

# MSBA

## SECTION OF ESTATE AND TRUST

Richard T. Wright, *Chair*  
Matthew Mace, *Chair-Elect*  
Sharon Ritter, *Secretary*

### Newsletter

Mary Alice Smolarek, *Editor*  
Aryeh Guttenberg, *Editor*

Spring 2010

Vol. 19 No. 2

### Notes From The Chair

*Richard T. Wright, Esq.*

The Estate and Trust Law Section enjoyed a very good year in the 2010 General Assembly. The Legislature passed seven of the original nine proposals on our Legislative Agenda and also enacted an eighth emergency bill we added when we realized that Congress would not take timely action to address our 2010 clients' federal estate and generation-skipping transfer taxation terminology uncertainties. Among these successes were the following (listed in our original order of priority):

- After three years of effort, a Maryland General and Limited Power of Attorney Act (Senate Bill 309 and House Bill 659) that for the first time codifies an agent's responsibilities to his or her principal, gives an extended list of interested persons standing to petition a court to construe a power of attorney or to review an agent's conduct, makes powers of attorney generally enforceable as to third parties dealing with the agent, and provides statutory forms whose acceptance is enforceable by court order and liability for reasonable attorney's fees and costs. Please note that powers of attorney executed on or after October 1, 2010 must be

executed with the same formalities as a will and acknowledged before a notary public.

- A Maryland inheritance tax exemption for distributions to surviving spouses of a decedent's predeceasing descendants if those spouses have not remarried (House Bill 443).
- A Maryland International Wills Act (2010 Laws of Maryland Chapters 63 and 64) to facilitate the recognition of Maryland international wills in the foreign probate proceedings of 12 countries including Canada, France, Belgium, and Italy.
- A legislative reversal of *Battley v. Banks*, 177 Md. App. 638, 937 A.2d 846 (2007) that will authorize a guardian to pay court approved final guardianship fees, commissions, and expenses from a guardianship estate before transferring the balance of a deceased ward's assets to his or her personal representative. (Senate Bill 339 and House Bill 328)
- Clarification of the consequences of a criminal conviction for exploiting a vulnerable adult (or a

person over age 68) under Criminal Law Article Section 8-801 that provides that, although such a criminal conviction disqualifies the guilty party from inheriting or otherwise benefiting from the victim's estate, insurance proceeds or property after that victim's death, such disqualification only occurs if and to the extent that the defendant fails to restore fully the property taken or its value. (House Bill 327) Importantly, in the event of an erroneous distribution of the decedent's property to such a defendant, this bill gives the rightful heir, legatee, or beneficiary standing to sue the defendant for full restitution and exculpates a fiduciary or other person who has erroneously distributed property to the defendant in good faith and without actual knowledge of the conviction.

- Correction of the situation noted in *Downes v. Downes*, 388 Md. 561, 880 A.2d 343 (2005) by changing Estates and Trusts Article, § 3-206(a)(2) to allow a surviving spouse to file a petition for an extension of the time in which to make a spousal election against a

*(continued on page 2)*

---

---

## Notes From the Chair . . .

*(continued from page 1)*

will within the period for making the election without requiring the Orphans' Court to take action on that petition within that period as well. (2010 Laws of Maryland Chapter 146)

- Clarification that a grant of property by a deed from a grantor designated as a decedent's estate or a trust has the same effect, respectively, as if the grantee had received the property from a personal representative or the trustee or trustees appointed and acting for the trust on the effective date of the deed. (Senate Bill 341 and House Bill 341)
- Emergency legislation (2010 Laws of Maryland chapter 62) effective on and after April 13, 2010 providing that references in the will or trust of a decedent dying in 2010 to federal estate ("FET") or generation-skipping transfer tax ("GST") terminology shall be deemed to refer to FET or GST laws as they existed on December 31, 2009 unless the will or trust is executed or amended after that date or manifests that a contrary rule should apply.

In addition, the General Assembly passed interesting new legislation (Senate Bill 25) designed to free Maryland estate planners from the inflexibility of tenancies by the entirety in situations where tenancy by the entirety-like asset protection is important. (This latter bill is discussed in much greater detail in other articles appearing in this issue.)

