



Message from the Section Chair

Jay Hagerman, 2026-27 Section Chair

Hello RPPT Section members! I am excited to share my first report as Chairman of this section. I would like to report that our section is quite healthy from a membership perspective. We are the largest section of the Pennsylvania Bar Association with just over 1,600 members state-wide.

When I assumed this role in May of 2026, I offered my thoughts on legislative items that I have been determined to address when I became chairman of this section. Some examples of these items are the fiduciary exception, mandatory interest imposed on legacies contained in 20 Pa. C.S. §3543 and 20 Pa. C.S. §7799, addressing a decanting statute for trusts, and addressing the lack of a stale mortgage statute in the Commonwealth.



Jay Hagerman

Just like many things in life, the phrase, “Man plans, God laughs” crept into my legislative agenda. The state legislature had different ideas for its legislative agenda as it relates to our section’s subject matter areas. Late in the session, two bills began moving relatively rapidly through committees in both the house and the senate. Specifically, these two bills are the Uniform Partition of Hiers Property Act (“UPH-PA”) and the Uniform Real Property Transfer on Death Act (“URPTODA”).

Working with section leadership and Anna King, the Pennsylvania Bar Association’s capable Director of Legislative Affairs, we assembled a team in conjunction with the Elder Law Section and the Agricultural Law Section to address both of these legislative items. Our formal Reports and Recommendations are working through the drafting phase into finality and will be voted on by our council by the time this article is published. These positions will be promulgated to the entire Section by the November Committee/Section Day meeting, and we are hoping to gain full support of the PBA’s Board of Governors and House of Delegates at that time.

On a non-legislative note, the leadership of the section was committed to resurrect the annual section retreat which has been missing for several years. Led by Vice Chair Alexandra Sipe, the retreat sub-committee engaged with the Solo and Small Firm Section to plan a joint retreat at Bedford Springs in October. At the time of this publication, there will be over 100 guests in attendance and registration keeps climbing. We are also happy to welcome Supreme Court Justice David N. Wecht back to the section for a keynote speech at the Friday plenary session. Justice Wecht has been a great ally of the RPPT section, having spoken in Pittsburgh at our section’s regional dinner in the spring of 2025.

The future of the section seems to be bright as leadership succession plans are also a priority for my administration. Once

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we are through the November meetings and shepherding the two previous legislative items across the finish line, we will be able to tackle the legislative agenda that I outlined in May of this year during my acceptance speech.

On a final note, nothing in the organization moves without countless hours of volunteer work. All of the dynamic happenings that our section is accomplishing does not occur without volunteers. Unfortunately, many of those volunteers don't have much more to give. I ask that upon reading this report, if you have any curiosity or desire to help the section continue its work into the future, please contact me as we could use the help to move our agenda forward. I look forward to providing my final report in the spring of 2027 with the same bright future for this section on the horizon.

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From the Vice Chair (Probate & Trust): The Work of the Section Happens Between Meetings

By Alexandra Sipe, Vice Chair, Probate & Trust Division

One of the greatest strengths of the Real Property, Probate and Trust Law Section is that our members do more than discuss developments in the law. Through task forces, committees, and legislative initiatives, we actively contribute to the advancement of Pennsylvania law and the practice of our profession.

As we enter a busy fall season, several important projects are underway. The Probate & Trust and Real Property members of our Section are currently working on reports and recommendations concerning the **Uniform Partition of Heirs Property Act, Trust Decanting, the Fiduciary Exception, and the Real Property Transfer on Death Act**. These topics represent significant developments affecting clients across the Commonwealth and present important opportunities for thoughtful analysis and meaningful contribution by Section members.

The Uniform Partition of Heirs Property Act addresses challenges frequently encountered when real estate is passed through generations without comprehensive estate planning, often resulting in fractional ownership interests and difficult partition actions. Likewise, the proposed Real Property Transfer on Death Act raises important questions regarding nonprobate transfers of real estate and the role of transfer-on-death mechanisms within Pennsylvania's broader estate planning framework. Both of these are a wonderful joint effort combining both sides of our section and providing an opportunity for collaboration with other sections and committees in interest.

More squarely on the Probate & Trust side, our task forces continue to examine issues involving Trust Decanting and the Fiduciary Exception. Both areas involve evolving legal concepts with practical implications for fiduciaries, beneficiaries, and practitioners alike. The work undertaken by these groups will help inform future Section recommendations, educational programming, and potential legislative positions.

While these topics are complex, participation in the Section's task forces does not require specialized expertise or longtime involvement. In fact, some of our most valuable contributions come from practitioners willing to bring practical experience from everyday client matters and share diverse perspectives from different regions of the Commonwealth.



Alexandra Sipe

Whether you are a seasoned attorney, a new practitioner, or someone looking for a meaningful way to become more involved in the Section, I encourage you to join the conversation.

Task force participation offers an excellent opportunity to collaborate with colleagues from across Pennsylvania, develop professional relationships, contribute to the development of policy recommendations, and help shape the future of our practice areas. The strength of our Section has always been rooted in the willingness of its members to engage, volunteer, and lead.

I also encourage you to mark your calendars for two upcoming opportunities to connect with fellow Section members. We look forward to seeing everyone at the **RPPT and Solo & Small Firm Joint Retreat, October 7-9**, which promises outstanding educational programming, networking opportunities, and meaningful discussion on issues affecting our practices. We also hope you will join us for **Committee and Section Day on November 12 at the Harrisburg Hilton**, where members can become further involved in the work of the Section and help shape our priorities for the coming year.

The success of our Section depends upon active participation from our members. If any of these task force projects interest you, I encourage you to reach out and become involved. Your experience, perspective, and ideas are valuable, and together we can continue to strengthen both our Section and the profession we serve.

I look forward to working with many of you in the months ahead and seeing you at our upcoming events.

Real Property Report – Fall 2026

By Reilly Noetzel, Esq., Vice Chair, Real Property Division

Over the past several months, our Section has been busy advancing legislative and law reform initiatives that address various issues in the “dirt” sector. Most notably, the Council has undertaken an extensive review of proposed Transfer on Death (“TOD”) deed legislation, including the Uniform Real Property Transfer on Death Act. Working with practitioners from the real property, title insurance, and trusts and estates areas, we have evaluated the practical implications of TOD deeds in Pennsylvania, including their impact on title examination, estate administration, joint ownership interests, creditor rights, and the marketability of title. That work has involved substantial study, collaboration, and discussion and ultimately resulted in the development of a formal Report and Recommendation that is progressing through the PBA review process.



Reilly Noetzel, Esq.

are examining the unintended consequences of TOD deeds, searching for solutions to tangled title problems, or exploring ways to modernize mortgage satisfaction procedures, the underlying goal is the same. As real estate lawyers, much of what we do centers on creating certainty in ownership, ensuring the reliability of the public records system, and removing barriers that unnecessarily cloud title. The Council’s current efforts reflect that mission. As this work continues, I encourage more real property practitioners to become involved with the Council and lend their perspective. The best solutions come from attorneys who confront these issues in practice every day, and additional participation will only strengthen the Section’s ability to advocate for thoughtful and practical improvements to Pennsylvania real property law.

At the same time, the Council has continued to focus on broader title issues affecting property owners across the Commonwealth. One area receiving significant attention is the growing problem of tangled titles. Whether arising from unadministered estates, informal family transfers, unclear chains of title, or other ownership defects, tangled title issues can prevent property owners from obtaining financing and insurance, conveying property, making improvements, or otherwise realizing the full value of their real estate. These challenges are particularly impactful in communities where property has remained within families for generations. The Council has spent considerable time evaluating legislative proposals and pro bono opportunities to work on these important issues.

The Council has also begun preliminary work on a potential mortgage satisfaction reform initiative. Every real estate practitioner has encountered situations involving old, unreleased mortgages, successor lenders, missing records, or satisfaction issues that create unnecessary delays and expense in otherwise straightforward transactions. Our early discussions have focused on identifying recurring problems and considering whether targeted statutory improvements could provide a more efficient and predictable process for clearing obsolete liens and documenting mortgage payoffs. Again, this initiative is spearheaded by a variety of stakeholders, including title underwriters and real estate attorneys.

Although these initiatives involve different statutes and different areas of the law, they share a common objective: improving the quality of title in Pennsylvania. Whether we



Thank you to those who attended the RPPT Reception and Award Luncheon during the 2026 Annual Meeting!





*Highlights from the Oct. 7-9 Real Property,
Probate & Trust Law and Solo and Small Firm
Sections Joint Retreat*



Closing the Trust-Funding Gap: Why Pennsylvania Should Preserve Tenancy by the Entireties Protection When Married Couples Fund Revocable Trusts

By Danielle Friedman, Esq.

I. INTRODUCTION

Pennsylvania's tenancy by the entireties ("TBE") doctrine is one of the Commonwealth's most powerful creditor-protection tools for married couples. Under longstanding Pennsylvania law, property held by spouses as tenants by the entireties cannot be reached by the separate creditors of either spouse acting alone. The ownership form embodies a unity-of-marriage principle that places the entire estate beyond the reach of individual judgments.¹

That protection, however, rests on a fragile predicate: the property must remain titled in the names of both spouses, as spouses. The moment a couple transfers TBE property into a revocable trust — a routine step in many modern estate plans — the protection evaporates. This applies regardless of whether the couple uses separate revocable trusts or a joint revocable trust. Because a trust is not a natural person and cannot hold property in the marital unity that TBE requires, courts have generally held that the transfer severs the tenancy and strips the asset of its protective character.²

The result is a structural conflict that forces Pennsylvania practitioners to counsel married couples to choose between two legitimate and complementary planning goals: (1) funding a revocable trust for probate avoidance and efficient wealth transfer; and (2) maintaining TBE creditor protection on their most significant assets. In a state without a homestead exemption, without a domestic asset protection trust statute, and with relatively limited statutory alternatives to probate, that is not a trivial trade-off.

