the second objection concerning the request to appoint a Co-Trustee, the Orphans' Court relied on the well-settled three-prong test for standing – that a party has a (1) substantial, (2) immediate, and (3) direct interest in the outcome of the litigation. "A party has a substantial interest in the litigation if his interest surpasses that of all citizens in procuring obedience to the law. The interest is direct if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative." Applying this test, the Orphans' Court found that: Reed's interest in the outcome was substantial because, as a trust beneficiary, it differs from that of the general public; Reed's interest was direct because the Trustee's actions could directly impact her as trust beneficiary, and Reed's interest was immediate because continued breaches will likely occur if a co-trustee was not appointed. Accordingly, Reed had standing to request the appointment of a Co-Trustee.

The Orphans' Court further found that Reed had standing to

continued on page 5

TRUST UNDER WILL OF ASHTON, CONTINUED

challenge the fee agreement and request for retroactive fee increase as well as PNC's administration of the Trust. In reaching this decision, the Orphans' Court did not take into account whether Reed's interest was likely to be threatened by the increased fees. Because Reed's interest in the Trust was financial, increased payments to PNC would affect that interest.

Additionally, the Orphans' Court held that PNC owed all beneficiaries the same duty of loyalty, no matter how big or how small their financial interests. Thus, Reed had standing to challenge the administration of the Trust when such allegations are based on breaches of that duty.

Lastly, the Orphans' Court held that the Trust "favors the annuity beneficiaries over the charitable beneficiary" because the annuitants receive their income distributions first. In contrast, according to the Orphans' Court, the proposed division "strongly favors" the charitable beneficiary and takes this priority away from the annuitants. Accordingly, the Orphans' Court held that Reed had standing to challenge the proposed division because Reed's interest in maintaining that priority was substantial, direct and immediate. In reaching this conclusion, the Orphans' Court further found that dividing the Trusts would defeat Augustus' stated purpose and original intent.

Following the issuance of the Opinion Sur Appeal, the matter was extensively briefed by the parties and in October 2019, the Superior Court panel heard oral arguments. In June 2020, the Superior Court issued its majority opinion, reversing in part and affirming in part, the Orphans' Court's determination, and remanded the matter for further proceedings.

In reaching its holding, the majority first reviewed general principles of standing and cited the long-standing principle that "a person who is not adversely impacted by the matter that he or she is litigating does not enjoy standing to litigate the court's dispute resolution machinery." Prior to looking at whether the harm is substantial, direct and immediate, the Superior Court held that a litigant must first establish that the challenged conduct caused him/her harm.

With this principal in mind, the majority opinion (authored by Judge Dubow and joined by Judge Bender) held that Reed did not have standing to: (1) object to the Account, (2) request the appointment of a Co-Trustee, or (3) challenge Trustee's request for retroactive commissions and increased fees. In reaching this decision, the majority largely relied on the fact that Reed received the full amount of her annual annuity payments every year. The Court also considered whether Reed's right to her annual annuity payment was threatened. In analyzing the facts, the Superior Court took into consideration the growth in the assets and its current value and determined that "it is not reasonable to infer… that [Reed's] right to receive $2,400 annually will be adversely impacted." Indeed, "such inference is, at best, speculative and remote." Judge Colins filed a dissent simply stating that he would affirm the opinion of the Orphans' Court.

Lastly, the entire panel affirmed the Orphans' Court's determination that Reed had standing to object to the division of the Trust. The Court found that the proposed division of the Trust involved transferring Reed's interest to a new trust and the amount of funding would directly impact Reed's interest in receiving her annuity.

Reed timely petitioned for appeal, which was granted in December 2020. The certified issue before the Supreme Court of Pennsylvania was limited to whether Reed, a current, vested beneficiary, had automatic standing to challenge

continued on page 6

TRUST UNDER WILL OF ASHTON, CONTINUED

Trustee's alleged breaches of fiduciary duties, without showing that she suffered a substantial, direct and immediate injury.

Briefs were submitted by the parties and an *amicus curiae* brief was filed by the Pennsylvania Bankers Association. The Bankers Association supported the position that Reed did not have standing, and requested that the Supreme Court to affirm the decision of the Superior Court. The Bankers Association argued that (1) waiving the requirement for injury would be a significant departure from Pennsylvania case law, (2) the Pennsylvania law does not grant a party automatic standing, and (3) granting automatic standing would significantly obstruct trust administration and frustrate the intent of settlors.

