SECTION REPORT:
From the Chair

By Aubrey H. Glover

The Real Property, Probate and Trust Law Section continues to be a strong voice for members of our section by advocating for the improvement of those laws which are of concern to our members. In the last session of the Legislature, we reviewed, commented on, revised and supported many bills that did not make it through but are poised to be reintroduced in the coming session. Examples of legislation with which we have been actively involved and which we expect to be reintroduced include:

- Former Senate Bill 1092, which would make changes to our power of attorney statute in response to the decision in Vine v. SERS Board, 9 A3d 1150.
- Former Senate Bill 2275 (the Revised Uniform Law on Notarial Acts) to provide minimum standards for all notarial acts and govern the recognition of notarizations across state and national lines.
- Former House Bill 1701, to create a Geospatial Coordination Council.

In addition, we are also actively participating in discussions to consider whether statutory changes should be made regarding (i) Pennsylvania’s real estate tax sales laws and (ii) the use of the POLST Form (Physicians Orders for Life Sustaining Treatment). Our section will continue to monitor legislative developments and advocate for resolution of issues affecting areas of the section’s concern.

Another priority item for the section was to provide for new leadership for the section’s newsletter. For several years, the executive editor of the newsletter was Neil E. Hendershot and the editor was Mark B. Hammond. While Neil will continue to have a role with the newsletter, Mark decided the time was right for him to pursue other endeavors. We owe a debt of gratitude to both, especially Mark. They provided an invaluable service to our section, and we are very grateful for their amazing dedication and efforts.

Going forward, the following have graciously agreed to serve in various editorial capacities:

Executive Editor: Daniel B. Evans
Assistant Editors, Probate and Trust Division: Alison T. Smith, Anthony A. Simon

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SECTION REPORT: From the Chair

(Continued from Page 1)

Assistant Editors, Real Property Division: Charles F. Smith Jr. Theodore Claypoole

Editor at Large: Neil E. Hendershot

I am confident that with the new editorial board, the newsletter will continue to be a valuable resource to our members.

While our newsletter is one of the best resources we provide to our members, its production involves a great deal of effort and commitment from the editors. Between locating authors and articles to provide the wonderful content and occasionally twisting the arms of chairs and vice chairs to provide their reports, the editors have a difficult job. To make it less difficult, please reach out to the editors with articles to submit or ideas for future articles.

Finally, please mark your calendar and make plans to attend this year’s Real Property, Probate and Trust Law Section Annual Meeting from May 8-9 in Pittsburgh. Our annual wine-tasting dinner will be held on May 8 at Cioppino, which is located in Pittsburgh’s Strip District and promises to be a delightful event. Space is limited for the dinner so you will want to register as soon as you receive the brochure for the Annual Meeting.

The section will also offer its usual menu of CLEs. The Annual Meeting will begin with the ever-useful update of the law in real property, probate and trust areas. In addition there will be several other CLE programs offered, including: (i) Real Estate Reassessments, (ii) Redevelopment of Pittsburgh’s Strip District, (iii) Inheritance Tax Exemption for Family Farms, (iv) Deed Drafting Errors and How to Avoid Them, (v) Update on Orphans’ Court Rules and Guardianship Legislation, (vi) Update on Federal Estate and Gift Taxes, (vii) Tax Increment Financing, (viii) Representing Lawyers in Trust and Estate Malpractice and (ix) Financial Action Task Force on Money Laundering – the Gatekeeper Initiative.

I must extend my thanks and gratitude to Immediate Past Section Chair Bridget Whitley for all of her hard work in planning the Annual Meeting. I also thank Vice Chair Louis M. Kodumal and council member Hal D. Coffey for their efforts in assisting Bridget in identifying topics and speakers.

Until the Annual Meeting, I welcome comments from our section membership on any other matters of concern. I can be reached at aglover@cohenlaw.com or 412-297-4713.

Aubrey H. Glover, chair of the section, is an associate with the Pittsburgh law firm Cohen & Grigsby PC.

Interested in contributing to the next RPPT Section Newsletter?

We welcome updates on committee activities or projects, or on matters affecting our practice areas. We seek equality between our Divisions; and we need commitments for material from each Division. We ask our officers, council members and committee chairs to submit or recruit material, or to recommend material to reprint with permission. Please produce submissions in MS Word format and send the file as an attachment via e-mail to the editor. The deadline for the Summer 2013 newsletter is May 17, 2013.

Executive Editor: Daniel B. Evans, dan@evans-legal.com

PBA Staff Editor: Amy Kenn, Amy.Kenn@pabar.org
Looking Back on 2012...

As we all try to absorb the fallout of post-fiscal cliff America, let us take a moment to reflect upon the past and take a look at some of the significant developments in the probate trust world that occurred in 2012.

LEGISLATIVE ROUNDUP

Power of Attorney Legislation: Withered on the Vine

In the Summer 2012 newsletter, we spent time discussing HB 1905 and SB 1092, and commended Immediate Past Section Chair Bridget M. Whitley for her active involvement advancing the views of our section in the legislative response to the Pennsylvania Supreme Court’s ruling in Vine v. Pennsylvania State Employee’s Retirement Board. We anticipated that the Legislature would adopt new law clarifying the circumstances under which third parties may refuse to honor the directions of an agent under a power of attorney and what, if any, liability they might incur if they do so without a valid reason. But, alas, as the 2012 legislative session came to a close, no action was taken. It appears that SB 1092 will be re-introduced next session, and the RPPT Section will remain involved and keep our members informed.

“Granny Snatching” Law Adopted

On July 5, 2012, HB 1720 was signed into law as Act 108 of 2012 to create a new Chapter 59 in Title 20 (Decedents, Estates and Fiduciaries) to provide for uniform adult guardianship and protective services jurisdiction. Act 108 is rooted in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which was approved in 2007 by the National Conference of Commissioners for Uniform State Laws (NCCUSL — the same folks who brought us the Uniform Trust Act). The new law provides procedures to resolve interstate jurisdiction controversies, facilitates transfers of guardianship cases among jurisdictions, provides for recognition and enforcement of a guardianship or protective service order from a foreign jurisdiction, facilitates communication between courts of different jurisdictions, and addresses emergency situations and other special cases.

Sweeping Amendments to Guardianship Law Proposed

Introduced late in the 2011-12 legislative session, SB 1614 (reintroduced as SB 117 in the 2013-14 session) would make sweeping amendments to guardianship law in Pennsylvania. Among the many proposed changes to Title 20 are the following:

1. Amendment of § 751 and 752 to provide for the appointment and compensation of auditors and masters;
2. Creating a new § 5503 which addresses venue and jurisdiction where proceedings are brought in different Pennsylvania counties;
3. Creating a new § 5504 dealing with the confidentiality of information in guardianship proceedings;
4. Amending § 5511 to expand the scope of persons entitled to notice, to specify that the inability of the alleged incapacitated person (“AIP”) to understand the proceedings does not constitute “harm” excusing their attendance, mandating that where a guardianship support agency is the petitioner, they must disclose their financial information and current list of guardianships, and providing a framework regarding order of preference in appointing a guardian;
5. Repealing § 5512 in view of new § 5504;
6. Creating a new § 5512.4 to expedite the uncontested termination of a guardianship;
7. Creating a new § 5512.5, which addresses counsel’s ability to act on behalf of an AIP, even if retained prior to adjudication, and terminating services of current counsel and appointment of new counsel or a guardian ad litem;
8. Reorganizing § 5513 to better address when an emergency guardian of a Pennsylvania resident may be appointed, even if they are currently outside of Pennsylvania, and clarifying the scope and judicial extension of an emergency guardian’s powers;
9. Repealing § 5515 in view of new §§ 5515.1, 5515.2, and 5515.3;
10. Creating new § 5515.1 providing for the removal and discharge of a guardian;
11. Creating new § 5515.2 providing for the appointment of a guardian in conveyance;
12. Creating new § 5515.3 providing for the execution and filing of a surety bond;
13. Amending § 5518 to specify how to establish incapacity when the proceeding is contested, or is not contested but the AIP or the AIP’s counsel is present;
14. Amending § 5518.1 to confirm that testimony regarding incapacity is subject to cross examination generally (not just by counsel for the AIP);
15. Amending § 5521 regarding abatement of actions and clarifying which powers of a guardian require court approval prior to their exercise and creating a statutory framework for several commonly encountered circumstances, including (a) enforcement of liens against real estate owned by guardian, (b) dealing with death or incapacity of guardian, (c) specifying the powers of surviving or remaining guardians, (d) means of resolving disputes between co-guardians, (e) specific performance of contracts, (f) abandonment of property, (g) title of purchaser, (h) settlement of claims with or without court approval, (i) record keeping by guardian and (j)
**REPORT:**

Real Property Division

**By Louis M. Kodumal and Steven B. Loux**

**New Land Banks Legislation is Approved**

Act 153 of 2012 (House Bill 1682), amending Title 68 (Real and Personal Property) of the Pennsylvania Consolidated Statutes, provides for the creation of land banks for the conversion of vacant or tax-delinquent properties into productive use. Land banks are locally created and managed legal entities established for the purpose of amassing, inventorying, managing and marketing blighted, abandoned and tax foreclosed properties. Act 153 enables any county, city or borough with a population of 10,000 or more to form a land bank to acquire and manage taxed foreclosed and abandoned properties for the purpose of preparing them for re-use. A group of two municipalities with populations less than 10,000 would also be permitted to establish and maintain a land bank under the bill. The act was signed into law by Gov. Tom Corbett on Oct. 24, 2012, and takes effect in 60 days.