None of this activity would have been possible without the input, participation, and cooperation of dedicated and talented professionals too numerous to name without inadvertently omitting someone's mention. This issue's Notes From the Chair needs to be as much an appreciation as it is a review of this year's new legislation. Thank you to those who imagined how we can improve the practice of our profession and who engineered those inspirations into legislative words and action plans. Thank you to those who debated these ideas and words and who vetted their salient strengths, weaknesses, and improvements. Thank you to those who thought outside the box to discover unintended consequences. Thank you to those who previously and patiently laid the groundwork for this year's successes. Thank you to those who mentored us in the nuances of legislative processes. Thank you to those who were always available to discuss new wrinkles and roadblocks. Thank you to those who worked on weekends and who stayed up past midnight to make sure we got it right. And thank you to those who encouraged participants to keep at it, to be all they could be, and to do all they could do.

We have all heard uninformed (or perhaps disenfranchised) pessimists liken the legislative process to sausage making:

Sweet results if you don't have to look too carefully at the way those results are produced. My recent immersion in the legislative process has had just the opposite effect. The more I see and understand, the more I realize that this process works because high-minded electoral servants go above and beyond the call of duty to achieve what they perceive is the greater good. It works because busy legislators voluntarily take the time necessary to master complex subjects outside their normal areas of comfort and customary expertise. It works because those busy legislators make the time to sit through lengthy hearings to listen to people's thoughts on proposed legislation and then reshape that legislation to take advantage of the ideas, or to correct for the deficiencies, exposed at those hearings. The process works because its participants are experts at the arts of negotiation and compromise and can accommodate the inspirations of the many rather than just the few. It works because words and terminology are important and because we have dedicated wordsmiths in the Department of Legislative Services who remember legislative history and who know how best to craft words and terminologies effectively to communicate the results intended by inspired legislative initiators. It works because legislative officers know how to manage in the midst of chaos. And it works because legislators are not afraid to speak their minds, to listen and learn, and to vote using both their intellect and their conscience.

*(continued on page 3)*

### IN THIS ISSUE

NOTES FROM THE CHAIR.....	1
HECKERLING HIGHLIGHTS 2010.....	4
PLANNING AND DRAFTING IN AN UNCERTAIN ENVIRONMENT- 2010.....	6
ISSUES CONCERNING SENATE BILL 25: PRESERVING TENANTS BY THE ENTIRETIES PROTECTIONS IN REVOCABLE TRUST.....	12
WEIGHING THE NEW PLANNING POSSIBILITIES OF MARYLAND'S SENATE BILL 25.....	13
BETTER THAN SLICED BREAD?- A REPLY TO RICHARD WRIGHT.....	20
REALITY BYTES.....	23

## Editor's Note

Our goal is for the *Estate and Trust Law Section Newsletter* to provide current, useful information on areas of interest to Section members. The Newsletter can be better tailored to suit members' needs with input from you. If you would like to suggest a future topic, change of format, or submit an article, please contact the Editors at:

Aryeh Guttenberg  
Law Offices of Aryeh Guttenberg  
2835 Smith Avenue  
Suite 201  
Baltimore, MD 21209  
(410) 484-7711 phone  
(410) 484-3533 fax  
[aryeh@guttenberglaw.com](mailto:aryeh@guttenberglaw.com)

Mary Alice Smolarek  
Wright, Constable & Skeen, LLP  
One Charles Center 16<sup>th</sup> Floor  
100 North Charles Street  
Baltimore, Maryland 21201-3812  
(410) 659-1318 phone  
(410) 659-1350 fax  
[masmolarek@wcsolaw.com](mailto:masmolarek@wcsolaw.com)

### Notes From the Chair . . .

*(continued from page 2)*

We can't always agree that the process works the way we want it to. Obviously, legislators' perceptions of the comparative greater good can differ and conflict with our own. Reasonable people can and do in fact differ while each is right or, at least, not wrong. Sometimes legislators misallocate their intellectual resources. Sometimes personalities get in the way or people dealing with legislators don't understand how to deal with personalities that are different from their own or outside their frame of reference. Sometimes the individuals involved get tired or just run out of patience or time. The people in this process are humans and have human frailties. The process itself is a "people process" that reflects those frailties. More often than not, however, the participants in this process (from both within and without the government) use their humanity to bridge these difficulties and make it work. More often than not, good ideas and mutual respect prevail. And more often than not, legislators forgive and forget and start over next year to once more seek what's best for our State.