Of the twenty-five tenancy by the entirety jurisdictions, eleven states and the District of Columbia have resolved this conflict by statute.³ Virginia led the way in 2001, with other jurisdic-



Danielle Friedman, Esq.

tions following.⁴ Each enacted a qualified spousal trust statute preserving TBE immunity when TBE property is transferred into one or more revocable trusts, subject to straightforward conditions designed to ensure the marital unity underlying the protection is not genuinely severed. Pennsylvania has not.⁵

This article argues that Pennsylvania should adopt a similar statute. Part II describes the TBE doctrine and the problem created by trust funding. Part III surveys the qualified spousal trust approach taken by other states, with particular focus on the Maryland and Virginia models. Part IV addresses the policy justifications for reform.

Part V proposes the core elements of a Pennsylvania statute.

II. THE TENANCY BY THE ENTIRETIES DOCTRINE AND THE TRUST-FUNDING PROBLEM

A. Tenancy by the Entireties in Pennsylvania

Tenancy by the entireties is a form of concurrent ownership available only to married couples and premised on the common-law fiction that husband and wife constitute a single legal entity. Each spouse holds *not* a divisible fractional share but the *entirety of the property*. Neither spouse can unilaterally alienate, encumber, or sever the tenancy. Critically, the creditors of one spouse cannot reach TBE property to satisfy a judgment against that spouse alone because there is no separable interest to execute upon.

Pennsylvania recognizes TBE for both real and personal property⁶, making it among the most expansive TBE regimes in the country. This breadth matters: a married couple in Pennsylvania can hold their home, investment accounts, and business interests as TBE, potentially shielding their entire accumulated wealth from the creditors of either spouse. For professionals, business owners, and anyone with meaningful liability exposure, TBE is frequently the first and most important layer of asset protection planning.

Transfers to Trusts, 36 J. Am. Acad. Matrim. Law. 33 (2023).

⁴ Va. Code Ann. § 55.1-136(C) (enacted 2001, last amended 2019).

⁵ See Julie M. Cheslik, *Tenancy by the Entirety Property and Transfers to Trusts*, 36 J. Am. Acad. Matrim. Law. 33 (2023).

⁶ *Raiken v. Mellon*, 399 Pa. Super 192 (1990).

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¹ *Madden v. Gosztonyi Savings & Trust Co.*, 331 Pa. 476 (1938).

² See, e.g., *In re Givans*, 623 B.R. 635 (Bankr. M.D. Fla. 2020) (transfer of TBE property into joint revocable trust terminated TBE character because the unity of marriage is lost when title vests in a trust entity).

³ The twelve jurisdictions with qualified spousal trust statutes are Delaware, the District of Columbia, Hawaii, Illinois, Indiana, Maryland, Missouri, North Carolina, Oregon, Tennessee, Virginia, and Wyoming. Julie M. Cheslik, *Tenancy by the Entirety Property and*

Continued from page 7

B. How Trust Funding Destroys the Protection

The problem arises from a mismatch between TBE doctrine and the mechanics of trust ownership. TBE requires the “four unities” of time, title, interest, and possession, plus the unity of marriage. When TBE property is retitled into a revocable trust, legal title vests in the trustee — not in the spouses as a marital unit. Courts have generally held that this transfer severs the tenancy and terminates TBE’s creditor immunity.⁷ A 2020 federal bankruptcy decision, applying this mainstream rule, found that a couple forfeited TBE protection when they transferred their home into a joint revocable trust because the requisite “unity of marriage” could no longer inhere in title held by a trust.⁸

The problem is not hypothetical. Consider a straightforward fact pattern common to Pennsylvania estate planning practice. A married couple — one of whom is a physician, the other a business owner — holds their residence, a brokerage account, and an LLC interest as TBE. Their estate plan calls for separate revocable trusts to enable use of the first-to-die spouse’s applicable exclusion amount at his or her death and to facilitate efficient administration at death. Funding those trusts requires retitling the TBE assets to the couple’s respective revocable trusts. After funding, none of the assets are considered TBE assets. The physician’s malpractice exposure and the business owner’s contractual liabilities are now direct threats to assets that, moments earlier, were immune from individual creditor claims.

Practitioners attempting to thread this needle have limited options. Some counsel clients to retain TBE assets outside their trusts and rely on the right of survivorship to avoid probate at the first death. However, probate avoidance is not the only objective of most estate plans. While TBE ownership does avoid probate, couples lose out of the countless other benefits of having assets owned by their revocable trusts, such as maintaining control over what happens to each spouse’s interest in an asset after he or she dies. Others accept the trade-off and prioritize trust funding, accepting the loss of TBE protection as a cost of comprehensive estate planning. Neither option is satisfactory. A statutory fix is available and Pennsylvania should adopt one.

III. THE QUALIFIED SPOUSAL TRUST APPROACH: MARYLAND AND VIRGINIA AS MODELS

⁷ *In re Givans*, 623 B.R. 635, 641 (Bankr. M.D. Fla. 2020), citing *In re Anderson*, 561 B.R. 230, 242 (Bankr. M.D. Fla. 2016) (holding that a trust is not a married person for the purpose of the required unities and therefore a trust cannot hold property as a tenancy by the entirety).

⁸ *In re Givans*, 623 B.R. 635 (Bankr. M.D. Fla. 2020).

A. The Jurisdictional Landscape

Virginia enacted the first qualified spousal trust statute in 2001, now codified at Va. Code Ann. § 55.1-136(C).⁹ Maryland followed in 2010 with MD Code, Estates and Trusts, § 14-113.¹⁰ Since then, at least ten additional jurisdictions have enacted analogous provisions.¹¹ Collectively, these statutes rest on a common premise: transferring TBE property into a revocable trust should not, standing alone, strip the property of its creditor-protection character, provided the spouses retain the functional indicia of marital co-ownership.

B. The Virginia Model

Virginia Code § 55.1-136(C) provides that TBE property conveyed to the spouses’ joint or separate revocable or irrevocable trusts retains “the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety,” subject to three conditions: (i) the spouses remain married to each other; (ii) the property continues to be held in the trust or trusts; and (iii) the property continues to be their property.

The Virginia approach is elegantly simple. It makes no distinction between joint and separate trusts, covers both real and personal property, and extends to irrevocable as well as revocable trusts.¹² The immunity can be waived by express trust provision or written consent of both spouses. Virginia’s statute has been in operation for over two decades, and its structural simplicity has made it a model for subsequent enactments.

C. The Maryland Model

Maryland’s statute takes a more detailed approach to address implementation questions that arose after the statute’s initial enactment. The Maryland statute expressly applies whether the TBE property is conveyed into a single trust or divided between separate trusts for each spouse. This “split-trust” coverage is significant: it enables the most common modern estate planning structure — separate revocable trusts for each spouse to facilitate estate tax and basis planning — without forfeiting TBE immunity.

⁹ Va. Code Ann. § 55.1-136(C).

¹⁰ MD Code, Estates and Trusts, § 14-113 was enacted in 2010 and later repealed and replaced by MD Code, Estates and Trusts, § 14.5-511 (effective January 1, 2015)).

¹¹ See Julie M. Cheslik, *Tenancy by the Entirety Property and Transfers to Trusts*, 36 J. Am. Acad. Matrim. Law. 33 (2023).

¹² Va. Code Ann. § 55.1-136(C) (covering both real and personal property).

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Maryland's statute requires that the trust instrument or the deed of conveyance expressly invoke the statute's protection. This opt-in mechanism prevents inadvertent application and ensures that lenders and other parties dealing with trust property receive clear notice of the claimed immunity. The statute also provides a waiver mechanism, allowing the spouses to consent in writing to release the protection as to specific creditors or specific assets. Importantly, the Maryland statute addresses transparency: immunity is waived if a trustee executes a financial statement on behalf of the trust that fails to disclose the identity of the TBE-sourced protected property upon request.¹³

D. Common Structural Features

Surveying the qualified spousal trust statutes across jurisdictions, several structural features appear consistently. First, all require that the spouses remain married to each other for the protection to persist. Divorce severs TBE and similarly defeats the trust-based immunity. Second, all require that the property remain in trust. Distributions out of the trust to one spouse may remove that property from the protection. Third, all provide a waiver mechanism so that the couple or the trustee can voluntarily subject the property to creditor claims, which is often necessary for mortgage financing. Fourth, and critically, all treat the transfer to trust as neutral for purposes of the underlying TBE analysis — the trust is treated as a transparent vehicle through which the marital co-ownership continues.

IV. THE CASE FOR PENNSYLVANIA REFORM

A. The Policy Justification Is Compelling

The argument for reform begins with the observation that the current Pennsylvania rule produces an outcome that no coherent policy rationale supports. The TBE doctrine is premised on protecting the marital unit from the separate liabilities of either spouse¹⁴. A married couple who transfers TBE property into their revocable trusts has not changed the economic reality of their shared ownership. They remain married. The property remains theirs. The marital unity that justifies TBE protection is fully intact. What has changed is only the legal form of title — a change made for entirely independent estate planning reasons that has nothing to do with creditor avoidance.

The current rule effectively punishes married couples for making responsible estate plans. This is particularly acute

in Pennsylvania, which lacks both a homestead exemption and a domestic asset protection trust statute. In neighboring states, residents have access to homestead protections and, in some cases, DAPT statutes that provide additional creditor-protection flexibility. Pennsylvania married couples planning to fund revocable trusts have neither of those alternatives and are forced to choose between two legitimate goals that the law should permit them to pursue simultaneously.