The Pennsylvania Supreme Court issued a landmark 7-0 decision on October 4, 2021, affirming in part and reversing in part, the decision of the Superior Court. In an opinion authored by Justice Saylor, the panel acknowledged the long-standing principle that in order to have standing, "a litigant must be adversely affected in some way." While this principle seems straightforward enough, the parties largely disagreed on what "affected" meant. Reed took a broad approach and argued that as a vested beneficiary, the Trustee owed her certain duties. If Trustee breached those duties, regardless of whether it caused an actual financial injury, she was entitled to redress. PNC, on the other hand, argued that in order to be affected, the vested beneficiary had to sustain and identify a financial harm. Because Reed had always received her annual distribution, and because the Trust and more than enough to pay Reed's annuity for the remainder of her lifetime. PNC argued that any financial harm was not immediate, but rather, speculative and remote.

The Supreme Court looked at the nature of Reed's objections, and found that the objections related to PNC's fiduciary duties. If PNC breached its duties it concluded, any beneficiary, no matter the size of his/her interest, is entitled to raise the issues before the Court. The panel further reasoned that income beneficiaries, such as Reed, rely on trust corpus to generate the income for which they are entitled. As such, income beneficiaries have an equitable interest in the trust as a whole. If a trustee breaches its fiduciary duties affecting the trust res, the beneficiaries are entitled to equitable relief. Allowing such equitable relief to each and every beneficiary, regardless of a demonstrative financial loss, will induce the trustee to perform its duties appropriately. Thus, the Supreme Court held that Reed had standing to challenge transactions that were allegedly self-dealing or breach of trust.

Similarly, the Supreme Court found that because the increased trustee fees and approval of retroactive commissions affected the trust corpus, Reed had standing to challenge the request.

Lastly, the Supreme Court determined that while Reed's request to appoint a Co-Trustee arose as a result of alleged breaches of fiduciary duties, her request was a request for a remedy and as such, was not properly before the Court.

RISING INTEREST RATES AND THEIR IMPACT ON ESTATE PLANNING

BY JUSTIN H. BROWN, ESQUIRE, AND BRITTANY A. YODIS, ESQUIRE | BALLARD SPAHR, LLP.

This year has seen a series of interest rate hikes by the Federal Open Market Committee that will significantly impact the wealth transfer strategies. The success of many estate planning techniques is dependent on interest rates, so while interest rates are rising in an effort to curb inflation, the increase will correspondingly curb the effectiveness of many common estate planning techniques that have been used over the past decade when interest rates were at historically low levels. On the other hand, higher interest rates will allow planners to dive deep into their bag of old tricks that were popular in high-interest rate environments.

Each month, the Internal Revenue Service sets and publishes the "Applicable Federal Rate" or "AFR". The AFR is the minimum interest rate required by the Internal Revenue Service for private loans. As interest rates plummeted, the AFR correspondingly dropped to historically low levels over the past decade. As interest rates have risen, the AFR has risen. While no one knows when interest rates and the AFR will reach their ceiling, there are a number of planning techniques that can be implemented to either lock in both before rates rise any higher or to take advantage of the higher-interest rate environment.

Locking in Rates Before They Rise Any Higher

1. Related-Party Loans

In a low-interest rate environment, related-party loans are an effective intra-family lending strategy. By leveraging low interest rates, an individual can borrow money from a family member for little to no interest cost. As interest rates increase, the interest due on the loan will also increase, thereby reducing the effectiveness of the planning strategy. If interest rates continue to rise in the future, locking in the current interest rate (even though it is higher than it would have been a year ago), will still be a beneficial strategy as interest rates continue to rise.

Intra-family loans are also beneficial in a high interest rate environment compared to conventional lending from a bank or financial institution. For example, if an individual is purchasing a home and has the option to borrow money from either a bank or a family member, the thirty-year fixed mortgage rate charged by a bank (currently over 7%) is going to be considerably higher than the long-term AFR that could be charged in an intra-family loan (currently around 4%). While the benefit to related party loans is lower in a high-interest rate environment, there is a benefit, nonetheless to utilizing intra-family loans in a high-interest rate environment.