My own experiences indicate that not many legislators know a great deal about estate taxes, estate planning,

or estate and trust administration. They know a little, but not a lot. Notwithstanding those limitations, the legislative committee members with whom I dealt this year invariably were able to ask the questions necessary to understand and to analyze the many complex subjects covered by our 2010 Legislative Agenda. If we were successful this year, it was not because legislators passed legislation that they didn't understand. That doesn't happen. People don't trust what they don't understand and for which they can't predict the consequences. Instead, if we were successful this year, it was because we respected both what legislators needed and the resources they could bring to bear and because they gave us the time and interest to learn and appreciate what we were trying to accomplish. Obviously we are proud of the legislative process we have developed to advance our estate and trust law proposals, but that process would never work if legislators didn't meet us halfway and "carry the ball" to passage. A lot of very able attorneys, Senators, and Delegates stepped up this year to help us, and to each of them goes our most heartfelt appreciation. ♦♦

---

---

# Highlights from the 2010 Heckerling Institute on Estate Planning

By Sarah H. B. Kahl, Esq.  
Venable LLP

As of the end of March at the writing of this article, two months since the Heckerling Institute on Estate Planning, there is still no resolution on the long-term status of the federal estate and generation skipping transfer taxes. The primary topic of the 2010 Heckerling Institute on Estate Planning was the absence of these taxes in 2010 and what to do in the meantime. Two additional panel discussions were added to the agenda to cover "repeal." Nevertheless, there were hours of presentations focusing on other topics, and these topics continue to be relevant during repeal. This article will discuss a few recent "non-repeal" developments emphasized at Heckerling and then cover some of the significant time devoted to the inapplicability of Chapter 12 and Chapter 13 in 2010.

## Recent Developments

1. *Roth Conversions*. One of the first presentations was Christopher Hoyt's summary of the new Roth conversion rules. Conversions can now be made without any income limitations. Conversion can even be undone with a later recharacterization by the time the next income tax return is due if the results are not favorable. Conversion works particularly well when values are low, or if clients have significant losses or deductions (such as a charitable deduction carryforward) to offset the income on conversion. A client converting should be sure to have sufficient cash in order to pay the tax with other assets.

2. *Defined Value Clauses*. The new cases of *Christiansen* and *Petter* gave practitioners additional confidence in using a defined value clause to effect wealth transfers. *Christiansen v. Commissioner*, 130 T.C. No.1 (2008); *Estate of Petter v. Commissioner*, T.C. Memo 2009-260 (Dec. 7, 2009). In both cases, there was a formula that provided for a particular amount to pass to an individual with the balance to be distributed to charity. In contrast, in the old *Proctor* case, which the IRS won on public policy grounds, the gift reverted to the donor if it was subject to gift tax. Commentators at Heckerling advised that formula gifts be structured more like those in *Christiansen* and *Petter* and less like the one in *Proctor*, although there are hints in the recent cases that the public policy argument has weakened.

3. *Discount Planning*. Because possible upcoming changes in the law would limit valuation discount planning, the advice at Heckerling was to take advantage of discounts while

they are available. Presenters suggested gifting, selling or redeeming existing family limited partnership interests in order to lock in a discounted value.

4. *Price*. The recent *Price* case encourages careful drafting of a partnership or operating agreement in order to allow the annual exclusion to apply to gifts of partnership or limited liability company interests. 133 T.C. No.15 (Dec. 15, 2009). In a family limited partnership where there could be no assignments without the consent of all partners, the gift of an interest was not a gift of a present interest. One solution offered at Heckerling is to allow a transfer subject to a right of first refusal. Another solution offered is to include a temporary put. The partnership or limited liability company agreements must carefully balance the goals of protecting the interests from outsiders, obtaining valuation discounts, and qualifying for the annual exclusion.