B. The Reform Does Not Create a Self-Settled DAPT

The most significant objection to a qualified spousal trust statute is that it creates, by implication, a domestic asset protection trust — allowing individuals to place their own property in a revocable trust while shielding it from their own creditors. Pennsylvania, like most UTC states, follows the rule that a settlor's creditors can reach assets in a self-settled revocable trust.¹⁵ A TBE-preservation statute must be designed carefully to avoid reading as a repeal of that rule.

The better-designed statutes navigate this concern by grounding the protection in the marital unity, not in the spendthrift or self-settled trust framework.¹⁶ The protection is available only to married couples as to property they already hold as TBE. It preserves an existing protection against a change in title form; it does not create new protection from scratch. Critically, the protection evaporates when the spouses divorce, when the property leaves the trust, or when both spouses jointly waive it. These constraints make the qualified spousal trust a different instrument from a DAPT and distinguish it doctrinally from the self-settled trust concern.

A Pennsylvania statute should include explicit language disclaiming any intent to authorize self-settled trusts more broadly, and should condition the protection on continuous marital status and continued trust holding. With those guardrails in place, the reform is difficult to characterize as a creditor-avoidance vehicle beyond the scope of existing TBE law.

C. Pennsylvania's Peer States Have Resolved This Issue

Pennsylvania practitioners regularly counsel clients who have connections to other states. The lack of a qualified spousal trust statute in Pennsylvania creates a planning disadvantage that clients increasingly notice when they compare their op-

¹⁵ UTC § 505(a) (self-settled revocable trusts remain accessible to the settlor's creditors); 20 Pa. C.S. § 7745 (codifying this rule in Pennsylvania).

¹⁶ See 20 Pa. C.S. § 7742 (Pennsylvania UTC spendthrift provision); compare with self-settled trust limitations under 20 Pa. C.S. § 7745.

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¹³ MD Code, Estates and Trusts, § 14.5-511(e)(1).

¹⁴ See, e.g., *Constitution Bank v. Olson*, 426 Pa. Super. 134 (1993).

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tions to those available to peers in neighboring TBE states that have modernized their law. It also places Pennsylvania-licensed attorneys in the awkward position of recommending state-of-residence considerations primarily to access creditor protections that Pennsylvania itself should provide.

Virginia, a TBE state with a robust estate planning culture, has operated its qualified spousal trust statute for over twenty years. Maryland, with a practice environment and bar culture closely analogous to Philadelphia and its suburbs, enacted its statute in 2010 and subsequently amended it to address practical questions. The body of interpretive experience in these nearby states provides a ready roadmap for drafting a Pennsylvania analog.

V. ELEMENTS OF A PROPOSED PENNSYLVANIA STATUTE

A Pennsylvania qualified spousal trust statute should include the following core elements:

(1) Scope of Covered Property. The statute should apply to all property that married spouses hold as tenants by the entireties at the time of transfer, encompassing both real and personal property in line with Pennsylvania's broad TBE doctrine. It should cover transfers into one or both spouses' revocable trusts and into joint revocable trusts.

(2) Preservation of Immunity. TBE-sourced property transferred to a qualifying trust should retain the same immunity from the claims of each spouse's separate creditors as it would have had if held in TBE, for so long as: (a) the spouses remain married; (b) the property continues to be held in the trust or trusts; and (c) the property continues to constitute their property.

(3) Opt-In Mechanism. Consistent with Maryland's approach, the statute should require the trust instrument or the deed of transfer to expressly invoke the statute's protection. This prevents inadvertent application and provides notice to lenders and other parties.¹⁷

(4) Waiver Provision. The spouses or the trustee acting under express trust authority should be able to waive the protection as to specified creditors or specified assets by written consent. This is essential for mortgage transactions, refinancing, and commercial lending arrangements that may require both spouses to subject the property to the lender's claims.

¹⁷ MD Code, Estates and Trusts, § 14.5-511(b)(4) (requiring the trust instrument or deed of conveyance to designate the property as subject to the statute's protection).

(5) Disclosure and Transparency. The statute should include a provision — along the lines of Maryland's — under which the immunity is waived as to assets whose TBE character the trustee fails to disclose upon a creditor's request for a financial statement. This provision balances protection with creditor transparency.

(6) Savings Clause. The statute should expressly state that it does not create, expand, or authorize self-settled domestic asset protection trusts more broadly, and that it does not alter or limit the application of Pennsylvania's Uniform Trust Code provisions governing settlors' rights, spendthrift trusts, or creditor access to revocable trust assets on the settlor's death.

(7) Death, Divorce and Dissolution. The statute should provide that the protection terminates automatically upon the dissolution of the marriage or a non-debtor spouse's death, at which point the property held in trust shall be treated as if the TBE tenancy had been severed at the time of the triggering event for purposes of creditor analysis.

VI. CONCLUSION

The qualified spousal trust is not a novel or exotic planning technique. It is a straightforward statutory fix to a problem that many states have already solved. The solution aligns form with substance: when a married couple transfers TBE property into their revocable trusts, the marital unity that justifies TBE protection is unchanged. Only the title form has changed, for entirely legitimate planning reasons. The law should not penalize that choice.

Pennsylvania's estate planning bar, fiduciary litigators, and creditor rights practitioners would all benefit from a clear statutory rule. Married couples in the Commonwealth deserve access to the same integrated estate and asset protection planning that their peers in Virginia, Maryland, and a growing list of other states already enjoy. The Real Property, Probate and Trust Law Committee of the Pennsylvania Bar Association is well-positioned to champion this reform.

Danielle Freidman author is a Principal and Estates & Trusts Practice Group Leader at Offit Kurman, P.A. in Philadelphia, where she practices exclusively in trusts and estates planning and administration. She is licensed in Pennsylvania, New Jersey, and South Dakota.

Yes! You Do Need to Know About Guardianship Law

By Linda J. Olsen, Esq., Hazen Law Group LLC

Think again if your first impression is “this article isn’t for me” because you don’t “do guardianships.” No matter what area of law is the focus of your practice, there is a better than even chance that, at some point, you will encounter a situation that requires an understanding about the provisions of Pennsylvania Guardianship law.

Did you know...

- If your client is buying real property and the owner has been declared an incapacitated person, the sale requires Orphans’ Court approval.
- If your client is the specific devisee of real estate under a Will, but the real estate was sold by a guardian after an adjudication of incapacity of the decedent, your client is entitled to an amount of money from the estate equal to the sale proceeds of the real estate.¹
- If a party in a divorce proceeding has been found to be incapacitated, absent specific authority contained in a guardianship order or otherwise ordered after a subsequent hearing with specific findings of fact, the guardian has no authority to consent to the divorce of the incapacitated person.²
- If a parent is adjudicated as incapacitated, the Court may *not* grant to a guardian the authority to consent, on behalf of the incapacitated person, to the relinquishment of the person’s parental rights.³
- If you are asked to prepare Wills for clients that one of the questions you should be asking is whether the testator has a special needs child or other family member who is incapacitated under the law. You should also know if the client is already serving as a guardian for any individual. Even if they have not been appointed Guardian by the Court, the testator should consider nominating a primary or successor guardian for any incapacitated individual named in their Last Will and Testament.
- If a special needs or disabled client is the recipient of a settlement award in litigation, you may need a guardian



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of the estate appointed to properly administer and protect any public benefits that individual is receiving or to which they might be entitled.

Even for attorneys, the word *guardianship* often first elicits an image of a written provision in a Last Will and Testament nominating someone to become the “guardian” of minor children in the event of parents’ deaths. In my experience, that’s just the tip of the guardianship iceberg and is a relatively small segment of guardianship legal practice in Pennsylvania. The larger segment of the practice is focused on the provisions to ensure the safety of and protection of assets for Pennsylvania adults, particularly those who have been identified as having an incapacity. While my own guardianship practice focuses primarily

on representing the parents of special needs children turning 18 who are unable to make decisions regarding their well-being, including activities of daily living, health care and medical decisions, and financial decisions, there are other populations equally in need of guardianship. For the purpose of this article, and in actual practice, an individual in need of guardianship protection is referred to as an Alleged Incapacitated Person (AIP).

When is Guardianship appropriate?

Guardianship is a way to protect an incapacitated individual from harm, whether physical, mental, or financial, but it also takes away significant rights and the autonomy of the AIP. Guardianship can override the wishes of the person who is found to be incapacitated. The appointed guardian may decide where the AIP lives, what care they receive and how their assets are used. Because of that, Pennsylvania holds that guardianship must be the least restrictive alternative. Before petitioning the Court to appoint a guardian, other less restrictive methods for protection of the AIP, such as Durable Powers of Attorney, Health Care Powers of Attorney and Health Care Representative Agreements must be explored and considered by Petitioners.

An adjudication of guardianship requires the “testimony, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities and disabilities and the person’s mental, emotional and physical condition, adaptive behavior and social skills.”⁴

⁴ 20 Pa. Cons. Stat. § 5518

¹ 20 Pa. Cons. Stat. § 2514 (16.1) (2025)

² 20 Pa. Cons. Stat. § 5521 (d)(2)

³ 20 Pa. Cons. Stat. § 5521 (f)(2).

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Context

On June 30, 1972, P.L. 508, No. 164 added Chapter 55 to the Pennsylvania Estates and Fiduciaries Code (“PEF Code”).⁵ It became effective July 1, 1972. The guardianship provisions of the PEF Code remained largely unchanged for 20 years. Various sections of Chapter 55 were amended in 1992⁶ and again in 2023⁷ and, most recently, in 2025.⁸

Currently, as added in the 1992 Amendment and retained through subsequent amendments, the stated purpose of Chapter 55 is

to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.⁹

This purpose does not specify any single specific group of people who may need guardianship protection. It speaks to the general welfare of all citizens. Understanding how this is important for those who are now the population of AIPs is critical. Historically the words “incompetent” and “incapacitated” have been used interchangeably in Pennsylvania. From a legal perspective, however, the two words have different meanings. Until 1992, someone who lacked the ability to make decisions on their own behalf and needed a legal guardian was called an incompetent under the PEF Code; however, in 1992, the PEF Code was updated to use the term “incapacitated”

⁵ 20 Pa. Cons. Stat. § 5501, *et seq.*

⁶ P.L. 108, No 24, April 16, 1991

⁷ Act of Dec. 14, 2023, P.L. 446, No. 61, amended subsections (a), (e) and (f) and added subsection (a.1).