**Real Property, Probate and Trust Law Section Council Business**

The Real Property, Probate and Trust Law (RPPT) Section Council conducted a meeting and teleconference on Nov. 15, 2012, at the Holiday Inn East Harrisburg. The following topics were discussed as part of the Real Property Division report.

**1) Mechanic’s Lien Law**

There are two very significant decisions of the Superior Court from the past year involving the Mechanic’s Lien Law, which practitioners in the fields of real estate law and financing are following to see if the Pennsylvania Supreme Court takes these cases for review:

(a) **Bricklayers of Western PA v. Scott’s Development Co., 41 A.3rd 16 (Pa. Super 2012)**

The lower court in this case had ruled that the collective bargaining agreements in question were not subcontracts and that the trustees under a union’s collective bargaining agreement lacked standing to assert Mechanic’s Lien Law claims. This ruling was reversed by the Superior Court, holding that the definition of “subcontractor” in the Mechanic’s Lien Law is to be liberally construed.

This case holds for the first time that trustees under a union’s collective bargaining agreement may file subcontract mechanic’s lien claims under the Mechanic’s Lien Law, even though the statute does not include laborers in the definition of “subcontractor.” The majority’s opinion also indicates that a liberal rather than a strict construction standard is to be applied in the interpretation of the Mechanic’s Lien Law, which abrogates a long line of precedent to the contrary.


In Kessler, the Superior Court held, inter alia, that the mortgagee’s open-end mortgage recorded in 2007 did not have priority over a 2009 judgment rendered in favor of a general contractor who had obtained a mechanic’s lien based on construction begun in 2006, where Section 1508 of the amended Mechanic’s Lien Law (which provided that any lien obtained under the law was subordinate to an open-end mortgage) was not satisfied.

As a result of the Superior Court’s ruling in Kessler, an open-ended mortgage qualifies for the statutory exception in Section 1508(c)(2) and gains priority over contractors/subcontractor’s liens, only if all of the proceeds of the mortgage are used to pay for completing erection, construction, alteration or repair of the mortgaged premises. In Kessler, a portion of the mortgage proceeds were used for costs such as tax claims, closing costs, satisfaction of an existing mortgage on the property and payment of other judgments and liens.

As a result of this ruling, one would expect that lenders would take special care to scrutinize and control the distribution/use of loan proceeds based on an open-end mortgage and note, to ensure that all of the loan proceeds in question are used for completion of “erection, construction, alteration or repair” and not for other purposes such as payment of back taxes against the subject property or other expenses of the loan, for purposes other than listed in the referenced Section 1508(c)(2). We will be monitoring the new legislative session to see if any legislation amending the Mechanic’s Lien Law is introduced.

**2) Real Estate Tax Sale Reform Legislation**

We continue to monitor proposed legislation affecting real estate tax sales. House Bill 1782 was introduced in 2011 and proposed to amend Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to provide for a uniform procedure throughout the Commonwealth of Pennsylvania for tax foreclosure sales. The Municipal Law Section and RPPT Section have reviewed House Bill 1782, and representatives of both sections attended a hearing before the House Urban Affairs Committee on this bill. These sections identified issues of concern which we believed required further review and recommendations. Based on the sections’ recommendations, the PBA approved a resolution that opposed the initial draft version of the bill and offered recommendations.

The Urban Affairs Committee is (Continued on Page 6)
ARTICLE:

Estate and Trust Tax Changes for 2013

The American Taxpayer Relief Act of 2012, Pub.L. 112-240, and the Health Care and Education Reconciliation Act of 2010, Pub.L. 111-152, made several changes affecting estate planning and estate and trust administration in 2013:

1. The $5,000,000 federal estate and gift tax exclusion amount that was enacted for two years as part of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, Pub.L. 111-312, and was due to “sunset” at the end of 2012, is now permanent. As adjusted for inflation, the exclusion amount is $5,250,000 in 2013. See Rev. Proc. 2013-15, Sec. 2.13.

2. The maximum federal estate and gift tax rate has been increased from 35 percent to 40 percent for gifts made, and decedent’s dying, after Dec. 31, 2012.

3. Most of the income tax rate reductions first enacted in 2001 are now permanent, except that the top income tax rate has returned to 39.6 percent, which for estates and trusts begins at $11,950 in 2013. See Rev. Proc. 2013-15, Sec. 2.01. (Individuals have a new 35 percent tax bracket between the 33 percent bracket and the new 39.6 percent bracket, but estates and trusts do not.)

4. The top income tax rate that applies to capital gains and qualified dividends has been increased from 15 percent to 20 percent.

5. A new permanent “fix” to the alternative minimum tax has raised the AMT exemptions under IRC section 55(d) for most taxpayers, but not estates or trusts. However, a new inflation adjustment has raised the AMT exemption for estates and trusts to $23,100 for 2013. See Rev. Proc. 2013-15, Sec. 2.06.

6. A new 3.8 percent tax applies to net investment income in excess of certain amounts. For estates and trusts, the 3.8 percent tax applies to the lesser of (a) the undistributed net investment income or (b) the adjusted gross income in excess of $11,950. See I.R.C. section 1411, and the IRS’s Net Investment Income Tax FAQs at http://www.irs.gov/uac/Newsroom/Net-Investment-Income-Tax-FAQs.

ARTICLE:

Inheritance Tax Return Correction Procedures Clarified

(The following is the text of a notice published in the Tax Update newsletter of the Pennsylvania Department of Revenue, No. 164, page 2 (October/November 2012).)

To address confusion among tax practitioners and taxpayers concerning proper procedures for correcting errors on inheritance tax returns, the department clarifies that amended inheritance tax returns are not recognized by state law or accepted by the department.

A supplemental return is required when reporting additional assets, transfers or deductions that were not reported on the original return or a previously filed supplemental return. It is not appropriate, however, to use a supplemental return to amend a prior return in an attempt to correct errors.

To report errors such as transposed figures, miscalculations and obvious duplication of assets, an estate must notify the Department of Revenue of the mistake by letter. The letter requesting administrative adjustment must identify the alleged error and the proposed correction. The letter, along with any documentation supporting the adjustment, should be directed to:

PA Department of Revenue
Bureau of Individual Taxes
Post Assessment Review Unit
PO Box 280601
Harrisburg, PA 17128-0601

Errors more complex than those referenced herein must be resolved by utilizing either the statutory appeal or refund procedures. The appeal procedures are summarized on Page 4 of the Instructions for the Pennsylvania Inheritance Tax Return for Resident Decedents REV-1500, and Page 5 of the Instructions for the Pennsylvania Inheritance Tax Return for Nonresident Decedents REV-1737A.

Questions regarding correcting an error on a filed return may be directed to the Inheritance and Realty Transfer Tax Division at 717-787-8327.
REPORT:  
Real Property Division  
(Continued from Page 4)

reviewing the preliminary comments of the Municipal Law Section and RPPT Section and is seeking additional comment from PBA for the reintroduction of legislation in the new legislative session.

We will continue to work with the Municipal Law Section and the Urban Affairs Committee in our efforts to improve the legislation.

Proposed Legislation Affecting  
Notary Public Practice

The House of Representatives passed House Bill 2275, legislation to improve the regulation of Notary Publics, on June 13, 2012, by a vote of 198 to 0. While HB 2275 did not clear the Senate before the expiration of the most recent legislative session, similar legislation is expected to be introduced again in the current legislative session. We anticipate that the new legislation is likely to include additional anti-fraud provisions (with language consistent with the Resolution of the PBA House of Delegates) as part of the bill.

HB 2275, as written, proposed to amend the Judicial Code, Title 42 of the Pennsylvania Consolidated Statutes, to enact the Uniform Unsworn Foreign Declarations Act and amend Title 57 (Notaries Public) to enact the Revised Uniform Law on Notarial Acts. Under the proposed legislation, a notary public must determine that the person coming before the notary has the identity of the person claimed and that the signature is valid. A notary may determine the identity of the person by using documents, including a birth certificate, a passport, a driver’s license or another form of government identification. Notaries may refuse to perform a notarial act if they are not satisfied that the person coming before them is competent or that the person’s signature is not knowingly or voluntarily made or that the person coming before them is not the person claimed. The bill establishes revised qualifications for a notary public, increases the regulatory powers of the Department of State with respect to notary public practice and also prohibits a notary public from using the terms “notario” or “notario publico” or otherwise engaging in the unauthorized practice of law.

Additional language was added to ensure the Department of State could suspend or revoke a notary public’s commission where there is a conviction after trial, entrance into ARD, plea of guilty or nolo contendere or not guilty by reason of insanity for crimes related to fraud, dishonesty or deceit.


2013 RPPT Section Annual Meeting

If any section members have any interest in presenting a CLE seminar involving any aspect of real estate law at the 2013 RPPT Section Annual Meeting (May 8-9 in Pittsburgh), please contact Bridget M. Whitley, immediate past chair of the RPPT Section Council, by email at bwm@skarlatoszonarich.com or by phone at 717-233-1000.