2. Sales to Grantor Trusts

Another common estate planning technique that has been a staple in an estate planner's toolbox over the past decade has been sales to grantor trusts. A grantor trust is a trust that is ignored for income tax purposes, meaning that the grantor is taxed on all of the trust's income. If a grantor sells assets to a grantor trust, the sale will not trigger any gain recognition for federal purposes because for tax purposes, the grantor is selling the asset to himself or herself. The grantor could sell the assets to the grantor trust and take back a promissory note, which serves to freeze the value of the assets in the grantor's estate based upon the value of the promissory note. The trust would be required to pay the grantor interest on the promissory note. In a low-interest rate environment, the value of the interest could be minimal. In addition, to the extent that the value of the asset in the grantor trust appreciates at a rate higher than the interest rate, such

continued on page 8

amount will be removed from the grantor's estate for estate tax purposes. If interest rates continue to rise in the future, locking in the current interest rate (even though it is higher than it would have been a year ago), will still be a beneficial strategy so long as the asset that was sold appreciates at a rate greater than the interest rate of the promissory note.

3. Grantor Retained Annuity Trusts

Grantor retained annuity trusts (also known as "GRATs") are another planning strategy that is commonly used in low-interest rate environments. A GRAT is an irrevocable trust to which a grantor transfers property and receives in return an annuity payment from the trust for a fixed term. At the end of the GRAT term, any property remaining in the trust passes to the remainder beneficiaries free of gift tax. The calculation of the annuity amount is based on the AFR; so in order for a GRAT to succeed, the property held in the GRAT must have high-growth or income-producing potential such that the GRAT's total return exceeds the interest rate used at the time of the creation of the GRAT. The lower the interest rate, the easier it is for the GRAT to succeed. If interest rates continue to rise in the future, locking in the current interest rate (even though it is higher than it would have been a year ago), will still be a beneficial strategy so long as the asset that was transferred to the GRAT appreciates at a rate greater than the interest rate in effect at the time of the creation of the GRAT.

Estate Planning Strategies in a High-Interest Rate Environment

1. Qualified Personal Residence Trust

As interest rates continue to rise, clients should consider creating qualified personal residence trusts ("QPRTs"). A QPRT is an irrevocable trust in which the grantor gifts a personal residence to the QPRT, retains the right to live in the residence for a set term, and at the conclusion of the term, the residence passes to remainder beneficiaries. By retaining the right to live in the residence for a set term, the grantor's gift is based upon the value of the remainder interest in the property without taking into consideration the value of the grantor's retained interest. The calculation of the value of the remainder interest takes into consideration the AFR at the time of the transfer of the residence to the QPRT such that the higher the AFR, the higher the value of the grantor's retained interest, the lower the value of the remainder interest, and the lower the value of the grantor's gift to the QPRT. Accordingly, a QPRT is most advantageous in high-interest rate environments when a residence is likely to appreciate in value.

2. Charitable Remainder Annuity Trust

A charitable remainder annuity trust ("CRAT") is a trust with two types of beneficiaries: a noncharitable beneficiary who will receive a fixed annuity or unitrust payment throughout the term of the trust, and a charitable beneficiary who receives the assets remaining in the trust at the conclusion of the trust term. The present value of the remainder that will pass to the charity at the conclusion of the term of the trust is calculated using the AFR in effect at the time the grantor creates the trust. The higher the AFR, the higher the value of the charitable remainder interest, and the larger the charitable deduction ultimately afforded to the grantor.

* * * * *

Ultimately, a higher-interest rate environment could provide unique estate planning opportunities for clients and planners. Planners may need to incorporate "old" tools from over a decade ago into their modern estate planning toolbox, while strategically using some of the techniques that were previously used in low-interest rate environments.

TAX UPDATE

BY GEORGE C. DEENEY, ESQUIRE | GILBOY & GILBOY LLP

GUIDANCE FROM THE IRS

Internal Revenue Service Proposes Regulations on Certain Estate Expense Deductions

REG-130975-08: The IRS has issued proposed regulations on the use of present-value principals in determining what an estate can deduct for administration expenses, funeral expenses and other claims. The proposed regulations also address the deductibility of amounts paid under the personal guarantee of the decedent, interest expenses on tax and penalties the estate incurred and interest expenses on certain loan obligations the estate owes.