⁸ Act of October 27, 2025, P.L. No. 129, No. 39, amended subsection (a.1) of § 5512.2.

⁹ 20 Pa. Cons. Stat. § 5502.

to describe a person in need of a legal guardian. In 2007 in another change to the PEF Code, this time to Chapter 54 regarding healthcare decision making, the term “incompetent” was reintroduced.

Under the Healthcare Representative Provisions Act (Act 169)¹⁰, the Commonwealth allowed close family or friends to make certain medical decisions even if not named as agent in a written healthcare power of attorney. In order for this provision to be used, a physician needed to deem the individual “incompetent” for purposes of medical decision making (meaning they lack the ability to provide consent for medical decision making). Incapacity is a legal determination allowing a guardian, either plenary or limited, to be appointed for the person and/or estate of the AIP.

Types of Guardianship

The PEF Code does not explicitly define the types of guardianship, rather it relies on the clear procedural and jurisdictional statements contained in Chapter 55. **Practice Tip: READ THE PEF CODE!**

The PEF Code recognizes that guardianship of the person and/or estate may be limited or plenary. In making a determination of incapacity, the court considers “[t]he type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.”¹¹ In addition, “the court shall prefer less restrictive alternatives to guardianship and, if no less restrictive alternatives are available and sufficient, limited guardianship.”¹²

Plenary

Plenary guardianship is a full, comprehensive guardianship that gives the guardian complete authority over the AIP’s person and/or estate. This type of guardianship is typically granted when the court determines that the person cannot manage their affairs at all and that a full scope of decision-making is necessary.

Limited

Limited guardianship is a more restricted form of guardianship, one which is to be preferred by the Court,¹³ where the court grants authority only for specific matters or purposes,

¹⁰ 20 Pa. Cons. Stat. § 5461

¹¹ 20 Pa. Cons. Stat. § 5512.1 (a)(4)

¹² 20 Pa. Cons. Stat. § 5512.1 (a)(6)

¹³ *Id.*

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rather than full control over the person's life or finances. This is often used when the person can still manage some aspects of their affairs, but certain decisions require court oversight.

Temporary (may also be classified as Limited)

Temporary guardianship would normally be granted in an emergency situation or when the duration of the guardianship is anticipated, based on facts and medical testimony, to be for a short and temporary period, usually to accomplish some specific transaction for the benefit of the *temporarily* incapacitated individual. A temporary guardianship might also be appropriate to handle financial and other needs of the AIP during a period of recovery and rehabilitation when there are no less restrictive methods in place, and some financial or physical harm could result to the AIP if a temporary guardian is not appointed.

The distinction between plenary and limited/temporary guardianships is part of the framework for determining the level of control the court will grant to the guardian, based on the incapacitated person's abilities and needs.

Who may be appointed to serve as a Guardian?

There are currently only three criteria to be met to be named a guardian. The Petitioner must be 18 years of age, have not been convicted of a felony, and not adjudicated incapacitated.¹⁴ In 2023, Act 61 added additional requirements mandating certification for individuals seeking guardianship of three or more incapacitated individuals.¹⁵

The most frequent petitioners in guardianships for special needs children are the parents of the child who has reached the age of majority but is unable to care for himself or herself or to make financial or medical decisions. Guardianship is different from just "helping" a loved one fulfill their basic needs; it is a legal status that can be created only by a judge after a formal legal process. For other adult guardianships, petitioners are most likely to be family members (children or siblings) of the alleged incapacitated person. In more rare instances, skilled nursing facilities may petition for a guardian to be named for a resident. In those instances, the guardian is likely to be a paid professional guardianship service. Once appointed, all Guardians, whether plenary or limited, must register with the statewide guardianship tracking system and file annual reports.

In 2024, the Office of Elder Justice in the Courts (OEJC) launched a grant-funded pilot project to provide free legal representation for all guardianship cases in Dauphin County

involving adults aged 60 and older. Working with MidPenn Legal Services, Dauphin County's Orphans' Court, under the leadership of Judge McNally, developed a legal services model for appointment of counsel for all alleged incapacitated persons aged 60 and older unless they declined representation, elected to hire private counsel, or had had counsel appointed by the court prior to the start of the pilot project. The program aligned with Act 61 of 2023 strengthening protections against elder abuse in guardianship settings.

The initiative was an overwhelming success and, according to Judge McNally, when the grant ended, the Dauphin County Commissioners approved funding to continue the program under this legal services model.¹⁶

Pro Bono Guardianship Monitoring Program¹⁷

Established in 2007, The Honorable Todd A. Hoover Pro Bono Guardianship Monitoring Program is a Dauphin County initiative designed to help the Orphans' Court fulfill its ongoing duty to monitor all guardianships. Monitors act as the "eyes and ears" of the court by visiting guardians, incapacitated persons, and anyone assisting in their care at least once a year. They submit reports to the court highlighting any potential issues, ensuring the guardian's actions are in the best interest of the incapacitated person. The written reports of the Monitors can be the basis for *sua sponte* Orders for review hearings by the Court.

Currently, most Pennsylvania counties have no **formal** guardianship monitoring programs. However, funding from the Elder Justice Innovation Grant to the Administrative Office of Pennsylvania Courts (AOPC) provided for the implementation of a pilot guardianship monitoring project to create and implement a statewide guardianship monitoring program to improve statewide guardianship services. The pilot program is a collaborative effort by the Cumberland County Bar Association, the Cumberland County Orphans' Court, Dickinson School of Law, local courts and the AOPC.¹⁸

Most Recent Legislation Amending Chapter 55

The enactment of Act 61 in 2023¹⁹ was a major overhaul to the PEF Code requirements for guardianships. The key provisions

¹⁶ Interview with the Honorable John J. McNally, III, Judge of the Dauphin County Court of Common Pleas, via Zoom in Harrisburg, PA (July 28, 2026).

¹⁷ Author, Linda J. Olsen, Esquire, has served as a Dauphin County pro bono monitor for over a decade.

¹⁸ [211109-elderjusticeinnovationgrantssummaryfebruary2024.pdf](#)

¹⁹ Act of Dec. 14, 2023, P.L. 446, No. 61

¹⁴ 20 Pa. Cons. Stat. § 5511 (f)

¹⁵ *Id.*

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and requirements of Act 61 are:

- **Mandatory Legal Counsel** – every alleged incapacitated person must have an attorney, either retained or court-appointed, to advocate for the AIP's legal rights through all stages of the guardianship proceeding, including review hearings.
- **Proof of Alternatives** – Petitions must explicitly state what less restrictive options (like POAs, trusts, or representative payees) were tried and why they are insufficient.
- **Strict Court Findings** – Judges must formally document the lack of family supports and the failure of alternative choices before granting a guardianship.
- **Guardian Certification** – Individuals or entities seeking to act as a guardian for three or more incapacitated people must meet specific professional certification standards.
- **Targeted Review Hearings** – Court must schedule follow-up reviews if evidence suggests an individual's capacity might improve or change over time.

Although many Pennsylvania counties had been routinely appointing counsel for the AIP in all contested guardianships and some for all guardianships, in my personal experience, that was the exception, not the rule, particularly in smaller and more rural counties. With the passage of Act 61, for the first time, all counties in Pennsylvania are required to appoint counsel to represent the AIP if the AIP has not retained private counsel. In most cases, the costs associated with court-appointed counsel are borne by the Courts/Counties, not by the AIP. Thus, the requirement to provide representation for AIPs can be a substantial financial commitment by Pennsylvania counties.

According to Judge McNally, Act 61 has been instrumental in obtaining better results for AIPs, "giving them better access to the Courts, more zealous representation, more autonomy, and implementing less restrictive alternatives to guardianship in appropriate cases."²⁰

Act of October 27, 2025, P.L. 129, No. 39

Act 39 amends Section 5512.2 (a.1) of the PEF Code to set new timelines and procedures for review hearings in guardianship cases. Under Act 39 of 2025, review hearings must be

²⁰ Interview with the Honorable John J. McNally, III, Judge of the Dauphin County Court of Common Pleas, via Zoom in Harrisburg, PA (July 28, 2026).

scheduled promptly, typically within 30-60 days of the filing of a petition, with flexibility for medical evaluations or preparation. Additionally, Act 39 provides for:

- Extensions beyond 60 days
- Restrictions on repetitive filings
- Hearing participation
- Court discretion.²¹

Because Act 39 has been in effect for only six months, there is not a lot of data yet on how the Act will change guardianship practice. It remains to be seen how it plays out in various counties; however, according to Judge McNally, Dauphin County is already anticipating more review hearings based on recommendations of guardian monitors and interested parties seeking modification or termination in favor of less restrictive alternatives.

Yes! You **do** need to know about guardianship law so that when that unanticipated moment of "need to know" arises, you will be ready. Understanding the recent changes and those that may come will enable you to provide excellent representation for your clients.