## Estate and Generation Skipping Tax Repeal

Although other recent developments offered much to discuss, by far the most discussed recent development was the inaction of Congress and the resulting gap period in estate and generation skipping taxes. There was little speculation at Heckerling about what Congress would do about the estate and generation skipping taxes because the advice was generally practical: we as advisors need to deal with the current situation as well as all future possibilities. The possibilities are that Congress will do nothing, Congress will change the law retroactively, or Congress will change the law prospectively. Now that it is later in the year, the likelihood that Congress will change the law retroactively is less likely than it was at the time of Heckerling.

The current state of the law provides that Chapter 12 and thus the estate tax does not apply in 2010, Chapter 13 and thus the generation skipping transfer tax does not apply to generation skipping transfers in 2010, and there is a modified carryover basis regime for decedents dying in 2010. The gift tax rate is 35%.

The sunset of the 2001 Tax Act provides that in 2011, the Internal Revenue Code is to be applied as if the 2001 Tax Act had never been enacted. This sunset means that if there

(continued on page 5)

---

---

## Highlights from the 2010 Heckerling Institute. . .

(continued from page 4)

is no change in the law, in 2011, there will be a \$1.0 million applicable exclusion for gift and estate taxes, and a \$1.0 million plus inflation GST exemption. The rate would increase to 55%. Not only would the sunset lead to greater tax than under 2009 law, but also the sunset has led to confusion about lingering effects from the 2001 Act that exist in 2011. For example, would carryover basis continue to apply in 2011 to 2010 decedents? Would a proper allocation of the full GST exemption as it was in place in the 2001 Act still be successful?

Perhaps the most frustrating problem to arise from the new state of the law is the potential ambiguity in existing estate planning documents. As of the date of this writing, Maryland was considering a bill (H.B. 449) that would attempt to resolve ambiguity by interpreting tax terms no longer in the Internal Revenue Code with reference to 2009 law. This legislative patch would not apply to documents executed or amended in 2010 or expressing contrary intent.

Resolving the ambiguity by affirmative amendment would be preferable, however, to resolve any doubt as to client intent. For clients willing to consider the consequences of a 2010 death, alternative arrangements other than an interpretation under 2009 law may be appropriate. For example, it may be more tax efficient to leave amounts in trust to a surviving spouse rather than outright in order to permit the marital trust assets not to be included in the surviving spouse's taxable estate.

Many plans may already be tax efficient with respect to 2010 law, assuming resolution of tax term ambiguity. In Maryland, a common plan is to fund a Family Trust with the maximum amount passing free of federal and Maryland estate tax, with the balance to a Maryland QTIP. This approach has a lot of appeal in 2010 because it defers Maryland tax, can eliminate federal estate tax on both deaths, and allows use of the basis adjustments under the modified carryover basis regime.

Generation skipping planning can be a bit more complex. With respect to gifts, there is no GST exemption to allocate to a gift in trust in 2010, but distributions to skip persons after 2010 could nevertheless be subject to generation skipping transfer tax. With testamentary planning, whether transfers in trust will continue to be exempt is not clear, and funding trusts based on 2009 GST exemption levels could, in 2010, mix GST exempt assets with GST non-exempt assets. The opportunity exists, however, to make direct skips to individuals, either lifetime or testamentary, in 2010, assuming there is no retroactive tax.

Although these changes in the law make planning in 2010 more complex, the presenters at Heckerling reminded us to communicate the opportunities, such as the ability to make generation skipping transfers and low rate gifts, as well as the challenges, such as the need to update testamentary plans, as we wait for Congress to settle the questions. ♦♦



# Got News?

## MEMBER NEWS

Please send your professional news or announcements to one of the Editors at:

Aryeh Guttenberg  
Law Offices of Aryeh Guttenberg  
2835 Smith Avenue  
Suite 201  
Baltimore, MD 21209  
(410) 484-7711 phone  
(410) 484-3533 fax  
[aryeh@guttenberglaw.com](mailto:aryeh@guttenberglaw.com)

Mary Alice Smolarek  
Wright, Constable & Skeen, LLP  
One Charles Center 16<sup>th</sup> Floor  
100 North Charles Street  
Baltimore, Maryland 21201-3812  
(410) 659-1318 phone  
(410) 659-1350 fax  
[masmolarek@wcsllaw.com](mailto:masmolarek@wcsllaw.com)

---

---

# Planning and Drafting in an Uncertain Environment- 2010

By Jonathan D. Eisner, Esq.  
DLA Piper LLP (US)

## 1. How Did 2010 Arrive With Such Uncertainty?

When Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”), few commentators discussed the impact of EGTRRA in 2010.\* It might have been because 2010 was almost a decade away. It may have been because most professionals assumed that subsequent legislation would address the provisions that were scheduled to go into effect in 2010. Or, perhaps everyone focused primarily on understanding the impact of this extensive piece of legislation in 2001 (and the few years immediately thereafter), so there was little appetite to study the impact of the law in 2010.