If you would like more information regarding any of the matters covered in the Real Property Division report or if you would like to become more involved with the RPPT Section newsletter or Real Property Division matters, please feel free to contact me by phone at 610-566-8064 or by email at lkodumal@vmancinilaw.com. We welcome your input and suggestions.

Editor’s note: Link references in this article utilize Google URL shortening for ease of reference for readers of the printed edition.

Louis M. Kodumal of the Law Offices of Vincent B. Mancini & Associates in Media is the vice chair of the Real Property Division of the PBA Real Property, Probate and Trust Law Section. Steven B. Loux is the PBA’s legislative counsel.

REPORT:  
Probate and Trust Law Division  
(Continued from Page 3)

standards of liability for guardians of the person;

(16) Creating new § 5526 addressing third-party liability and immunity;

(17) Amending § 5531 regarding mandatory and voluntary filing of accounts;

(18) Amending § 5536 regarding estate planning and gifting; and, finally,

(19) Amending § 5553 regarding posting of bond by a guardianship support agency.

As noted above, SB 1614 was introduced late in the legislative session and was not acted upon. The RPPT Section will continue to follow this legislation in its latest form as SB 117 of 2012-13.

Orphans’ Court Appellate Rules  
Rewritten

Appeals from orders issued by Orphans’ Court Divisions are now governed, effective Feb. 12, 2012, by revised procedural rules which were further amended by Pennsylvania Supreme Court Order dated July 16, 2012. The collective revisions address disputed matters in an estate, trust or guardianship from which a party seeks appeal to the Superior Court or, if granted, the Supreme Court. Revised Rule of Appellate Procedure 342 specifies what matters may be appealed as of right. Revised Rule of Appellate Procedure 311(g) deals with the failure to timely appeal an order that is immediately appealable.

Inheritance Tax Relief for  
Family Farms

Act 85 of 2012 offers significant

(Continued on Page 7)
inheritance tax relief to families engaged in farming from generation to generation. The act establishes an inheritance tax exemption for transfers of real estate “devoted to the business of agriculture” to members of the same family. “Agriculture” is broadly defined to include activities such as hunting and fishing preserves, training game animals, fur farming, stockyard, and slaughterhouse or manufacturing in addition to raising crops. The term “family” branches out broadly to include the brothers and sisters of the decedent’s parents and grandparents, along with the ancestors, lineal descendants or spouse of the foregoing.

The statutory provisions are found at 72 P.S. § 9111(s), effective June 30, 2012. The law requires the land to remain in agricultural use for seven years following the transferor’s date of death and the property must derive annual gross farming income of $2,000 or more. The new law is annotated in the August and November 2012 editions of Fiduciary Review.

DEVELOPMENTS IN THE CASE LAW

ERISA Pre-emption of PEF Code

In In Re Estate of Sauers, 32 A.3d 1241 (Pa. 2011), the Supreme Court reversed the Superior Court and held that the federal Employee Retirement Income Security Act (ERISA) preempts PEF Code § 6111.2, which creates a presumption that beneficiary designations in favor of a spouse are revoked upon divorce. At issue were life insurance benefits payable to a spouse where decedent died four years after a divorce and failed to remove her as primary beneficiary under an employer-sponsored plan. This case makes critical a post-divorce review of all beneficiary designations in life insurance plans or benefits governed by ERISA.

Pittas and filial responsibility in Pennsylvania

As annotated in the Summer 2012 RPPT newsletter, the Superior Court applied Pennsylvania’s filial support law to hold a son liable for his mother’s $93,000 nursing home bill in Health Care & Retirement Corporation of America v. Pittas (Pa. Super.Ct. No. 536 EDA 2011, May 7, 2012). The court relied upon a law that has long been “on the books” in Pennsylvania but seldom used as an enforcement tool, 23 Pa.C.S.A. § 4603, which requires a child to provide support for an indigent parent. The legislature has not yet responded to the Pittas case.

Estate Tax Relief Extended — For the Most Part

A brief comment on post-fiscal cliff America is perhaps unavoidable. In the wee hours of Jan. 1, 2013, the Senate passed HR 8, the “American Taxpayer Relief Act” (soon to be known as “ATRA”) by a margin of 89-8 and later that day the House of Representatives passed the bill by a margin of 257 to 167. The president signed the act into law on Jan. 2, and it became Public Law 112-240, the last of the 112th Congress. The good news … leaving aside the significant changes to the income tax rates under the new law, there was a sigh of relief among taxpayers whose estates exceed $5 million as the exemption level for estate, gift and generation skipping tax is slated to remain — apparently on a permanent basis — at that level. The bad news? The act also permanently increases the top estate and gift tax rate from 35 percent to 40 percent. The portability feature, which allows the porting of a deceased spouse’s unused exemption to their surviving spouse, also remains intact. The changes are effective for individuals dying after 2012.

Listserv

As a reminder to all of our readers, if you have not yet registered for our Listserv, you are missing out on a wealth of information. The Listserv is an e-mail based “chat room” where RPPT Section members routinely post questions, recent developments in statutory and case law, and other informative items and receive feedback from other section members. We are fortunate to have some very talented legal minds in our section who freely donate their time and effort to posts on the Listserv. Members who participate routinely describe the Listserv as one of the most valuable benefits of section membership. The sign-up form is at http://www.pabar.org/public/listservform.asp and you can email traci.raho@pabar.org with questions or problems with subscriptions.

Wishing all of you a healthy and productive 2013.

Eric R. Strauss is a shareholder in the law firm of Worth, Magee and Fisher PC, with offices in Allentown and Lehighton. He is vice chair of the Probate and Trust Law Division of the PBA Real Property, Probate and Trust Law Section.

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LCL Confidential Lawyers Helpline (888) 999-1941
By Ronald M. Friedman

Early in my career as a landlord-tenant attorney, I was asked to defend a landlord against a claim arising from the landlord’s disposal of many boxes of miscellaneous papers left behind by a tenant whose lease term had expired and who had vacated the premises. The tenant claimed that the boxes contained her doctoral thesis, and she sought reimbursement for three years of tuition, books and living expenses she lost because her thesis was destroyed. The former tenant demanded a very generous settlement. We did not settle, and we won the case in magistrate court. The downside was that the landlord had to go to the trouble and expense of defending the claim. At that time and until September 2012 there were no statutory procedures for dealing with personal property abandoned by a departed tenant.

Case Law

Because there was no statute and no specific procedures for dealing with abandoned personal property, it was left to the courts to resolve the issue, and it had been held that generally the tenant does not lose title to personal property by neglecting to remove it at the expiration of the lease term even if the tenant fails to remove the property within a reasonable time after the lease expiration. Bednar v. Marino, 435 Pa. Super. 417, 646 A.2d 573 (1994). And, it had been held that any retention, use or disposal of tenant’s property by the landlord or any other exercise of dominion and control over it to the exclusion of the rights of the tenant constituted conversion of the tenant’s property. Bednar v. Marino, supra. This holding is for actions taken by the landlord in a commercial lease.

The same result was reported in a case where the landlord threw away the tenant’s property during a rent dispute. Pikunse v. Kopchinski, 429 Pa. Super. 46, 631 A.2d 1049 (1993). The landlord’s actions were held to be conversion of the tenant’s property and an award of punitive damages was made in favor of the tenant. Also, there is a case, Hoyt v. Christoforou, 692 A.2d 217 (Pa. Super. 1997), that held that abandonment of personal property cannot be inferred by the landlord by reason of the tenant’s departure from the leased premises. In other words, there must be something more than the departure of the tenant for the landlord to assume that the property left at the leased premises has been abandoned.

New Statute

Pennsylvania has now adopted a statute to create procedures for dealing with property left on the leased premises by the tenant. The Act of July 5, 2012, No. 129, amended the Landlord and Tenant Act of 1951 to include a new section 501a (68 P.S. 250.505a), Disposition of Abandoned Personal Property.

Under the new statute, the tenant is required to remove all personal property from the premises. If there still is property at the leased premises, the tenant must notify the landlord within 10 days regarding the removal of the property. The landlord then is obligated to “retain” the property at a site of the landlord’s choosing. If the tenant does not notify the landlord within 10 days of the intent to remove property, then the landlord shall have the right to dispose of the property, subject to compliance with the statute.

For situations in which the tenant has not notified the landlord of the intent to remove personal property left behind, the landlord must notify the tenant that property has been left behind, and the tenant shall have 10 days from the date of the postmark on the notice to retrieve the property. If the tenant wishes to recover the property, the landlord must retain the property for the benefit of the tenant for a period of 30 days from the postmark date. The location of the property must be in “reasonable proximity” to the leased premises. If no communication is made by the tenant to the landlord within 10 days, then the landlord may dispose of the property.

Notice Requirements

The notice by the landlord to the tenant must be in writing and conveyed by: 1) regular mail to the forwarding address of the tenant or to the leased premises if no forwarding address is provided; or 2) personal service by hand delivery. Also, if the lease agreement does not include the language in subsection (b) of the statute (which describes the 10-day period for claiming property left on the premises), then a copy of the notice must be sent to any emergency contact provided by the tenant in the lease agreement.