Linda J. Olsen is an attorney at Hazen Law Group LLC in Harrisburg, PA. She is a graduate of Duquesne University (B.S., summa cum laude, 2001) and The Dickinson School of Law of the Pennsylvania State University (J.D. 2004). Prior to joining Hazen Law Group, Ms. Olsen was an associate with a small Harrisburg law firm practicing in the areas of estate planning, estate administration, administrative law, business planning, and civil litigation. During law school, she served a student internship as a judicial clerk with the Honorable Sylvia H. Rambo, U.S. District Court for the Middle District of Pennsylvania. Ms. Olsen was also named as Public Interest Advocate by The Miller Center for Public Interest Advocacy and worked as a summer associate at MidPenn Legal Services in Gettysburg, Pennsylvania. Linda is a strong advocate for diversity and equality and brings real-life experience, beyond the classroom, to every area of her practice of law and representation of clients. As a member of the Hazen Law Group LLC, she concentrates her practice in the areas of estate planning, estate administration and guardianships.

²¹ See <https://www.palegis.us/statutes/unconsolidated/law-information/view-statute?txtType=HTM&SessYr=2025&ActNum=0039.&SessInd=0> for additional specifics

Special on Data Centers: Pennsylvania's Next AI Data Center May Be Won or Lost Before the Interconnection Application is Filed

By Daniel A. Garcia

For decades, proceedings before the Pennsylvania Public Utility Commission (PUC) have provided the forum in which utilities, ratepayers, consumer advocates, businesses, and other stakeholders shape the tariffs, rules, and rates governing electric service. Every affected party has the opportunity to participate by intervening in those proceedings.

What has changed recently is the significance of those proceedings for developers of artificial intelligence (AI) data centers, large-load customers, and municipalities. As utilities respond to unprecedented load growth, issues that directly affect project development — i.e., interconnection requirements, cost responsibility for system upgrades, customer classification, electric service agreements, and reliability obligations — are increasingly being addressed through tariff revisions and rate case settlements.

Recent proceedings before the Pennsylvania PUC demonstrate that utilities are actively reevaluating how large-load customers connect to and use the electric grid. While each case presents utility-specific issues, several common themes are providing a road map for how Pennsylvania's regulatory framework is likely to evolve as demand for electric infrastructure continues to accelerate. For more information, see PPL Electric's Base Rate Case, Docket No. R-2025-3057164; UGI Base Rate Case, Docket No. R-2025-3059430; UGI Default Service Plan Petition, Docket No. P-2024-3049343; and FirstEnergy Pennsylvania Electric Company Default Service Plan Petition, Docket No. P-2026-3060298.

Waiting Until Your Project Is Ready May Be Too Late

Many developers become involved only after selecting a site and submitting an interconnection application. By then, however, many of the governing rules have already been established through tariff revisions approved in prior PUC proceedings.

Increasingly being decided in PUC proceedings and not during individual project negotiations are questions such as:

- Who pays for dedicated substations and distribution upgrades?
- Will financial security or revenue guarantees be required?
- What happens if a project is delayed or constructed in phases?



Daniel A. Garcia

- How will large-load customers be classified for tariff purposes?
- What contractual commitments will utilities require before constructing infrastructure?

Developers, municipalities recruiting economic development projects, and large industrial customers all have a direct stake in those decisions.

Timing matters. In most Pennsylvania PUC proceedings, petitions to intervene must be filed within 20 days of the PUC's order instituting the proceeding unless a later filing is permitted for good cause.

Developers, municipalities, and other stakeholders should monitor proposed tariff filings and rate cases closely, as the opportunity to participate can pass long before a project enters the utility's interconnection queue.

For organizations evaluating significant infrastructure investments, participating in a proceeding can be substantially more effective than attempting to challenge a tariff after it has been approved or negotiating around standardized tariff provisions once a project enters the interconnection process.

Looking Ahead

Pennsylvania is well positioned to capitalize on growing demand for AI infrastructure, but the regulatory framework governing large-load interconnections is evolving just as rapidly as the market itself. Looking Ahead

Organizations considering significant electric infrastructure investments should monitor PUC proceedings as closely as they monitor site selection, permitting, and financing. The legal and commercial terms governing a future interconnection may be established months, or even years, before a project enters the utility's queue.

Whether evaluating a proposed tariff, considering intervention in an ongoing proceeding, or negotiating utility service for a large-load project, early participation can provide opportunities that may not be available once the regulatory framework has been established.

Pennsylvania Raises the Regulatory Bar for Data Center Development

By Kurt L. Krieger and Daniel A. Garcia

Pennsylvania continues to welcome data center investment, but the Commonwealth is imposing greater discipline on how projects secure electric service and address impacts on ratepayers and host communities. These new regulations are mandating that developers coordinate utility, regulatory, environmental, and municipal approvals much earlier in the development cycle.



Kurt L. Krieger

Large-Load Tariffs Will Shape Project Economics

In May 2026, the Pennsylvania Public Utility Commission (PUC) issued a Final Order establishing a model large-load tariff. The model generally applies to individual loads of at least 50 MW or aggregated loads of at least 100 MW, although utilities may propose applying similar requirements to smaller projects with significant system impacts.

The model addresses interconnection studies, infrastructure-cost responsibility, financial security, minimum contract terms, load-ramp schedules, minimum billing demand, early-termination obligations, and customer self-construction of certain facilities. The model tariff does not require specific statewide rates or service terms. Instead, it provides a framework for utility-specific tariff filings that must be reviewed and approved by the PUC. Each electric distribution company must still implement appropriate requirements through a Commission-approved tariff.

PPL Electric has already adopted a separate large-load framework through its recent base-rate proceeding, including long-term service commitments, minimum demand guarantees, and financial protections. Developers must therefore evaluate the serving utility's tariff before relying on preliminary cost estimates or energization schedules.

Projected Loads Will Face Greater Scrutiny

Act 45 of 2025 established a statutory framework for PUC oversight of the load forecasts that Pennsylvania electric distribution companies submit to PJM Interconnection. Act 21 of 2026 amends that framework by expressly autho-



Daniel A. Garcia

rizing the PUC's enforcement bureau and statutory advocates to review utility agreements and customer commitments affecting forecast assumptions, subject to confidentiality protections.

This expanded review authority elevates the importance of documentation supporting a proposed large load. Letters of authorization, service agreements, deposits, ramp schedules, site-control arrangements, and other commercial commitments may influence whether

a utility considers a project sufficiently viable for inclusion in its load forecast. Developers should therefore coordinate project milestones and avoid inconsistent timelines, unsupported demand projections, or duplicative service requests that could undermine the project's treatment in utility and PJM planning.

Reporting and State-Support Requirements Beginning

Beginning July 1, 2027, Act 21 of 2026 requires Pennsylvania data centers with a peak electric demand of at least 10 MW to report energy and water consumption, projected demand, generation sources, efficiency measures, and environmental protections to the Department of Environmental Protection. Failure to report may result in penalties of \$10,000 per day.

Separately, the Governor's Responsible Infrastructure Development Standards establish conditions for data centers seeking certain Commonwealth benefits. Participating developers must address energy affordability, incremental generation, project-caused utility costs, community engagement, workforce commitments, and environmental performance.

The Pennsylvania Department of Community and Economic Development's nonbinding Data Center Planning Toolkit will also influence municipal review of zoning, water, infrastructure, fiscal impacts, emergency services, and community benefits.

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What Developers Should Do Now

Because a data center's development schedule and economic viability will depend in large part on decisions made by the serving utility, the PUC, PJM, and state and local permitting authorities, developers should evaluate potential system upgrades, cost responsibility, and regulatory conditions before committing to an energization date or finalizing the project's financing structure.

Dan Garcia brings more than a decade of regulatory experience to clients in the energy industry where he helps oil and gas producers, midstream companies, and utility clients navigate various regulatory matters before public service, utility commissions, and Department of Transportation agencies, including the Pipeline and Hazardous Materials Safety Administration (PHMSA), Pennsylvania Public Utility Commission (PA PUC), and Maryland Public Service Commission (MD PSC). Prior to joining Steptoe & Johnson, Dan served as a state regulatory attorney for a major regional electric utility company, and as a regulatory compliance manager for a midstream company serving the Marcellus and Utica Shale regions.

Kurt Krieger focuses his practice in the areas of utility regulation and energy law. He has experience representing interstate natural gas pipeline companies, midstream companies, and gas and electric utilities before the Federal Energy Regulatory Commission (FERC), and state and commonwealth public service (or utility) commissions. His experience includes counseling gas and electric companies on economic, safety and facility siting regulation, and counseling and drafting commercial agreements pertaining to energy-related transactions. Kurt has experience with all types of state and federal rate-related, ratemaking, tariff, facility expansion, certificate, complaint, and rule-making matters, and federal enforcement proceedings before the FERC.

Beware the Philadelphia Realty Transfer Tax Trap

By Andrew J. Barron

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Trusts and estates and real estate lawyers should have a good understanding of Realty Transfer Tax (“RTT”). Without a full grasp of the technical rules and the key distinctions between state and local taxes (Philadelphia in particular), a transfer to or from a trust could end up with an unexpected and significant tax liability. This article highlights the inconspicuous but important differences between the Pennsylvania and Philadelphia rules and the traps to avoid while dealing with Philadelphia real estate.



Andrew J. Barron

[a]ny trust, *other than a business trust or a living trust*, which takes effect during the lifetime of the settlor and for which the trustees of the trust take title to property primarily for the purpose of protecting, managing or conserving it until distribution to the named beneficiaries of the trust. An ordinary trust does not include a trust that has an objective to carry on business and divide gains, nor does it either expressly or impliedly have any of the following features: the treatment of beneficiaries as associates, the treatment of the interests in the trust as personal property, the free transferability of beneficial interests in the trust, centralized management by the trustee or the beneficiaries, or continuity of life.⁷

RTT is a tax on the value¹ of real property transferred from one party to another. All transfers are subject to RTT unless the transaction is specifically excluded. Taxable transfers are subject to a 1% Pennsylvania tax. Transfers of Philadelphia property are hit with an additional 3.578%, while other localities impose their own RTT. Although local RTT rules are often similar or equivalent to the state statute, they have different bases in law and should be treated separately. The parallel sets of rules frequently cause confusion among attorneys and other real estate professionals.