A public hearing on the proposed regulations is scheduled to occur on October 12, 2022. Written comments must be submitted by September 26, 2022.

Internal Revenue Service Proposes Regulations Addressing the Basic Exclusion Amount for Estate and Gift Tax

REG-118913-21: The IRS has issued proposed regulations which would amend the estate tax regulations basic exclusion amount for federal estate and gift tax purposes. By way of background, the Tax Cuts and Jobs Act of 2017 (the "Act") provided the Treasury Secretary with authority to issue regulations addressing tax consequences for an estate in which the decedent made gifts between $5 and $10 million (adjusted for inflation) during the time period between the implantation of the Act and its sunset (January 1, 2026). The final regulations issued by Treasury and the IRS in 2019 which allowed an estate to determine its estate tax credit using the greater of the (1) the basic exclusion amount applicable on the decedent's death, and (2) that applicable to gifts made during the decedent's lifetime.

The proposed regulations note that the current regulations do not distinguish between completed gifts treated as (1) testamentary transfers for estate tax purposes and included in the donor's gross estate, and (2) adjusted taxable gifts for estate tax purposes and not included in the donor's gross estate.

The proposed regulations would create an exception to the special rule for transfers that are includible in the gross estate or treated as includible in the gross estate for Section 2001(b) purposes, including (1) transfers subject to a life estate or otherwise described in Sections 2035-2038 and 2042, regardless of whether it was deductible under Sections 2522 or 2523, (2) transfers subject to Section 2701 and 2702, (3) transfers made by an enforceable promise to pay, and (4) transfers that would be included above but for the elimination from the gross estate within 18 months of death.

The proposed regulations will apply to estates in which the decedent died on or after April 27, 2022 (after being published in final form).

FALL RULES AND PRACTICE UPDATE: PROPOSED AMENDMENT TO GUARDIANSHIP RULE 14.8

BY KATHERINE F. THACKRAY, ESQUIRE | ALEXANDER & PELLI, LLC

The Supreme Court Orphans' Court Procedural Rules Committee (the "Committee") announced in August that it is considering proposing an amendment to Pa.R.O.C.P. 14.8, which is the rule that governs the procedures for guardianship reporting, monitoring, review and compliance. "Proposed Amendment of Pa.R.O.C.P. 14.8," 52 Pa.B. 5119 (Aug. 20, 2022). This rule plays an important role in the mission of the 2019 overhaul of the guardianship rules, when the rules were revised to achieve consistency in guardianship proceedings and to make it easier for the courts to oversee guardianships. Now that the rules have been in place for a few years, it has come to the Committee's attention that there are certain circumstances, such as the death or unavailability of a guardian, where the requisite reports are not filed, despite reasonable efforts from the courts to enforce the rules or to compel a guardian to act. The proposed amendment to Rule 14.8 would provide a path for the court to direct a successor guardian to file the delinquent report or authorize the court to enter an order in lieu of such report.

The reporting requirements set forth in Rule 14.8 are critical in helping the court obtain a detailed picture as to the status of the incapacitated person's circumstances. Rule 14.8(a)(1) requires the guardian of the estate to file an initial inventory, which provides a comprehensive look at the assets being held in the guardianship. Some of the items included on this initial inventory include a list of the incapacitated person's assets; disclosures about their accounts, safe deposit boxes, and insurance policies; a list of their income and liabilities/debts; and detailed information relating to their personal care, financial and medical plans. See Orphans' Court Form G-05, "Guardian's Inventory for an Incapacitated Person."

After the filing of the initial inventory, the guardians of the person and the estate are each required to file their own annual reports. Pa.R.O.C.P 14.8(a)(2)-(3). The purpose of these reports is seemingly to keep the court informed as to changes related to the incapacitated person's financial and medical status. For example, the guardian of the estate must report, among other things, changes in income, a list of the incapacitated person's annual expenses (including the nature of the expense, the total amount, and to whom the payment was made), additional assets received, and certain updates about the guardian's compensation and attorney fees. *See* Orphans' Court Form G-02, "Report of Guardian of the Estate." The information that the guardian of the person must report includes the incapacitated person's personal information, medical information (including the names of the incapacitated person's doctors and any medical events that occurred throughout the year), and the guardian's opinion as to whether the guardianship should be continued. *See* Orphans' Court Form G-03, "Report of Guardian of the Person."