The statute also sets out the requirements for what must be included in the notice by the landlord. The contents of the notice should include a description of the property and must include a summary of the time limits and rights of the tenant to retrieve the property, as well as information concerning any costs that the tenant may incur for the transportation and storage of the property. Also, contact information must be provided in the notice, including a telephone number that may be used to reclaim the property and the location of the property.

Standard of Care

After the time period has expired for the tenant to contact the landlord or retrieve the property, the landlord shall have no further responsibility to the tenant for safeguarding the property. As for safeguarding the property, the
landlord need only use “ordinary” care in doing so. “Ordinary care” is not defined. Presumably it means that there are no special efforts required to ensure that the property is safeguarded at a higher level than a reasonable person might do with personal property. If the disposition of the property involves its sale, then the landlord must account to the tenant for the proceeds by certified mail if a forwarding address was provided. If no address was provided, then the landlord is required to hold the proceeds for 30 days, after which the proceeds may be retained by the landlord. The landlord is also permitted to retain the amount of proceeds to pay any obligation that the tenant has to the landlord for the removal and storage of the property.

Of course, the landlord will know in advance of any sale whether a forwarding address has been provided by the tenant. If an address was provided, there is no real incentive for the landlord to go to the trouble of selling the property, obtaining the proceeds and accounting to the tenant for those proceeds unless there has been more than nominal costs incurred by the landlord.

Obligations and Liabilities

After either giving or receiving notice of abandoned property at the leased premises, the tenant is not obligated to pay any costs for retrieval or storage that may be incurred by the landlord if the property is reclaimed within the 10-day period. After the 10-day period, the tenant would have to pay for the removal and storage during the period that the property is held between the 10-day notice period and the final expiration of the right to reclaim the property within 30 days.

One positive outcome of having a procedure for the disposition of property is that the landlord by statute has no responsibility to the tenant for the property if the landlord has fully complied with the statute. This minimizes the potential of a lawsuit by a tenant for the loss of (for example) the six-pack of Rolex watches mistakenly left behind at the end of the tenant’s possession of the leased premises. Attorneys who deal in landlord-tenant matters should carefully review the procedures outlines in 68 P. S. 250.505a to make sure that their clients comply with the statute. The immunities granted to landlords in the statute for handling tenant’s abandoned property will most likely apply only if there is compliance with the letter of this new law. ■

Obligations and Liabilities

After either giving or receiving notice of abandoned property at the leased premises, the tenant is not obligated to pay any costs for retrieval or storage that may be incurred by the landlord if the property is reclaimed within the 10-day period. After the 10-day period, the tenant would have to pay for the removal and storage during the period that the property is held between the 10-day notice period and the final expiration of the right to reclaim the property within 30 days.

One positive outcome of having a procedure for the disposition of property is that the landlord by statute has no responsibility to the tenant for the property if the landlord has fully complied with the statute. This minimizes the potential of a lawsuit by a tenant for the loss of (for example) the six-pack of Rolex watches mistakenly left behind at the end of the tenant’s possession of the leased premises. Attorneys who deal in landlord-tenant matters should carefully review the procedures outlines in 68 P. S. 250.505a to make sure that their clients comply with the statute. The immunities granted to landlords in the statute for handling tenant’s abandoned property will most likely apply only if there is compliance with the letter of this new law. ■

The Consumer Financial Protection Bureau (CFPB) was created in July 2010 as part of the Dodd-Frank financial reform legislation in response to the sub-prime lending crisis and complaints about deceptive or abusive practices by banks, credit card companies and mortgage brokers. The Dodd-Frank Act directed the CFPB to combine forms created under two Federal statutes: the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act of 1974 (RESPA). The CFPB was created to implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent and competitive. There are two forms that have been proposed by the CFPB: (1) the Loan Estimate, and (2) the Closing Disclosure. The comment period for the proposed rules closed on Nov. 6, 2012, but the timing of the implementation of the forms remains unclear.

**Loan Estimate**

The Loan Estimate would replace two existing federal forms: the Good Faith Estimate (GFE), designed by HUD under RESPA, and the “early” Truth In Lending Disclosure (TIL), designed by the Federal Reserve Board under TILA. The Loan Estimate is designed to provide disclosures that will be helpful to consumers in understanding the key features, costs and risks of the mortgage and contains a specific definition of what constitutes an application. The lender must give the Loan Estimate to the consumer within three business days after the consumer applies for a mortgage loan. The lender generally cannot charge consumers any fees until after the consumers have been given the Loan Estimate form and the consumers have communicated their intent to proceed with the transaction. There are certain tolerances built into the numbers disclosed on the form and the ability to change those numbers. For example, after the Loan Estimate has been issued there are zero variations permitted on all lender mandated services with lender selected providers, all affiliate-provided services, and all transfer taxes. There is a 10 percent variation permitted on lender costs, third party costs if chosen by the consumer from a lender list, and recording fees. There is an unlimited variation permitted on third party fees if the consumer selected the provider, as well as the amounts of escrows, pre-paid interest and homeowners insurance.

**Closing Disclosure**

The Closing Disclosure would replace the HUD-1 and the “revised” TIL and is designed to provide disclosures that will be helpful to consumers in understanding all of the costs of the transaction. The lender must give consumers the Closing Disclosure at least three business days before the consumer closes on the loan. If changes occur between the time the Closing Disclosure form is given and closing, the consumer must be provided with a new form and the three-day period begins anew. However, there are several exceptions when a new form (and consequent new three-day period) is not required: changes resulting from negotiations between buyer and seller after the final walk through; minor changes which result in less than $100 in increased costs; post-closing changes to government fees, such as recording fees; and corrections to non-numerical clerical errors. There are alternative proposals being considered as to whether the lender or the settlement agent will be responsible for delivering the Closing Disclosure form to the consumer.

The proposed rule would restrict the circumstances in which consumers can be required to pay more for settlement services. Unless an exception applies, charges for the following services cannot increase: the lender’s charges for its own services; charges for services provided by an “affiliate” of the lender or mortgage broker; and charges for services for which the lender does not permit the consumer to shop. Unless an exception applies, charges for other services cannot increase by more than 10 percent. In addition, the APR section on both forms will disclose and include all of the up-front costs of the loan.

For more information, please visit the CFPB website at www.consumerfinance.gov.

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*By Charles F. Smith Jr.*
ARTICLE:

New Federal Estate Tax Return (Form 706) for 2012

By Vincent F. Lackner Jr.

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Last August, the Internal Revenue Service released a new version of the federal estate tax (and generation-skipping tax) return, Form 706, for decedent’s dying in 2012. There are five major changes to the form:

1) **Page 1**: Line 9a – 9d: Basic Exclusion, Deceased Spousal Unused Exclusion (DSUE) and Applicable Exclusion Amounts.

2) **Page 4 (new)**: Part 6 – Portability of Deceased Spousal Unused Exclusion (DSUE) Amount.

3) **Schedules A-I, M and O**: Special procedure for valuing marital/charitable assets when an estate value does not exceed $5,120,000 and the estate is filing a 706 solely for purposes of electing portability.

4) **Schedules J, K and L**: Special reference to new Schedule PC (Protective Claims) and the corresponding elimination of two columns from Schedule K (“Amount unpaid to date” and “Amount in contest”).

5) **Schedule PC (“Protective Claim for Refund”)**: Implements 2009 regulations and their general rule that deductions may not be claimed until they are actually paid. There are notable exceptions for ascertainable expenses such as attorneys’ fees and executors’ commissions, claims that do not exceed $500,000 in the aggregate, and claims that are related to counterclaims.

Existing regulations provide other exceptions to this general rule (including deductions still allowed for certain unpaid mortgages and other indebtedness under Section 20.2053-7). Schedule PC must be filed before the end of any applicable limitation period for claiming refunds (normally within three years of filing a return or two years of paying tax, whichever is later).

This abbreviated article will discuss only the changes to Form 706 relating to the deceased spousal unused exclusions and the new protective claims procedures.

**Deceased Spousal Unused Exclusion**

Many of the changes on page 1, and the new page 4, are the result of the new “portability” of the unified credit, referred to in the statute as the “deceased spousal unused exclusion.”

In Part 2, Lines 9a – 9d, the old “maximum unified credit” line is expanded into four lines:

- **9a. Basic exclusion amount ($5,120,000 in 2012; $5,250,000 in 2013)**
- **9b. Deceased spousal unused exclusion (DSUE) amount** (carried forward from one or more predeceased spouses)
- **9c. Applicable exclusion amount (9a + 9b)**
- **9d. Applicable credit amount (tentative tax on the amount in 9c from Table A)**

**Note:** Line 9b represents the DSUE amount being received from one or more predeceased spouses, as determined on Page 4, Part 6, Section D. For example, it is possible that the decedent used DSUE amount from a spouse “two (or more) spouses ago” against lifetime gifts made by the decedent before the decedent’s next spouse died. This DSUE amount, and the lifetime gifts that it protected, are consolidated on the decedent’s 706.

On page 2, Part 4, Block 3b, the names and social security numbers of former spouses must be listed for all prior marriages, as well as the date the marriage ended, and whether the marriage ended by annulment, divorce or death. Report only prior marriages here, not the decedent’s current marriage. If the decedent was married at the time of death, information about the current spouse goes only into Block 3a and Block 4a (“Surviving spouse”) and not into Block 3b.