Both Pennsylvania and Philadelphia exclude transfers for no or nominal consideration by testamentary or intestate succession.² Also excluded are transfers between spouses (including divorced spouses in some cases),³ between lineal ascendants and descendants (or their spouses),⁴ between siblings (or their spouses),⁵ and between stepparents and stepchildren (or their spouses).⁶ For the purpose of this article, let’s call this group of excluded transferees “Qualified Family Members.”

The tax becomes more complicated when a transfer is made to or from a trust. Defined terms play a crucial role. Pennsylvania defines “ordinary trust” as

“Business trust” is not directly defined, but the second sentence in the above definition of “ordinary trust” delineates its features.⁸ A “living trust” is “any trust, other than a business trust, intended as a will substitute by the settlor which becomes effective during the lifetime of the settlor, but from which trust distributions cannot be made to any beneficiaries other than the settlor prior to the death of the settlor.”⁹ Revocable trusts often qualify as a “living trust” but be sure to check that the trustee cannot make distributions to anyone other than the Settlor. Otherwise, your revocable trust may not qualify as a “living trust.”

Pennsylvania excludes transfers to ordinary trusts for no or nominal consideration where the transfer of the same property would be exempt if the transfer was made directly from the grantor to “all of the possible beneficiaries that are entitled to receive the property or proceeds from the sale of the property under the trust, whether or not such beneficiaries are contingent or specifically named.”¹⁰ The inclusion of a “takers of last resort” clause in the trust does not trigger the tax as long as the clause is limited to the grantor’s intestate heirs.¹¹

¹ Determining the “value” of transferred property is another complex issue beyond the scope of this article.

² 72 P.S. § 8102-C.3(7); Phila. Code § 19-1405(7).

³ 72 P.S. § 8102-C.3(6); Phila. Code § 19-1405(6).

⁴ 61 Pa. Code § 91.193(b)(6); Phila. RTT Reg. § 503(b)(6).

⁵ 72 P.S. § 8102-C.3(6); Phila. Code § 19-1405(6)

⁶ *Id.*

⁷ 72 P.S. § 8101-C (emphasis added).

⁸ See *Kosco v. Commonwealth*, 987 A.2d 181, 184 n.4 (Pa. Commw. Ct. 2009) (noting the definition of “business trust” can be extrapolated from the definition of “ordinary trust”); see also 15 Pa.C.S. § 9501, *et seq.* (Pennsylvania statute governing business trusts).

⁹ 72 P.S. § 8101-C (emphasis added).

¹⁰ 72 P.S. § 8102-C.3(8).

¹¹ *Id.* 61 Pa. Code § 91.156(b) Be aware that a last resort clause benefiting a charity does not comply with this rule and may cause the imposition of RTT at state and local levels.

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Transfers from ordinary trusts are excluded if the beneficiary is specifically named in the recorded trust document, or to a contingent beneficiary if a direct transfer from the grantor to that contingent beneficiary would be excluded.¹²

Remember that Pennsylvania differentiates “ordinary trusts” from “living trusts.” Transfers to a living trust for no or nominal consideration are always excluded from tax, regardless of the trust beneficiaries.¹³ After the grantor of a living trust dies, transfers from the trust to its beneficiaries are excluded.¹⁴ Transfers from a living trust back to the grantor are not taxed.¹⁵

Philadelphia’s RTT rules are in Chapter 19-1400 of the Philadelphia Code (the “Code”) and its regulations.¹⁶ The Code largely follows the state statute but has key differences:

1. Neither the Code nor its regulations define the term “ordinary trust” but, confusingly, the term is used throughout. Like Pennsylvania, Philadelphia does not tax transfers to ordinary trusts as long as direct transfers to all possible trust beneficiaries (including remote contingent beneficiaries) would be excluded.¹⁷
2. Philadelphia does not tax transfers from an ordinary trust (whatever that term means) to any “beneficiary specified in the original recorded trust agreement under which the property was initially conveyed into the trust.”¹⁸ On the other hand, Pennsylvania distinguishes between transfers to “specifically named” beneficiaries vs. “contingent” beneficiaries.¹⁹
3. Philadelphia makes no mention of living trusts or an analogous term
4. Unlike Pennsylvania, Philadelphia does not carve out “takers of last resort” provisions.

Section 406 of the Philadelphia RTT regulations provides some limited guidance. The section covers transfers to and from “trusts” generally, although the term is not defined.

¹² 72 P.S. § 8102-C.3(9).

¹³ 72 P.S. § 8102-C.3(8.1).

¹⁴ 72 P.S. § 8102-C.3(9.1). Since living trusts are often used as will substitute, this rule aligns with the exclusion of all transfers by testamentary or intestate succession. 72 P.S. § 8102-C.3(7).

¹⁵ 72 P.S. § 8102-C.3(9.2).

¹⁶ Philadelphia RTT regulations can be accessed at <https://www.phila.gov/media/20161003113934/Realty-Transfer-Tax-regulations-1989.pdf>.

¹⁷ Phila. Code § 19-1405(8).

¹⁸ Phila. RTT Reg. § 406(b).

¹⁹ 72 P.S. § 8102-C.3(9).

First, a transfer to a trust is fully taxable unless the transfer of the same property would be wholly exempt if the transfer were made directly from the grantor to all possible beneficiaries. Second, a transfer from a trust is fully taxable except for transfers for no or nominal actual consideration from the trustee to the beneficiary specified in the original recorded trust agreement under which the property was initially conveyed into the trust. Third, transfers of beneficiaries’ interests (i.e., by exercising a power of appointment) are taxable unless the transfer would be excluded if made directly from the beneficiary to the new beneficiary.²⁰

There are at least four traps in the Philadelphia RTT rules to be aware of when planning and drafting trusts:

1. **The temptation to use state definitions when interpreting Philadelphia RTT.** Pennsylvania expressly defines the terms “ordinary trust” and “living trust.” It does not define “business trust” but it has been described in case law. On the other hand, Philadelphia doesn’t define “ordinary trust” or “business trust,” fails to address living trusts, and has rules for “trusts,” generally, in its regulations. Although it is tempting to use Pennsylvania definitions to fill in Philadelphia’s various gaps, remember that the state and city rules stem from separate authority and are not binding on each other. Without further guidance, we can only guess what the city means when the Code and its regulations refer to ordinary trusts and business trusts.
2. **Transfers to and from revocable trusts.** At the state level, a transfer to a revocable (living) trust is typically excluded from RTT. Since Philadelphia does not account for living trusts, practitioners are left wondering whether the Philadelphia ordinary trust rules include living trusts. The author could find no published letter rulings, Tax Review Board decisions,²¹ or court opinions providing any additional guidance. Until the city clarifies this issue, assume transfers to and from revocable trusts are “trusts” governed by Section 406 of the RTT regulations. In other words, a transfer of Philadelphia real estate to the grantor’s revocable trust may be taxed by the city, even though it is essentially a transfer to him or herself.
3. **Takers of last resort clauses.** Drafters often include a “takers of last resort” (a/k/a catastrophe) clause in their documents in the case all current and contingent beneficiaries are deceased. The default takers are often charities

²⁰ Phila. RTT Regs. § 406(a)-(c).

²¹ The Tax Review Board has original jurisdiction to hear Philadelphia RTT appeals. Phila. RTT Reg. § 102.

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or the grantor's intestate heirs. The state carves out an exclusion for last resort clauses benefiting intestate heirs but the city does not. Since the class of Qualified Family Members (as defined above) is narrower than the group of possible intestate heirs, the inclusion of a last resort clause in a trust may inadvertently trigger Philadelphia RTT.²² To avoid this issue, limit takers of last resort to Qualified Family Members or request a private letter ruling from the Philadelphia Department of Revenue.²³

4. **Accidental creation of business trusts.** Philadelphia does not define business trust, directly or indirectly. However, business trusts are included in the definition of "corporation," which are not subject to the Qualified Family Rules. The city will look at facts and circumstances to determine whether a trust is sufficiently businesslike. Exercise caution and request a private letter ruling when in doubt.

Hopefully Philadelphia will release new regulations sorting out these issues and providing some certainty. Until then, estate planners and other real estate professionals should be advised of possible tax exposure.

Andrew J. Barron is an associate in the trusts, estates and personal planning practice at Stradley Ronon Stevens & Young. Based in the firm's Philadelphia office, Andrew represents high-net-worth individuals in all aspects of estate, trust and tax planning. He also represents fiduciaries in the administration of trusts and estates.

²² 20 Pa.C.S. § 2103. The intestacy statute includes aunts, uncles, nieces, nephews, and cousins, none of whom are Qualified Family Members.

²³ More information on requesting private letter rulings can be found at <https://www.phila.gov/services/payments-assistance-taxes/regulations-rulings/technical-private-letter-rulings>.

The Ascertainable Standard

The Good, the Bad, and the Misused and Misunderstood

By Joel S. Lubber

Real Facts from a Real Case. Grantor creates an irrevocable trust for the benefit of his wife and descendants (“Beneficiaries”). He names a corporate fiduciary as initial trustee. He also names a family friend as the trust protector. The trust permits the trustee to distribute net income and principal to and among the Beneficiaries for their health, maintenance, support, and education.

Wife asks the trust protector to remove the corporate fiduciary, who had been paying wife \$500 per month, and replace it with herself as the trustee, which the trust protector does. The friend, former trust protector, and now new trustee, then distributes the entire principal balance of the trust to the wife, thereby terminating the trust and leaving the grantor’s descendants with nothing. This distribution had no relation to the educational or medical or maintenance needs of the wife, who also happened to inherit \$6M for her husband, grantor.