The duty of the guardians to file these annual reports with the clerk ends only upon the incapacitated person's death, adjudication of capacity, a change of guardian, or the expiration of an order of limited duration. Pa.R.O.C.P. 14.8(a)(4)-(5). It is the role of the clerk of the Orphans' Court or other designee to monitor and confirm whether these reports have been timely filed. Pa.R.O.C.P. 14.8(d). If a report is deemed incomplete or is more than 20

continued on page 12

PRACTICE POINT, CONTINUED

days past due, Rule 14.8(f) sets forth the procedure for ensuring compliance. This process begins with serving a notice on the guardian directing compliance within 20 days; if the guardian fails to comply within 20 days of service of the notice, then a notice of deficiency is filed and served to those entitled to receive a notice of filing pursuant to Rule 14.7(a)(1)(iv). After such notice of deficiency has been filed, the "court may thereafter take such enforcement procedures as are necessary to ensure compliance."

The proposed amendment to Rule 14.8 addresses what happens when such enforcement procedures do not, or cannot, work. The proposed amendment comes following a request by the Advisory Council on Elder Justice in the Courts, which recognized that there are times that actions to enforce the Rule 14.8 requirements simply will not be effective, such as when the guardian is "deceased, incapacitated, beyond the court's jurisdiction, or otherwise unavailable," or when "the guardian is unwilling to comply despite the imposition of the court's contempt power." 52 Pa.B. 5121. The Committee notes that, in the latter case, there may be instances, such as when a family member is serving as guardian, where imposing sanctions against a guardian may not be the most appropriate remedy or in the best interest of the incapacitated person. *Id.*

The proposed amendment would assist in furthering Rule 14.8's objective of ensuring regular reporting to the courts. As drafted, the amendment adds a new subparagraph (f)(4), which provides that after taking reasonable enforcement procedures, the court shall enter an order that would enumerate the reasons why the guardian cannot be compelled to comply with the requirements and explain the actions taken by the court to attempt to enforce the requirements. *Id.* at 5120. The reasons why a guardian could not be compelled to comply "include (but are not limited to), the guardian or former guardian cannot be located, is located outside of the Commonwealth, is deceased, or remains unresponsive to enforcement measures." *Id.* The court could then either direct that a successor guardian or other designee file the delinquent filing, or direct that the order issued by the court be filed in lieu of the delinquent filing. *Id.* The Committee notes that it anticipates that the "order in lieu of report" would be used sparingly, emphasizing the "efforts to appoint qualified guardians and to educate guardians as to their responsibilities." *Id.* at 5121.

The period for submitting comments, suggestions, or objections to this proposed amendment closed October 11, 2022. Time will tell whether the currently drafted version of the amendment is proposed, but it seems clear based on the Committee's rationale that there is a need for some formal procedure to help ensure that these critical guardianship reports are filed. Adopting such procedures would assist the court in overseeing the guardianships and protecting the interests of the incapacitated persons involved.

REGISTER OF WILLS LITIGATION PRACTICE

BY FRANK CAMPESE, JR., ESQUIRE | CHIEF SOLICITOR, REGISTER OF WILLS-PHILADELPHIA COUNTY

ED. NOTE: This article will cover the process of litigating a case before the Register of Wills in Philadelphia County.

Initially, a Petition must be filed. Typically we deal with Petitions involving Probate of a Copy of a Will, Petitions challenging who will be the Administrator of an Intestate Estate, Claims for Common Law Marriage Status, Petitions Challenging the Mental Capacity of the Decedent and various others. All Petitions should include a complete set of facts, as well as notifications to all interested parties. The Petition should also attach all relevant exhibits.

The Petition is filed with the Register of Wills at Room 180, City Hall. The Chief Clerks, Nick Barrile and Mary Ellen Wons, will review the Petition and present it to me to see if an initial determination can be made after a careful review of the Petition and Response.

If a hearing is necessary, the matter will be scheduled for an Informal hearing before the Register of Wills, The Honorable Tracey Gordon. I will be present at the hearing along with Karima Yelverton, an additional Solicitor, and the Chief clerks. You will receive an email notice to join a Zoom Hearing on a particular date and time.

At the Informal Hearing, we typically ask the attorneys to present their position with respect to the Petition and any Response. We have already thoroughly reviewed all paperwork and are familiar with the issues.