In the few years after 2001, meaningful planning for clients could be accomplished under EGTRRA. The “rules of the game” were certain and understandable. In 2004, however, a push to immediately repeal the federal estate tax began in earnest, and complete and permanent repeal seemed like a realistic possibility. Many estate planners began drafting documents contemplating the possibility of repeal. Some planners included clauses that would apply if an estate tax was in effect at the decedent’s death and a separate, parallel set of clauses that would apply if no estate tax existed at the decedent’s death. Long estate planning documents became even longer.

There seemed to be even stronger political momentum in 2005 and 2006 to repeal the federal estate tax in its entirety. The House of Representatives passed a repeal bill in 2005, but the Senate failed to act. The 2006 mid-term elections shifted control of Congress to the Democrats and the talk of immediate repeal ceased. In 2006 and 2007, few commented about the 2010 storm that was brewing. Most attorneys went back to (or continued) drafting documents that assumed repeal would never occur.

All wealth management professionals were well aware of the steadily increasing estate tax exemption amount (or applicable exclusion amount) under EGTRRA from \$675,000 in 2001 to \$3,500,000 in 2009 and the gradual decrease in the highest marginal federal estate tax rate from 55% to 45%. We intellectually understood that the federal estate tax and

generation-skipping transfer (GST) tax would be “repealed” in 2010, but did any of us really believe that Congress would allow repeal to occur? Moreover, until very late in the 2009 calendar year, very few professionals focused on what 2010 would actually look like under the provisions of EGTRRA.

Well, December 31, 2009 came and went, and Congress failed to extend the 2009 laws or enact any legislation to address the bizarre effects of EGTRRA in 2010. To further complicate matters, EGTRRA contains a “sunset” provision. On January 1, 2011, the estate tax and GST tax are scheduled to revert back to pre-EGTRRA law; specifically, EGTRRA does not apply to “estates of decedents dying, gifts made, or generation skipping transfers, after December 31, 2010,” and, after that date, the Internal Revenue Code is to be applied “as if the provisions [of EGTRRA] had never been enacted.” Without legislative action, this presumably means a return in 2011 to a top federal estate tax rate of 55% (and a 5% surcharge on taxable estates between \$10 million and \$17.184 million), and federal estate and GST tax exemption amounts of \$1 million (but with the GST tax exemption to be adjusted for inflation). It is still possible that Congress will pass legislation in 2010 that will address the current uncertainty, but Congress appears to be focused on other matters, including seeking re-election.

Estate planners must now face the strange world of “temporary repeal” in 2010 and decide how to counsel clients in this uncertain environment. EGTRRA contains many provisions that can be interpreted in more than one manner and this has created significant confusion for planners and clients.

This article discusses several topics that estate planning attorneys should consider in 2010 and future years. First, what disasters lurk in our tried-and-true drafting provisions relating to marital, GST, and charitable gifts, and what can we do to mitigate or eliminate these problems? Next, what provisions might or should our clients incorporate to deal with the loss of basis step-up? Finally, what gifting and GST opportunities should we be discussing with our clients?

Because of the complexity of the subject matter and space limitations, the author does not attempt to address all possible issues that we must confront in 2010. Unfortunately, profound uncertainty exists and planning will continue to be challenging while the rules remain unclear.

*(continued on page 7)*

\*EGTRRA addressed many provisions of the Internal Revenue Code, but this article will primarily focus on the gift, estate and generation-skipping transfer tax provisions.