On the new page 4, there is a new Part 6 for elections and calculations relating to the DSUE. Section D is used to report the DSUE amounts received from predeceased spouses. Part 1 of Section D (the first line) is the DSUE amount received from the last predeceased spouse. The form requires the name, date of death, DSUE amount received, DSUE amount applied to any lifetime gifts, the year of the gift tax return (Form 709) for those gifts, and the remaining DSUE amount, if any. Part 2 (the remaining lines) is for other predeceased spouses from whom DSUE amounts might have been received and applied to lifetime gifts, and each line should reflect a different predeceased spouse.

The total DSUE amount received from predeceased spouse(s) consists of the sum of the DSUE amounts from all predeceased spouses that were applied to lifetime gifts (Section D, Part 1, Column D) and the remaining DSUE amount (if any) received from the last predeceased spouse (Section D, Part 2, Column E). This amount is carried to Part 2, Line 9b, and becomes part of the current decedent’s Line 9c “Applicable exclusion amount.”

The header to Section D includes

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a parenthetical instruction: “To be completed by the estate of a deceased surviving spouse with DSUE Amount from predeceased spouse(s).” The term “deceased surviving spouse” seems a bit odd, but it might make more sense if read as “now-deceased surviving spouse” (i.e., the second to die in the case of a couple with no other marriages).

You must file Page 4 even if no section is filled in (see instructions, Page 5, lower right corner).

If you check the box in Section A and elect out of portability for the surviving spouse (if there is a surviving spouse), leave Sections B and C blank. Section D can still be applicable because there might have been DSUE amounts from predeceased spouses.

Section C is “forward looking”; it applies only to a succeeding spouse (sending DSUE amount to the future). Section D is “backward looking”; it applies only to a preceding spouse (retrieving DSUE amount from the past).

So: 
Beginning of spousal chain: Section C only 
Middle of spousal chain: Sections C and D 
End of spousal chain: Section D only 

Schedules A-I, M and O have a note at the top that says that, if the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and the Form 706 is being filed solely to elect portability of the DSUE amount, “consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule.” See the instructions and Reg. section 20.2010-2T (a)(7)(ii) for more information. If you are not required to report the value of an asset, you should include a description of the property but make no entries in the columns for the value of the property.

Each asset and deduction eligible for the above treatment must be marked so that its amount appears on neither the schedules nor the Recapitulation. The aggregate amount (the same number for the asset and corresponding deduction) is entered on new Lines 10 and 23 of the Recapitulation.

New Schedule PC

The new Schedule PC is a two-page form for protective refund claims for the estates of decedents dying after 2011 (and probably only for a decedent dying after 2011). It must be filed with Form 706 and cannot be filed separately. (When making a claim for refund separately from the 706, use Form 843.)

You should use a separate Schedule PC for each separate claim or expense, and it must be filed in duplicate for each separate claim or expense.

You will have to distinguish among, and check the relevant box for, the following types of refund claims:

a) Initial: Protective claim for refund…

b) Partial: Partial refund claimed…

c) Final: Full and final refund claimed…

A Partial or Final claim is an Initial claim that has now “ripened” into a deductible claim based on events that have occurred in the meanwhile (i.e., the claim has been paid, has become ascertainable, etc.).

Any given claim can be only one of the above three types.

Distinguish further between the following types of “claims”:

i) Current: Being filed with this 706

ii) Prior: Filed with a prior 706 or on a prior Form 843

Any claim can be any combination of the above two categories.

If a Form 706 has already been filed before a particular protective claim was submitted, then Form 843 (and not Schedule PC) must be used to initiate the protective claim.

You may update the status of a claim originally filed on Schedule PC or Form 843 in either of the following two ways:

A) Supplemental 706 with new Schedules PC attached.

B) New Form 843

In both cases, attach copies of the initial claim that was submitted for the expense or claim (whether via Schedule PC or Form 843).

If you already deducted part of an expense or claim and are now deducting more of it (via a Partial claim) or the balance of it (via a Final claim), you should increase the deduction or expense on Schedule J, K or L, rather than entering a new item number. This way, you preserve the item numbering from the original 706 that is called for on Schedule PC, Page 2, Part 2, Column A.

The descriptions and amounts of claims are reported in Part 2 on the second page of Schedule PC. The following comments on columns C through F may be helpful in completing this part of the schedule:

Column C: Amount, if any, deducted under Treas. Reg. sections 20.2053-1(d)(4) or 20.2053-4(b) or (c) for the identified claim or expense.

If a part of an expense or claim was already deducted on the 706 (because it falls into one of the specified exceptions for unpaid expenses or claims), the amount already deducted on Schedule J, K or L is entered into Column C.

Notice 2011-48 specifies that Schedule PC “must reference the regulatory provision under which the deduction was claimed in order to identify properly the section 2053 claim or expense on a protective claim for refund.” Accordingly, it may be advisable to specify the section number in Column C right below the amount. This makes the regulatory reference more explicit, and you don’t have to remember to include this reference in Column B (Identification of the claim).

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whom the IRS has agreed upon.

Column D: Amounts presently claimed as a deduction under Section 2053 for the identified claim

We have received confirmation from the IRS that this column should include only the part of the claim reported on Page 1 of this Schedule PC, and not the combined amount now being deducted on Schedule J, K or L.

Column E: Ancillary expenses estimated/agreed upon/paid

Complete Column E only for Partial or Final refund claims.

Despite the form and the instructions, Notice 2011-48 does not require that specific amounts be reported in this column.

It would appear that, if an ancillary expense has been agreed upon (i.e., is "ascertainable") or paid, then that expense should be included in Column D ("Amount presently claimed as a deduction"), even if also separately stated in Column E. If the ancillary expense is merely estimated, it appears that this amount should be entered only in Column E in order to "protect" it for a later partial or final claim after this expense has become agreed upon or paid.

Column F: Amount of tax to be refunded

Complete Column E only for Partial or Final refund claims.

This would normally be 35 percent (the federal estate tax rate in 2012) of the amount of a Partial or Final claim, but there can be circumstances where the tax to be refunded is less than 35 percent or even 0 percent if the claim causes the taxable estate to cross over from taxable status to non-taxable status (i.e., below $5,120,000).

Part 3: Other Schedules PC or Forms 843 Filed by Estate

There is some inconsistency between the form (Page 1/Block 7 and Page 2/Part 3) and the instructions (Page 49, Part 3, right-hand column) as to exactly when other (current and prior) protective claims must be listed on Part 3. The IRS has advised us to display every other claim (whether current or prior) on each Schedule PC.

You must file two copies of Schedule PC and, in the case of Partial or Final claims, one copy of the corresponding Initial claim.

Column D asks the preparer to indicate whether the prior claim is:

1. [Initial] Protective Claim for Refund
2. Partial Claim for Refund
3. Final Claim for Refund

Because Form 706 and its schedules are screened by hand (not by machine), it shouldn’t matter whether you enter 1, 2 or 3 or the words that they stand for.

Vincent F. Lackner Jr. is founder and president of The Lackner Group Inc. in Pittsburgh (www.lacknergroup.com). He is the primary author of The 6-in-1 Estate Administration System, first released in 1986 and currently relied upon by nearly 1,500 users in law firms, accounting firms and banks throughout the United States. He received his undergraduate degree from Harvard and his law degree from New York University School of Law.
By Frank Kosir Jr.

1. Private Road Act: Board of Viewer’s authority to consider potential easement by necessity across other adjoining lands


This matter addressed the issue of whether a Board of Viewers appointed pursuant to the Pennsylvania Private Road Act was permitted to consider the potential existence of an easement by necessity over other adjoining lands in addressing a landlocked property owners’ petition to open a private road. Leonard Brenner and Paul Brenner (“Brenners”) were the owners of two parcels of real property (“Property”) situated in Hazle Township, Luzerne County, Pa., and consisting of approximately 34.5 acres. The Brenners took title to the Property from Mt. Laurel Memorial Park Inc. (“Mt. Laurel”), which owned other adjoining lands accessible by a public road. However, the deed of conveyance from Mt. Laurel did not include any easement rights across Mt. Laurel’s remaining lands, thereby landlocking the Property.

After taking title, the Brenners entered into an agreement (“Agreement”) with adjoining landowners Stephen Perchak, James Perchak, Michael Perchak and Josephine Perchak (“Perchaks”) for use of an easement across their property (“Perchak Property”) connecting to a private road on the Perchak Property that leads to a public highway. The Agreement was expressly contingent upon the Brenners obtaining a variance from Hazle Township (“Township”) to operate a scrap yard on the Property. However, following a hearing, the Township’s Zoning Authority denied the Brenners’ variance request. Thereafter, on Oct. 16, 2009, the Brenners petitioned the Luzerne County Court of Common Pleas for the appointment of a Board of Viewers under the Pennsylvania Private Road Act (“Act”) (36 P.S. §2731, et. seq.), asserting a right to open a private lane across the Perchak Property. A Board of Viewers (“Board”) was appointed, and the Board conducted a hearing and issued a report concluding that, as the Brenners should be entitled to an easement by necessity over Mt. Laurel’s remaining lands, the opening of the petitioned-for private road was not strictly necessary.