The Register often will speak to the participants to insure they are familiar with the process and their respective rights as potential heirs. We utilize the break out rooms to see if we can reach some sort of agreement. Since it is an Informal Hearing, no Court Reporter is present. Following presentation of the claim, the legal team will meet and discuss the matter. A decision may then be entered.

If the matter cannot be resolved, or the case cannot be adjudicated at the Informal conference, a Formal conference may be scheduled where testimony will be heard. Attorneys are responsible for insuring a Court Reporter is available to take notes of testimony for preservation to Orphans' Court. Following testimony, the Register of Wills will render a decision.

For your convenience I have listed the telephone numbers and email addresses for the two chief clerks who handle all Petitions.

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DIVERSITY COMMITTEE UPDATE

BY CHLOE MULLEN-WILSON, ESQUIRE | TIMONEY KNOX LLP

The Diversity Committee of the Philadelphia Bar Probate Section has concluded its programming for 2022 and will resume activities in 2023.

Please join the Diversity Committee at its first meeting of the year, which will be held via Zoom on Wednesday, January 11 at 12pm. The Committee will discuss its goals and potential programs for next year.

Some of the topics discussed to date include: (1) defining and understanding the significance of intersectionality; (2) property ownership in America, its origins and impacts on tangled title issues today; (3) the effects of bias, prejudice and microagressions on the body and relation to stress; (4) navigating estate planning options for clients benefiting individuals who suffer from substance abuse disorders; and (5) the utilization of mental health care powers of attorney and how to implement them.

If you have additional programming that you would like to see presented next year, or, if you have programming you would like to present on yourself, please send all inquiries to the Chair of the Committee, Chloe Mullen-Wilson, at CMullen-Wilson@timoneyknox.com.

JOIN A COMMITTEE

The Section's committees depend on the steady flow of people, energy and ideas.
Join one!

Contact the section chair:

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CASE SUMMARY FROM THE ORPHANS' COURT LITIGATION COMMITTEE[1]

In Re: Lincoln Fire Company, 12 Fid. Rep. 3d. 312

BY JULIA BOLAND[2] | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.[3]

In Re: Lincoln Fire Company, 12 Fid. Rep. 3d. 312, the Montgomery County Orphans' Court considered the proper recipient of a charitable entity's funds following its dissolution.

Lincoln Fire Company ("Lincoln") was a Pennsylvania non-profit corporation exempt from federal tax under IRC §501(c)(3)[4] and subject to Pennsylvania laws governing Pennsylvania non-profit organizations.

On December 1, 2016, the Whitemarsh Township Board of Supervisors approved an ordinance withdrawing funding and recognition of Lincoln and recommending that it be merged with nearby fire companies. In 2018, Lincoln filed a Petition with the Montgomery County Orphans' Court seeking approval of the sale of its real estate. The sale was approved, but the Court required Lincoln to file a petition under 15 Pa.C.S. §5547 to seek Court approval of the distribution of sale proceeds as an appropriate diversion of assets.

On January 6, 2021, Lincoln filed the Petition of Approval of Asset Transfer and Voluntary Dissolution requesting that the sale proceeds be distributed to Montgomery County Fire Academy ("MCFA") and North Penn Goodwill Services ("NPGS"). On January 26, 2021, the Pennsylvania Office of Attorney General, as *parens patriae*, filed an answer to Lincoln's Petition objecting to the Petition, arguing that that the proposed recipients resulted in an improper diversion of charitable funds pursuant to 15 Pa. C.S. §5567(b) and requesting that the Court apply the doctrine of *cy pres* to determine the proper recipient of the funds.[5]

Following a hearing, the Orphans' Court issued an Order on April 15, 2022, denying the asset transfer on the basis that Lincoln's proposed recipients "contravened the non-profit organization's purpose and dissolution provisions per its By-laws" and applied the doctrine of *cy pres* to "fulfill as nearly as possible [Lincoln's] charitable intention of 'maintenance and support of a company for the preservation of property in the Township of Whitemarsh" in equal portions to Spring Mill Fire Company and Barren Hill Fire Company pursuant 20 Pa.C.S. §7740.3(a)(3).[6]

In response, Lincoln filed a Motion for Reconsideration Motion (the "Motion"), which the Court denied.