Question 1: In defending the terminating distribution made by the successor trustee, would you be comfortable relying on the discretion the trustee had to make that distribution, which was circumscribed by “health, maintenance, support and education” (the shorthand used in the world of trusts being “HEMS”)? Would you be more comfortable if the discretion in the trust agreement was more generous, e.g., “best interests and general welfare”? Would you be even more comfortable if the discretion in the trust agreement was even more generous, e.g., “best interests, general welfare and happiness”? These questions, of course, are rhetorical.

Question 2: If the trustee above loses the lawsuit filed by the other Beneficiaries, would the wife have a malpractice claim against the scrivener of that trust for using the HEMS standard, as opposed to a more generous standard, if the grantor really intended to give broad discretion to benefit the wife (even to the detriment of the other Beneficiaries)? Stated differently, would a more generous standard of distribution in the trust agreement have likely deterred the other Beneficiaries from filing the lawsuit in the first place? I believe the answer to both questions is affirmative.

Question 3: So, why does anyone ever use a HEMS standard when writing a trust?



Joel S. Lubber

Purported Answer To Question 3: Because (i) it is found in many trust “forms” that have been passed down from generation to generation in large law firms and in small law firms, turning these four words almost into boilerplate and/or (ii) trust drafting software encourages its use. This paper will attempt to support a more succinct, but admittedly debatable answer: No one should use HEMS.

That being said, I do acknowledge that there are gift tax and estate tax considerations¹ that come into play that make recommending the HEMS standard a “safe” play. But those circumstances are very limited, at best. And the other reason normally given for using a HEMS standard is creditor protection. But that, too, is mostly a canard. Both topics will be explored.

I can also tell you from my 40+ years of experience primarily focused on estate planning that 95% (rough estimate) of all the trust documents I have ever read prepared by other lawyers use the HEMS standard to define a trustee’s discretion to make distributions from the trust. Not that I necessarily relish being a contrarian, but I can honestly tell you I almost never use it. Two exceptions: (i) a particular planning strategy utilizing an incomplete transfer nongrantor trust [DING or NING or WING depending on your preferred jurisdiction], where one needs to assure that the gift is incomplete for Federal gift tax purposes not only as to the principal portion of the gift, but also as to the income portion of the gift; and (ii) when a client absolutely insists on its use regardless of my recommendation to the contrary.

When this real case first dropped into my lap, and then thinking it could be the foundation for a paper that would be of interest to others, I did consider undertaking an examination of relevant case law which would shed light on distribution standards, and perhaps provide a list of permissible and impermissible distributions from a trust that fall within an ascertainable standard. Exhaustive research, however, has proved this a futile task for two reasons. First, the economics of American

¹ There are also income tax consequences associated with HEMS, which are primarily those that determine whether a trust is a grantor trust for Federal income tax purposes. This paper will not include any discussion of those rules, with the assumption that all the trusts discussed here are intended to be nongrantor trusts.

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jurisprudence make it unlikely that many such cases will ever be reported. A beneficiary may get upset when his trustee will buy him “only” a Cadillac for his support and maintenance, rather than the Ferrari he wants. But is the beneficiary really going to sue the trustee to get the Ferrari? Even if the beneficiary wins, his trust will likely pay the trustee's legal expenses, which will no doubt be substantially more than the cost of any car. Also, if the beneficiary does complain, is his case likely to get to the point where it will become legal precedent? Likely, the parties will settle out of court. Thus, the case will likely go unreported and therefore unavailable as legal precedent for future disputes.

That being said, Trustees should always be mindful that remainder beneficiaries can challenge distributions made if they do not comply with the terms of the trust – including the HEMS directive. So, while the current beneficiary may be perfectly content with a distribution that falls under the gray area of HEMS – or one that does not comply at all – there are other people who can challenge a trustee's decision to make a distribution; and not complying with the terms of the trust agreement can put a trustee in hot water fast.

As a final introductory note, although it is difficult to characterize the use of a HEMS standard as negligence, only because of the prevalence of use in the profession, in my humble opinion, I could probably make that case in almost every trust document I have seen that uses a HEMS standard to define permissible distributions to be made to a beneficiary.

To support my argument, let's get started with definitions.

What Does HEMS Mean? In almost all instances the traditional ascertainable standard is memorialized with the words “health, education, maintenance and support” or some variation thereon. Treas. Reg. § 20.2041-1(c)(2) also includes the following sample language that will be acceptable to the IRS to describe an ascertainable standard, albeit the language of this Regulation is provided in the context to avoid a power from being considered a general power of appointment:

1. support in reasonable comfort;
2. maintenance in health and reasonable comfort;
3. support in his accustomed manner of living; and
4. education, including college and professional education.

Health and Education. Of the four components of the HEMS standard, health and education are relatively easy. Although there is no clear, bright-line definition of what constitutes health or education, health and education expenses tend to be uncontroversial.

But that is not to say that there may be some distributions related to health that may be more problematic, such as elective medical procedures (especially cosmetic procedures); tattoo removal; concierge medicine; extended vacations or retreats to improve mental health; health-related home improvements or renovations; purchase of home exercise equipment; and gym, spa, tennis or golf club memberships.

As concerns education, without limiting or expanding provisions in a trust document, items typically include tuition, living expenses, fees, books and other cost of higher education and/or technical training.

Maintenance and Support. These two terms are generally considered to be similar or even synonymous.² However, when the distribution standard includes the terms support and maintenance, a trustee's discretion is not unbridled discretion. Rather, the trustee's discretion must be “reasonably exercised to accomplish the purposes of the trust according to the settlor's intention and his exercise thereof is subject to judicial review and control.”³

The Restatement provides a nonexclusive list of example expenditures which fall within the support and maintenance standard. These include: “regular mortgage payments, property taxes, suitable health insurance or care, existing programs of life and property insurance, and continuation of accustomed patterns of vacation and of charitable and family giving.”⁴ In addition, courts have held that “[t]he needs of a married man include not only needs personal to him, but also the needs of his family living with him and entitled to his support.”⁵

Comfort. That leaves the tricky one – “comfort”. As noted above, Treas. Reg. § 20.2041-1(c)(2) includes sample language that will be acceptable to the IRS to describe an ascertainable standard, with two of those including the word comfort. How far can a grantor go in directing a trustee to make a beneficiary reasonably comfortable?

² See Restatement (Third) of Trusts § 50 Comment d (2003).

³ See *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957).

⁴ Restatement (Third) of Trusts § 50 comment d(3) (2003).

⁵ *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181 (Ind. Ct. App. 1943); *Levine v. Levine*, 209 F. Supp. 564 (D. Del. 1962).

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It is an axiom of trust law that state law determines the legal interests and rights created by a trust instrument, but federal law determines the tax consequences of those interests and rights.⁶ In *Estate of Vissering v. Comm'r*, 990 F.2d 578, 581–82 (10th Cir. 1993), the Court had to determine how a Florida state court would rule on the use of the term “comfort.” The Court stated that it believed the Florida Supreme Court would hold that a trust document permitting invasion of principal for “comfort,” without further qualifying language, creates a general power of appointment.⁷ However, it then focused on modifying language in the trust that it believed would lead the Florida courts to hold that “comfort,” in context, does not permit an unlimited power of invasion. That language stated that invasion of principal was permitted to the extent “required for the continued comfort” of the decedent.⁸

Tax Law Definitions. If a trustee of a given trust is also its beneficiary, and he or she may make distributions to him- or herself without being bound by an ascertainable standard, then the IRS will treat the beneficiary as having a general power of appointment over trust property, which, in turn, would make all the trust’s assets includible in his or her estate at the death of the beneficiary.

Of course, a primary purpose of many trusts is keeping assets out of a beneficiary’s estate. To that end, Internal Revenue Code (“IRC”) Section 2041 and its regulations create an ascertainable standard as a safe harbor within which a trustee/beneficiary may take refuge and avoid inclusion for estate tax purposes, or within which the holder of a power may take refuge that a transfer is not a completed gift for gift tax purposes:

A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of section 2041(b)(1)(A), not a general power of appointment.⁹

This rule allows a beneficiary to act as Trustee and not risk inclusion in his or her estate for Federal estate tax purposes if he or she is limited to an ascertainable standard.

⁶ *Morgan v. Commissioner*, 309 U.S. 78 (1940).

⁷ See Treas. Reg. 20.2041-1(c).

⁸ For other cases interpreting the word “comfort,” see, e.g., *First Virginia Bank v. United States*, 490 F.2d 532, 533 (4th Cir. 1974); *Lehman v. United States*, 448 F.2d 1318, 1320 (5th Cir. 1971); *Miller v. United States*, 387 F.2d 866, 869 (3d Cir. 1968); *Estate of Schlotterer v. United States*, 421 F. Supp. 85, 91 (W.D. Pa. 1976); *Doyle v. United States*, 358 F. Supp. 300, 309-10 (E.D. Pa. 1973).

⁹ Treas. Reg. § 20.2041-1(c)(2); see *Estate of Budd*, 49 T.C. 468 (1968) acq. 1973-2 C.B. 1; *Estate of Frew*, 8 T.C. 1240 (1947); Rev. Rul. 73-143, 1973-1 C.B. 407; PLRs 200213013, 200123034, 200011055, 200011054, 199903025 and 9527025.