Following the issuance of the report, the Brenners filed exceptions to the trial court asserting that the Board had exceeded its authority in addressing their potential rights to an easement by necessity. Following oral argument, the trial court sustained the exceptions, concluding that the Board’s sole purpose was to determine whether the Property was landlocked and, if so, to establish the location of the private road. Therefore, as its powers did not include a determination of whether the Brenners potentially possessed an easement by necessity over Mt. Laurel’s remaining lands, the Board improperly considered this factor in preparing its report.

On appeal, our Commonwealth Court reversed. In issuing its ruling, the court noted that, pursuant to Section 12 of the Act (36 P.S. §2732), a private road cannot be opened unless it is found to be strictly necessary for the use of the petitioner’s property. Furthermore, as an action under the act is an eminent domain action, the necessity requirement must be strictly construed and a request for a private road denied if there exist other potential means of access to the landlocked property. As such, the fact that an easement by necessity may exist over the lands of another is exceedingly relevant to the question of whether the petitioned-for private road is necessary and was properly considered by the Board in preparing its report.

2. Oil and Gas Lease: Recorder of Deeds’ obligation to accept blanket assignments for recording


This matter addressed the issue of whether a recorder of deeds was required to accept blanket assignments of oil and gas leases for recording. Chesapeake Appalachia LLC (“Chesapeake”) is an entity engaged in the business of natural gas exploration and production. As part of its operation, Chesapeake routinely purchases and assigns natural gas leases and, in one instance, sought to record with the Wayne County Recorder of Deeds four multiple lease assignments relating to 211 separate underlying natural gas leases. However, Ginger Golden (“Recorder”) refused to accept these blanket assignments for recording, citing an inability to index them to each individual lessor in the underlying leases. In response, Chesapeake commenced a mandamus action seeking a determination that the Recorder was required as a matter of law to accept the blanket assignments for recording. The parties filed cross-motions for summary judgment, and the trial court entered summary judgment for Chesapeake.

On appeal, our Commonwealth Court affirmed. In issuing its ruling, the court held that Sections 351 and 356 of the Pennsylvania Recording Statute (21 P.S. §351 and 356) require a county recorder to record documents of conveyance if they are properly acknowledged. In this instance, the blanket assignments were properly acknowledged, thereby requiring the Recorder to accept them for recording. As such, mandamus relief was appropriate to assure an accurate
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public record of all property interests. In response to the Recorder’s argument that the blanket assignments precluded her from properly indexing the documents, the court noted that 21 P.S. § 358(2) requires only that a document be indexed to the parties to the instrument. Therefore, there is no requirement that the blanket assignments be indexed to the parties to underlying leases, and the Recorder’s argument in this regard was without merit.

3. Oil and Gas Lease: Guaranteed minimum royalty  


This matter addressed the issue of whether an oil and gas lease providing for the deduction of certain costs from royalties paid complied with the requirements of the Pennsylvania Guaranteed Minimum Royalty Act. Arthur Katzin (“Katzin”) is the owner of certain real property situated in Bradford County, Pa. On or about Feb. 13, 2002, Katzin entered into an oil and gas lease (“Lease”) for the Property with Central Appalachia Petroleum, which subsequently assigned the lease to Chesapeake Appalachia LLC (“Chesapeake”). Pursuant to the terms of the Lease, Katzin was to receive a royalty in the amount of one-eighth (1/8) of all oil and gas produced “less all taxes, assessments and adjustments on production,” (the “Deduction Provision”).

In an effort to invalidate the Lease, Katzin commenced a declaratory judgment action in the Bradford County Court of Common Pleas, asserting that the Deduction Provision constituted a violation of the Pennsylvania Guaranteed Minimum Royalty Act (“Act”) (58 P.S. § 33), which states that an oil or gas lease is invalid if it “… does not guarantee the lessor at least one-eighth royalty … .” The trial court, relying upon our Supreme Court’s ruling in Kilmer v. Exelco, et. al, 605 Pa. 413, 990 A.2d 1147, 2010 Pa. LEXIS 517 (2010) (holding that certain post-production costs were deductible from royalties due under the Act), entered judgment on the pleadings for Chesapeake and dismissed Katzin’s action with prejudice.

On appeal, our Superior Court affirmed. Addressing Katzin’s argument that this matter should be differentiated from Kilmer based upon the alleged lack of specific deductible costs in the Deduction Provision, the court concluded that, as the Lease provided for a one-eighth royalty, it is evident that the parties intended to comply with the Act. Therefore, an implied promise existed between the parties that Katzin would in fact receive such a royalty. The court further noted that, while Katzin may in fact be receiving less than the required one-eighth royalty, his right to relief lies in an action for breach of contract, not the invalidation of the Lease.


This matter addressed the issue of whether a sheriff’s sale of real property was properly set aside where the prior owner subsequently produced evidence that the property’s value significantly exceeded the amount of the winning bid. Robert L. Hood had given to Bank of America a mortgage (“Mortgage”) against certain real property (“Property”) situated in Butler County, Pa. The Property consisted of a home and one hundred (100) acres of land and, upon Robert L. Hood’s death, title passed to his Estate (“Estate”), which subsequently defaulted on the Mortgage. Following the default, Bank of America filed a complaint in mortgage foreclosure, obtained a judgment and proceeded to schedule the Property for a Sept. 17, 2010, Sheriff’s sale. At that sale, the Property was purchased by Gregory Simakas and Michael Newman (“Buyers”) for $255,800, a price that exceeded the $204,090.84 outstanding balance due on the Mortgage.

On Oct. 18, 2010, the Estate filed a petition seeking to set aside the sale, contending that the Property was worth far more than the winning bid. A hearing was held, and the Estate presented evidence that the Property was valued at over $560,000, as well as a letter of intent from a prospective purchaser stating that he would purchase the Property for $580,000. The trial court, concluding that the prevailing sheriff’s sale bid was grossly inadequate, set aside the sale and ordered the Estate to enter into an agreement of sale with the prospective purchaser. The Buyers intervened, and their request for reconsideration was denied.

On appeal, our Superior Court reversed. In issuing its ruling, the court noted that the purpose of a sheriff’s sale arising from a mortgage foreclosure proceeding is to enable the mortgagee to recover all amounts due under the mortgage. As such, Pennsylvania courts will not set aside a sheriff’s sale unless the sale price is “grossly inadequate.” In this instance, the record established that the sheriff’s sale had been properly advertised, competitive bidding had taken place and the prevailing bid exceeded the mortgage debt by more than $50,000. Furthermore, while it was true that the prospective purchaser alleged a willingness to pay a significantly higher sum for the Property such an assertion was not, in and of itself, sufficient to establish that the prevailing bid was inadequate. Therefore, the trial court erred in relying upon the prospective purchaser’s letter of intent as its basis for valuing the Property, and its determinations were contrary to Pennsylvania law. In dissent, Judge Robert Colville asserted that the Buyers had waived their right to appeal by failing to intervene in the matter before the trial court had issued its order.

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setting aside the sheriff’s sale.

5. Oil and gas lease: Definition of “paying quantities”


This matter addressed the issue of what level of production constitutes “paying quantities” under an oil and gas lease. Ann Jedlicka (“Jedlicka”) is the owner of a tract of land (“Property”) situated in North Mahoning Township, Indiana County, consisting of approximately 63 acres. The Property was once part of a larger tract of land consisting of approximately 163 acres, which was conveyed by deed to Samuel Findley and David Findley, who granted T.W. Phillips Gas and Oil Company (“Phillips”) an oil and gas lease (“Lease”) over the entire tract in 1928. The Lease included a habendum clause stating that the term of the lease would continue “... for the term of two (2) years, and as long thereafter as oil or gas is produced in paying quantities, or operations for oil or gas are being conducted thereon, including the right to drill other wells.”

Phillips subsequently drilled four gas wells in 1929, one of which was located on the Property. This well (“Well”) was temporarily abandoned in 1953, and all four wells were fractured in 1967. These wells were subsequently assigned to PC Exploration Inc., which planned to drill an additional four wells on the Property. However, Jedlicka objected to the drilling of any additional wells and asserted that, as the Well had failed to make a profit in 1959, it did not produce in paying quantities, thereby terminating the Lease. In response, Phillips brought suit asserting that, as at least two wells were consistently producing in paying quantities, the Lease remained in effect. The trial court ruled for Phillips, and Jedlicka appealed to our Superior Court, which affirmed noting that, although some other jurisdictions apply an objective standard (using a calculation of production receipts less royalties and expenses) to determine whether a well is producing in paying quantities, Pennsylvania has never adopted this approach. Rather, Pennsylvania has consistently followed a subjective standard and the phrase “found or produced in paying quantities” has long been construed with reference to the operator of the well and by its judgment when exercised in good faith. Thus, if a well produces a profit, even a small one, it is producing in “paying quantities.”

Thereafter, our Supreme Court granted allowance of appeal and affirmed concluding that in instances where a well’s production has been such that, for certain periods, profits did not exceed operating costs, the phrase “in paying quantities” must be construed as being subject to the gas company’s good faith judgment. Therefore, as the record indicated Phillips was operating the wells in good faith and that, in its judgment, the wells had produced in paying quantities, the trial court and the Superior Court had correctly concluded that the Lease remained valid.