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1 The Orphans' Court Litigation and Dispute Resolution Committee will provide summaries of recent litigation cases in each quarterly newsletter.

2 Law student at Drexel University's Kline School of Law, co-op student at Heckscher, Teillon, Terrill & Sager, P.C. J.D. expected May 2023.

3

4 Lincoln, as an organization operated exclusively for "public safety" fell under IRC §501(c)(3); "An organization falling under subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503." IRC §501(a).5 5 "Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable or wasteful: . . . the court shall apply cy pres to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific." 20 Pa. C.S. §7740.3(a)(3).

6 "Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable or wasteful: . . . the court shall apply cy pres to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific." 20 Pa. C.S. §7740.3(a)(3).

continued on page 17

CASE SUMMARY, CONTINUED

Lincoln thereafter appealed the April 15, 2022 Order, and the Court issued an RAP 1925(b) opinion. In the opinion, the Court determined it had acted within its discretion when it decided Lincoln's suggested distributees did not adequately fulfill its charitable purposes and would result in an improper diversion of charitable assets pursuant to 15 Pa. C.S. §5547(b). Lincoln's Constitution and By-laws stated that Lincoln's purpose was "the maintenance and support of a company for the preservation of property in the Township of Whitemarsh . . . and its vicinity, from destruction by fire." Lincoln's operations had ceased, so it was no longer able to fulfill its charitable purposes, and the Court reaffirmed its previous decision that Lincoln's intended dissolution recipients, MCFA and NPGS, would not be a continuation of Lincoln's charitable purpose because they were "not the closest possible fit to Lincoln's charitable mission."

With respect to MCFA, the Court noted that MCFA's mission was materially different from Lincoln's, as its mission is to provide *training* for fire, rescue, and general emergency medical services, whereas Lincoln's charitable purpose was to respond to and fight fires. MCFA's purpose was far broader and county-wide, as opposed to more localized to Whitemarsh Township. Additionally, Lincoln's Dissolution Clause explicitly stated that in the case of dissolution, the surplus funds should be given to a "tax-exempt Volunteer Fire, Ambulance, or other Emergency or Service Rescue Squad," which MCFA is not.

Similarly, the Court concluded that NPGS's charitable purpose (to "provide hot food, hold and cold drinks, temporary shelter from the elements, and a restroom facility to emergency workers including police, firefighters and rescue personnel") was materially different from Lincoln's and thus, improper as a suggested recipient under Pa.C.S. §5547(b). The Court wrote, "North Penn's mission [is] supportive, rather than dedicated to the front line fire fighting for which Lincoln existed."

The Court then analyzed whether it appropriately applied the *cy pres* doctrine to direct Lincoln's assets to Barren Hill Fire Company and Spring Mill Fire Company. The Court specifically stated that it was replying on the *Elkins* test,[7] which requires the transferring organization to mirror the transferee organization in terms of: (1) the purposes and object of each organization; (2) the locality of service of each; and (3) the nature of the served populations. The Court concluded that Barren Hill Fire Company and Spring Mill Fire Company met all of the above factors, as both were firefighting organizations that provide fire and rescue services through front line firefighting in Whitemarsh Township, not just supporting firefighting activities.

Lincoln also argued that the Court failed to consider Lincoln's alternative requests for distribution and that the *cy pres* proceeding was not properly before the Court. The Court dismissed Lincoln's argument that it the Court failed to consider alternative recipients because Lincoln failed to raise them at a hearing: "Thus, to the extent that Lincoln claims it was somehow deprived of an opportunity to suggest alternative recipients, any alleged deprivation resulted from Lincoln's own litigation strategy wherein it opted repeatedly to turn a blind eye and forge ahead despite the repeated attestations of the Commonwealth, as parens patriae, as to Lincoln's proffered distributees." Similarly, the Court dismissed Lincoln's arguments that *cy pres* should not have been applied because the Pennsylvania Office of Attorney General made clear in its answer that it was raising the doctrine of *cy pres*, and thus Lincoln was on notice that the doctrine of *cy pres* would be considered at the hearing.

7 *In Re Estate of Elkins,* 888 A.2d at 823-24 (holding that the appropriate application of cy pres requires a court to choose a distributee that resembles the original beneficiary in its charitable purpose, locality, and nature of the population served).