But are taxes really an issue? Putting aside for the moment any discussion of grantor trusts, and the estate and legacy planning purposes for utilizing trusts, but focusing more on financial management and asset protection purposes of a trust, the trust vehicle for the transfer is chosen because there is real concern by the Grantor that an outright transfer is either not appropriate or not in the best interests of the Beneficiary. Otherwise, the Grantor would make an outright gift or testamentary transfer to the Beneficiary. Those reasons can include age; exposure of the assets to the claims or designs of third persons; disability of the Beneficiary; and simply the possibility of improvident (spendthrift) behavior of the Beneficiary. With this basic structure of a trust, i.e., where the Grantor, Trustee and Beneficiary are distinct individuals, there is no question that giving the Trustee discretion to make distributions of income and principal to the Beneficiary for purposes more generous than a HEMS standard does not expose the trust assets to gift tax or estate tax of the Grantor or the Beneficiary. So, why restrict the distribution discretion of the Trustee to HEMS? I see no reason for that, unless, of course, the Grantor really does want to circumscribe distributions to be limited to the very basics of life, like food, shelter, clothing, and health and/or to avoid a Beneficiary from becoming a “trust fund baby” (“trustafarian”). But that’s not a tax motivated reason. Think about whether the purpose of your trust has any tax motivations before defaulting to HEMS.

First Variation on the Theme. The Grantor wants to name the Beneficiary as the Trustee. Why would a Grantor want to do that? It can’t be because the Grantor wants the Beneficiary to have control over the distributions from the trust. Otherwise, there is no reason to create the trust in the first place (putting aside the creditor protection issues for the moment). Just make an outright transfer. But even if the distribution standard is limited to HEMS, notwithstanding the purported safe harbor of Treas. Reg. §20.2041-1(c)(2), the assets of the trust may still be included in the Beneficiary’s estate for estate tax purposes. Moreover, who is to stop the Beneficiary from making whatever distributions he or she wants to make to himself or herself regardless of a HEMS standard? The remainder beneficiaries? That means a lawsuit of not inconsequential cost, family disruption, and uncertain result, like the real case first described above. To structure a trust with that type of exposure can’t be a reason to create a trust in the first instance, HEMS or no HEMS.

The more likely reason a Grantor wants to name the Beneficiary as a Trustee is to offer that Beneficiary the opportunity to become more familiar with the financial and investment aspects of trust management, certainly a legitimate goal. But that can be accomplished by designating the Beneficiary as a co-trustee of the trust, as opposed to the sole trustee, and

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excluding from that Beneficiary-Trustee's authority the distribution decisions. With this variation, there also is no reason to restrict the distribution discretion to HEMS. The assets will not be included in the Beneficiary's estate for estate tax purposes; because the Beneficiary will not possess a general power of appointment over those assets.¹⁰ The only restrictions or concerns here may be the identity of the co-trustee, even if the co-trustee is the only person making the distribution decisions. It is best that the co-trustee is not a "related or subordinate party" to the beneficiary, as defined in IRC §672(c). An "independent" trustee (not a defined term in the Code) would be better. Even better would be an "adverse party", which is a defined term in the Code. IRC §672(a). Similarly, the Beneficiary should not be given the authority to remove and replace the co-trustee with a related or subordinate party. If there is power to remove with no requirement to replace, and the Trustee has the discretion to distribute principal or income under a standard broader than HEMS, then the Beneficiary will be deemed to hold a general power of appointment.¹¹

Second Variation on the Theme. The Grantor, himself, also wants to be the Trustee, or co-trustee, of the trust. Here, as stated above, if the Grantor is the sole Trustee, a HEMS standard is needed to avoid inclusion of the assets in the Grantor's estate under IRC §§ 2036 and 2038. But if the Grantor can live with being only a co-trustee and authorizing the other

¹⁰ IRC §2041; *United States v. Byrum*, 408 U.S. 125 (1972).

¹¹ Treas. Reg. § 20.2041-1(b)(1).

trustee to make the distribution decisions, the distribution discretion can be expanded beyond HEMS, and the Grantor can be assured that the assets will not be included in his or her estate for estate tax purposes, so long as the identity of the co-trustee is not a "related or subordinate party" to the Grantor. And, if the reason the Grantor wants to be a co-trustee is to retain the power to remove and replace the designated co-trustee (which can be done without serving as co-trustee in any event), so long as the identity of the successor co-trustee is not a "related or subordinate party" to the Grantor, there will be no estate tax inclusion of the trust assets in the Grantor's estate. Also, if the reason a Grantor wants to be a Trustee is to control the investments of the trust, a Grantor can designate himself as the investment manager of the trust, removing that traditional role from the trustee, without fear of estate tax inclusion; provided, however, investment decisions are not made with the intent to shift beneficial interests among the Beneficiaries.¹²

¹² Secondary authorities and administrative rulings distinguish general investment or management authority from a grantor's nonfiduciary power to substitute trust assets of equivalent value under I.R.C. § 675(4)(C). Under Revenue Ruling 2008-22, a grantor's retained nonfiduciary power to substitute assets will not, by itself, cause estate inclusion under I.R.C. §§ 2036 or 26 USC § 2038, provided specific safeguards are met. To prevent the substitution power from being deemed an estate-triggering power to shift benefits, one of the conditions that must be satisfied is that the substitution power must not be capable of being exercised in a manner that can shift benefits among the trust beneficiaries.

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Pennsylvania State Law Specifics.

Built In Safeguards. Under Pennsylvania law, 20 Pa.C.S. § 7504(a)(1), establishes the general rule that a trustee cannot exercise a power conferred by a governing instrument to make discretionary distributions of principal or income to or for the benefit of themselves, their estate, or their creditors. If the trust instrument does not contain an ascertainable standard, the statutory prohibition strips the interested trustee of the authority to participate in the distribution, leaving any such distribution power to be exercised solely by the remaining co-trustees.

Pennsylvania law also includes a statutory savings clause that automatically intervenes to prevent estate tax inclusion. Specifically, 20 Pa.C.S. § 7506(a)(1) provides that no beneficiary of a trust may remove a trustee and appoint in their place a trustee who is "related or subordinate" to the beneficiary within the meaning of IRC § 672(c) unless the trustee's discretionary power to make distributions to the beneficiary is limited by an ascertainable HEMS standard.

This statutory prohibition effectively prevents the beneficiary from possessing a general power of appointment, thereby avoiding federal estate tax inclusion under IRC § 2041. This restriction does not apply if the appointment can only be made in conjunction with an adverse party possessing a sub-

stantial interest in the trust. 20 Pa.C.S. § 7506(b)(1), or if the beneficiary holds an unlimited individual right to withdraw the entire principal.¹³

Creditor Protection. To be fair, and ironic, the actual meaning of the most common ascertainable standard in American trust law (HEMS) remains amorphous, undefined and poorly understood, even by most practitioners. Yet, as amorphous or undefined as it may be, American trust law does accord that term a level of significance to the point that any trust beneficiary to whom distributions are to be made in accordance with an ascertainable standard can essentially demand that a distribution from the trust be made to that beneficiary if the trustee fails to do so, even when the discretion to distribute is prefaced with "in the sole discretion of the trustee", or words of similar import. This being the result, as previously posited, because ascertainable is synonymous with the concept of "certainty". And if that is the case, how much of a quantum leap does it take to be able to argue that a creditor of that beneficiary can also demand that a distribution be made from the trust, either directly to the creditor, or to the beneficiary, where that creditor can lie in wait, ready to pounce upon the distribution as soon as it hits the hands of the beneficiary.

Spendthrift Provisions. As a preliminary matter, before delving into the nuances of a beneficiary's right to demand a distribution, and concomitantly, a creditor of the beneficiary's right to demand a distribution, arguably, this is (or should be) an academic exercise only; so long as there is a sufficiently crafted spendthrift provision included in the trust agreement. Of all the trust agreements I have read, if, as first stated above, the 95% number is accurate for those that I have seen that include a HEMS distribution standard, that percentage must be higher for those that I have seen that include a spendthrift provision. That is, it is a rare trust agreement, indeed, that does not include one.

Is this sufficient? Does this put to rest the canard that a HEMS standard is necessary to achieve creditor protection for a trust beneficiary? I sure hope so. On the other hand, the PEF Code tells us what happens if you don't include a spendthrift provision in the trust agreement. 20 Pa. C.S. § 7741, titled "Rights of beneficiary's creditor or assignee - UTC 501", states as follows:

A judgment creditor or assignee of the beneficiary may reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means to the extent the beneficiary's interest is not subject to a spendthrift provision.

¹³ 20 Pa.C.S. § 7506(b)(2).

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Submissions for the Winter/Spring 2027 issue are due March 31, 2027.

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So, Rule #1 always include a spendthrift provision in a trust agreement. As I observed earlier, I have rarely seen a trust agreement that does not.

Conclusion. The use of the HEMS standard is not required to avoid exposure to gift tax or estate tax of the grantor or beneficiary. That can be accomplished easily with the careful selection of the trustee, and/or carefully circumscribing powers to replace trustees, and/or carefully defining any powers the grantor wishes to retain. There is nothing in Pennsylvania law that states or implies that the use of a HEMS standard is required to assure that result, or that a HEMS standard creates more creditor protection than if a different standard is used. Ergo, it is my considered opinion that there is no reason to use a HEMS standard for discretionary distributions in a trust agreement, but that a much more generous standard can be used without any exposure to demands from beneficiaries or demands from beneficiary creditors. Moreover, as surprising as it may sound, the use of a HEMS standard could very well create more exposure to demands from beneficiaries and their creditors than would the use of a more generous standard.

Joel S. Luber is Senior Counsel and Chair of the Wills, Trusts & Estates Group at Reger Rizzo & Darnall LLP. He concentrates his practice on sophisticated estate planning for high-net-worth individuals, asset protection, estate administration, Orphans' Court matters, and corporate and tax planning. Joel also advises clients on complex commercial transactions, including mergers and acquisitions, business succession planning, shareholder and partnership agreements, and real estate transactions.

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