6. Real estate tax exemption application: HUP Test vs. Act 55


This matter addressed the issue of whether a religious camp qualified for real estate tax exempt status as a “purely public charity.” Mesivtah Eitz Chaim of Bobov Inc. (“Applicant”) is a non-profit religious corporation associated with the Bobov Orthodox Jewish community in Brooklyn. The Applicant owns certain real property (“Property”) situated in Delaware Township, Pike County, Pa., on which Property it operates a summer camp comprised primarily of lectures and classes on its faith. This camp supplies its campers with food and recreational activities and is financed through tuition, donations and rental income from property owned in New York City. The camp, which is also open to members of the public, provides financial aid to some of its campers, some of who come from as far away as Europe and Israel.

In 2009, the Applicant applied for a real estate tax exemption for the Property on the basis that it was a purely public charity and was entitled to such an exemption pursuant to the five-prong test established in HUP v. Commonwealth, 507 Pa. 1, 487 A.2d 1306 (1985) (“The HUP Test”), which provides that an entity qualifies as a purely public charity if it (a) Advances a charitable purpose; (b) Donates or renders gratuitously a substantial portion of its services; (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (d) Relieves the government of some of its burden; and (e) Operates entirely free from private profit motive. The Applicant’s application was denied by the Pike County Board of Assessment (“Board”), which concluded that the Applicant did not satisfy the HUP Test. On appeal, the trial court affirmed. The Applicant then appealed to our Commonwealth Court arguing inter alia that, as the Institutions of Purely Public Charity Act, (10 P.S. §§ 371-385) (“Act 55”) was enacted subsequent to the establishment of the HUP Test, the Applicant was not required to meet the elements of the HUP Test, but was entitled to a real estate tax exemption if it satisfied the broader requirements set forth in Act 55. The Commonwealth Court affirmed the trial court, and our Supreme Court allowed appeal on the sole issue of whether Pennsylvania courts must defer to the broader definition of “institution of a purely public charity” set forth in Act 55.

On appeal, our Supreme Court affirmed. In issuing its ruling, the court noted that the General Assembly is not permitted to alter or amend the phrase “purely public charity” as it sees fit. Rather, the ultimate authority to interpret statutes and the Pennsylvania Constitution lies with the courts and, as Pennsylvania courts have established the HUP Test as the basis

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This matter addressed the issue of whether a religious camp satisfied the requirements for classification as a “purely public charity” entitled to real estate tax-exempt status. Camp Hachshara Moshava of New York (“Applicant”) is a non-profit corporation that owns certain real property (“Property”) situated in Wayne County, Pa. The Property consists of eight adjacent parcels on which is located a camp (“Camp”) comprised of walking trails, a dining hall, seven synagogues, 70 bunk houses or dorms, recreational and camping areas and two libraries. The Applicant operates summer camps at the Camp from mid-May to mid-September; the camps are based upon the educational and religious themes of Zionism and Orthodox Judaism. Participating in these camps are children ranging in age from 8 to 14; each camp session including approximately 400 staff members overseeing about 650 campers; and, at the conclusion of each camping session, the Camp donates surplus food and clothing to local charities. As part of its operations, the Camp provides discounted tuition for those of its campers with special needs, as well as vocational training for young adults with special needs. The Camp also provides significant assistance to local emergency services, owning a fire truck that it permits the local volunteer fire department to utilize and permitting local emergency medical services to store an ambulance on the Property.

On Aug. 31, 2009, the Applicant filed an application with the Wayne County Board for the Assessment and Revision of Taxes (“Board”), seeking a real estate tax exemption for the Property. The Board reviewed the application and issued a determination granting tax-exempt status for the two parcels that the Camp uses primarily for religious education and prayer purposes, but denying the application as to the remaining parcels. The Applicant appealed to the Wayne County Court of Common Pleas which affirmed, concluding that the Camp does not relieve the government of any burden and, as such, is not a “purely public charity” entitled to real estate tax exemption.

On appeal, our Commonwealth Court affirmed. In issuing its ruling, the court referred to the Pennsylvania Supreme Court’s recent decision in Mesivtah Eitz Chaim of Bobov, Inc., 2012 Pa. LEXIS 964 (2012), for the conclusion that the HUP Test remains the standard for determining whether an entity qualifies as a “purely public charity” and, if the HUP Test is not satisfied, an applicant is not entitled to review under Act 55. In this instance, the Applicant failed to establish that any of its programs or activities relieve the government of any burden. While it is true that the Applicant provides tuition to its special needs campers, as well as vocational training to young adults with special needs, there is no statutory requirement for the government to provide such services. Furthermore, while the assistance that the Applicant provides to local emergency services does relieve the government of some of its burden, the Applicant’s Certificate of incorporation identifies its mission as providing “…a camp for young people with a program designed to benefit them morally and physically and to do all things necessary or incidental thereto.” As Article VIII §2(a)(v) of the Pennsylvania Constitution only allows for real estate tax exemption for real property “actually and regularly used for the purposes of the institution,” the assistance that the Applicant provides to local emergency services falls outside of the scope of its mission. Therefore, although the Applicant’s programs and services were laudable, they did not serve as a basis for granting real estate tax-exempt status.

8. Eminent Domain: Condemnor’s obligation to provide adverse possession claimant with notice of taking


This matter addressed the issue of whether a party asserting adverse possession title to lands is a “condemnee” under the Pennsylvania Eminent Domain Code and entitled to notice of the condemnation. Raymond P. Alincic and Patricia Ann Alincic (“Alincics”) are the owners of a parcel of land (“Farm”) approximately 60 acres in size and situated in Mt. Pleasant Township (“Township”), Westmoreland County, Pa. Adjacent to the Farm is a railroad right-of-way (“Property”) consisting of a temporary easement 30 feet in width and a permanent easement 20 feet in width. In 1983, the Alincics sought to purchase the Property from Penn Central Railroad Company. However, when the parties were unable to reach agreement on a sale price, the Alincics enclosed the Property as part of the Farm with a barbed wire electric fence attached to posts and maintained that fence from 1984 to 2008. The Alincics also maintained the Property during that time, and installed drainage pipes in the Property to allow for the drainage of water from their fields. In
9. Oil and gas lease: Duration of lease, percentage royalty leases v. fixed royalty leases


This matter addressed the issue of whether the term of an oil and gas lease providing for a flat royalty rather than a percentage royalty remains in effect for as long as the flat royalty is paid, despite a lack of production. Larry Heasley (“Heasley”) is the record owner of the surface and oil and gas rights to two parcels of real property situated in Jefferson County, Pa. The parcels, 56 and 55 acres in size, were subject to separate 1942 oil and gas leases (“Leases”) entered into with KSM Energy Inc. (“KSM”), which leases provided for a 20-year initial term and a secondary term that continued for “as long thereafter as oil or gas, or either of them, is produced therefrom.” The Leases further provided that Heasley was to receive a quarterly rental payment of $12.50 for as long as oil and gas were being produced, and the quarterly rental was subject to increase in the event that the total gas pressure exceeded a certain threshold.

Despite ceasing production on the parcels, KSM continued to pay Heasley a quarterly royalty as provided for in the Leases until, in early 2009, Heasley ceased accepting the payments and advised KSM that the Leases had been terminated as a result of lack of production. Soon after, Heasley commenced an action in the Jefferson County Court of Common Pleas seeking a judicial determination that the Leases had been terminated. In response KSM asserted that, as the Leases provided for a fixed quarterly rental and KSM had made these quarterly rental payments, the Leases remained in full force and effect. The trial court entered judgment on the pleadings for Heasley, concluding that, as the terms of the Leases provided that they would remain in effect after the expiration of the primary term for so long as production continued, KSM’s ceasing production served to terminate the Leases despite its continued making of the quarterly payments.

On appeal, our Superior Court affirmed. In issuing its ruling, the court cited to the long-standing principle in Pennsylvania oil and gas law that, where an oil and gas lease provides that the lessor’s compensation is based upon the volume of oil or gas produced, the duration of the lease is the time period where oil and gas are actually produced. Conversely, in instances where an oil and gas lease provides that the lessor’s compensation is fixed and unrelated to the amount of oil and gas produced, the duration of the lease is measured by the time period that the lessor is to receive the fixed rental, and the lease remains in effect so long as the fixed rentals are paid. (Clark v. Wright, 311 Pa. 69, 166 A. 775 (1933)). In this matter, although the Leases provided that Heasley was to receive a fixed quarterly rental, the payment of the fixed rental was only due for so long as oil and gas were being produced. Therefore, as KSM was no longer producing oil or gas on the parcels and the initial term of the Leases had expired, the Leases were terminated, and KSM could keep them in effect by merely making the quarterly rental payments.

10. Oil and gas exploration: Commonwealth’s authority to establish uniform state-wide zoning regulations


This matter addressed the issue of whether the Commonwealth of Pennsylvania can compel local municipalities to adopt uniform zoning regulations relating to the development of oil and natural gas as a prerequisite to their receipt of funds collected from natural gas well “impact fees.” In 2012, the Commonwealth of Pennsylvania enacted “Act 13,” which set forth a series of amendments to...
New Links to Register of Wills and Orphans’ Court Forms

By Neil E. Hendershot

While seeking to access through my blog’s sidebar links to their source on the Internet, I discovered my links are no longer valid. What happened? Something changed.

On Jan. 31, 2013, the website of the Uniform Judicial System of Pennsylvania was completely refreshed and reformatted. Not only is there a new homepage for the PA UJS, there is also a new “portal” leading into it.

All Pennsylvania Orphans’ Court forms were reposted to different Internet references. Now, these forms are displayed in a more pleasant presentation, along with other content formerly on that website.

On the related new Pennsylvania UJS portal, the layout is straightforward and efficient. The left column offers many direct links to various sections of the new website, much like a book index, thereby avoiding navigation delays. Such links include:

- UJS Web Portal
- Attorney Registration
- County Court Calendar
- Rules of Court
- Public Calendar Schedule
- Public Web Docket Sheets
- Financial Records

The main Pennsylvania UJS website itself is colorful and animated. “Welcome to the Pennsylvania Judiciary’s New Website” presently was displayed upon opening its home page:

Pennsylvania’s Unified Judicial System was the second state court system — by one week — to launch a website in 1995. With nearly 60 million hits last year, Pennsylvanians have come to depend on pacourts.us for information about the judiciary, court cases and the most recent court news and statistics.

The UJS is dedicated to continuously improving the way we provide information about the courts. Our goal was to develop something that is easy to use, attractive in appearance and capable of serving our vastly diverse audience. We want to keep you up-to-date regarding events in the judiciary and news and issues, and this space will allow us to do that.

In a press release titled “Redesigned courts website helps meet changing user expectations,” dated Jan. 31, 2013, the Administrative Office of Pennsylvania Courts announced the redesigned website:

Enhancements to the new website include redesigned page layouts, improved navigation and organization of various court information areas, and highlighted news of interest to the court community and general public.

The changes provide Pennsylvania’s judiciary a unified website while providing each court the opportunity to feature its own news and information on separate web pages.

Among the radical changes to the Pennsylvania UJS website is a redesigned home page, offering recent news involving Pennsylvania’s court system. On the right sidebar are links for the court’s welcome message, opinions, docket sheets, fee or fine payments, public records and forms.

In an expansive area below is a listing, with links, to components of the court system, by function and organization, like a “mini-portal.” This lower banner appears consistently on every web page, so you can’t get lost.

A link to the Orphans’ Court and Register of Wills forms is prominently featured as the first category in the full list of all types of court forms provided “For the Public.”

The current approved OC/RW forms, which remain unchanged so far in 2013, are then divided into categories:

- Audit and Administration (7 forms)
- Guardianship (6 forms)
- Abortion Control Act (2 forms)
- Register of Wills (10 forms)
- Model Account Forms (4 forms)
- Foreign Adoption Forms (9 forms)

My random sampling of forms indicates that most are in fillable PDF format. This allows data entry into the form, which could be saved using PDF editing software to retain it for later revision. PDF reader or viewer software could only print the form with data, but not save it, so that, upon closing it online, such personalized data would be lost. See: Wikipedia’s List of PDF Software.

These website revisions mean greater convenience for the public and for practitioners.

(Continued on Page 20)
the Pennsylvania Oil and Gas Act (58 P.S. §§ 601.101 et. seq) including, but not limited to, the elimination of local municipalities’ right to regulate the location of oil and gas wells, essentially requiring local governments to amend their respective zoning codes to permit oil and gas exploration in all zoning districts, as well as an authorization to the Pennsylvania Department of Environmental Protection (“DEP”) to grant waivers of certain setback requirements from wetlands and bodies of water for the location of oil and gas wells. In response, Robinson Township and several other municipalities (“Petitioners”) filed a Petition for Review with the Pennsylvania Commonwealth Court seeking a judicial determination that Act 13 violates numerous provisions of both the Pennsylvania Constitution and the United States Constitution including, but not limited to, the right to substantive due process. In response, the Commonwealth of Pennsylvania filed Preliminary Objections asserting, inter alia, that the Petitioners’ claims are barred as involving non-justiciable political questions, and that many of the counts to the Petitioners’ Petition failed to state cognizable causes of action.

By a vote of 4-3, the Commonwealth Court upheld certain portions of the Petitioners’ challenge to Act 13 and struck down the provisions establishing statewide uniform zoning for oil and natural gas exploration as violative of the Pennsylvania Constitution, as well as the provisions authorizing the DEP to grant setback waivers for oil and gas wells. In support of its striking the zoning provisions, the court concluded that the provisions did not serve the police powers of local municipalities, which is one of the express purposes of zoning regulation. The court further noted that, as these provisions required municipalities to permit oil and gas exploration in all zoning districts, including residential districts, such a use would result in incompatible uses within a particular zoning district, thereby violating property owners’ substantive due process rights. In striking the provisions authorizing the DEP to grant setback waivers for oil and gas wells, the court concluded that those provisions did not establish any guidelines or standards for the DEP to follow in reviewing requests for such waivers.

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UPDATE: 2012 Real Estate Case Law

(Continued from Page 18)

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**ARTICLE:**

New Links to Register of Wills and Orphans’ Court Forms

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1 http://www.pacourts.us/
2 http://ujsportal.pacourts.us/
3 http://goo.gl/y6lVB
4 http://ujsportal.pacourts.us/
5 http://goo.gl/2i5OZ
6 http://goo.gl/vwY1d
7 http://goo.gl/IOYXP
8 http://goo.gl/glsbQ
9 http://goo.gl/Sxbh7
10 http://goo.gl/oPFG0
11 http://goo.gl/rGNXx
12 http://goo.gl/0W1BW
13 http://www.pacourts.us/forms
14 http://goo.gl/y6lVB
15 http://www.pacourts.us/forms/for-the-public
16 http://goo.gl/jSSV
17 http://goo.gl/2ABl0
18 http://goo.gl/4hoNv
19 http://goo.gl/jDqQg

Editor’s note: Link references in this article utilize Google URL shortening for ease of reference for readers of the printed edition. Neil E. Hendershot is with Ser- ratelli, Schiffman & Brown PC in Harrisburg, where he concentrates his practice in the areas of elder law, personal and estate planning, estate and trust administration, and Orphans’ Court litigation. He is editor at large of this newsletter and has been involved with it since 1978.
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For additional information or to register, go to the Pennsylvania Bar Institute’s website at www.pbi.org.

ESTATES PRACTICE

How to Prepare the PA Inheritance Tax Return
5 substantive CLE credits
8:30 a.m. to 2:15 p.m.
Tuesday, June 18, 2013 – Philadelphia
Wednesday, July 10, 2013 – Pittsburgh

Using Trusts as Building Blocks for Your Client’s Estate Plan
Morning Session: Common Trust Techniques for the Foundation of an Estate Plan
3 substantive CLE credits
8:30 to 11:45 a.m.
Afternoon Session: Sophisticated Trust Techniques for the High-Net-Worth Client
4 substantive CLE credits
12:30 to 4:45 p.m.
Tuesday, July 9, 2013 – Philadelphia
Tuesday, July 16, 2013 – Pittsburgh
Thursday, June 6, 2013 – Mechanicsburg; simulcast to Allentown, Butler, Chambersburg, Hollidaysburg, Honesdale, Indiana, Johnstown, Lebanon, Mansfield, Mill Hall, New Castle, Plymouth Meeting, Stroudsburg, Uniontown, Warren, West Chester, Wilkes-Barre and Williamsport

Natalie Choate on Estate and Distribution Planning for Retirement Benefits
6 substantive CLE credits
9 a.m. to 4:30 p.m.
Tuesday, April 16, 2013 – Philadelphia

REAL ESTATE PRACTICE

Title Insurance 101
4 CLE credits (3 substantive/1 ethics)
9 a.m. to 1:15 p.m.
Tuesday, July 23, 2013 – Pittsburgh
Friday, July 26, 2013 – Mechanicsburg
Tuesday, July 30, 2013 – Philadelphia, live webcast; simulcast to multiple locations

Who’s on First? Lien Priority in Pennsylvania
3 substantive CLE credits
9 a.m. to 12:15 p.m.
Monday, April 8, 2013 – Mechanicsburg, live webcast; simulcast to Beaver, Chambersburg, Easton, Erie, Greensburg, Hollidaysburg, Indiana, Lebanon, Mansfield, Meadville, Mill Hall, Plymouth Meeting, Selinsgrove, Uniontown, Warren, West Chester, Wilkes-Barre and York
Tuesday, April 16, 2013 – Pittsburgh
Tuesday, April 23, 2013 – Philadelphia
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March 22-23, 2013 • Crowne Plaza Hotel and Dauphin County Courthouse, Harrisburg, Pa.

PBA Committee/Section Day
April 11, 2013 • Radisson Hotel Harrisburg, Camp Hill, Pa.

PBA Annual Meeting
May 8-10, 2013 • Wyndham Grand Pittsburgh Downtown, Pittsburgh, Pa.

PBA Committee/Section Day
Nov. 21, 2013 • Holiday Inn East, Harrisburg, Pa.

Check the PBA Events Calendar at www.pabar.org for more information, or call the PBA at 800-932-0311.