---

---

## Planning and Drafting . . .

(continued from page 6)

### 2. Drafting Issues – Formula Clauses and Potential Pitfalls

Testamentary estate planning documents for wealthy individuals typically use formula clauses to postpone, minimize, or eliminate the federal estate tax. These formula clauses incorporate terms and concepts in the Internal Revenue Code. The most typical example is a formula clause to fund a marital trust or a credit shelter trust. Examples include “I give the maximum amount that can pass free of federal estate tax to the Bypass Trust” or “I give an amount equal to my remaining applicable exclusion amount under the Internal Revenue Code to the Bypass Trust,” with the balance in each case passing to the surviving spouse or to a Marital Trust. (Unmarried clients who wish to eliminate the federal estate tax may leave the balance to charity.) An example of a clause used by clients focused on generation-skipping planning is “I give an amount equal to my unused generation-skipping transfer tax exemption to the Grandchildren’s Trust.”

If a client’s death occurs during repeal, note the possible different results with the two clauses designed to fund the bypass or credit shelter trust. In the first clause, the “maximum amount that can pass free of federal estate tax” would probably be the decedent’s entire estate. In the second clause, because “remaining applicable exclusion amount” uses a term that does not exist in 2010, arguably none of the client’s estate would go to the bypass trust. Thus, a client could have opposite results, depending on which formula is contained in his or her estate planning documents.

To make things even more confusing, the first clause may be perfectly acceptable, even desirable, in 2010 if it allows all of the first-to-die spouse’s assets to fund a bypass trust that is not subject to federal estate tax at the surviving spouse’s death. However, what if the bypass trust only benefits the children (from the first marriage or otherwise) so that nothing passes to the surviving spouse? This could have the unintended and disastrous consequence of disinheriting the surviving spouse. (The surviving spouse may have certain rights under state law to elect against the Will to avoid completely being disinherited, but this is rarely a desired result.) Great care must be taken to avoid this type of result, especially in family situations where children from a prior marriage exist. Further, Maryland residents must keep in mind that all of the bequest to the bypass trust over \$1 million will be subject to Maryland estate tax at rates of up to 16%. Depending on the relative assets of each spouse, it may or may not be economical to incur Maryland estate tax upon the first spouse’s death.

Charitable formula clauses that attempt to take advantage of the federal estate tax charitable deduction could also be

problematic in 2010. Examples include giving an amount to charity that causes “my taxable estate to equal \$5 million” or giving “20% of my adjusted gross estate” to charity. Do we know what the terms “taxable estate” and “adjusted gross estate” mean in 2010? How should these clauses be construed to best carry out the decedent’s intent? Would the decedent have provided more to his or her family if there was no estate tax?

For wealthy families that have sizable amounts passing to charitable organizations, the 2010 environment can create unnecessary Maryland estate taxes. Consider a husband and wife with a net worth of \$50 million (\$25 million in each spouse’s name) and a goal of providing \$8 million to their only child at the survivor’s death, with the balance of assets passing to charity. If their wills provide classic A/B trusts with a formula clause referring to the “maximum amount that can pass free of federal estate tax,” it is quite possible that \$25 million will pass to the bypass trust (which permits distributions to the surviving spouse and to the child) if one spouse’s death (let’s assume it is husband) occurs in 2010. Although this result may be acceptable from a federal estate tax perspective, the \$25 million will be subject to the Maryland estate tax at husband’s death, thereby causing approximately \$3.4 million of Maryland estate tax. In this situation, it may be far preferable to limit the amount passing to the bypass trust to \$8 million, or perhaps only \$5-6 million. This will substantially reduce the Maryland estate tax payable by the family.

With these ambiguities and pitfalls in mind, we now turn to some possible drafting solutions. As a preliminary matter, attorneys should ascertain the intentions of clients and include provisions in estate planning documents that are clear in the current environment and, to the extent possible, in the future. Because almost no one predicted repeal would actually come to pass, many attorneys never asked their clients how they would like to distribute their estates if the estate tax did not exist.

For many attorneys in Maryland who have been drafting to include a Maryland-only QTIP Trust during the past several years, most documents should be in fine order because the amount passing to the bypass trust is likely limited to the “maximum amount that can pass free of *state* and federal estate tax.” This clause ensures that no more than the \$1 million Maryland estate tax exemption amount will pass to the bypass trust, which avoids the mental gymnastics that might otherwise be necessary to determine the “maximum amount” under federal law in 2010 when no federal estate tax exists.

(continued on page 8)

---

## Planning and Drafting . . .

*(continued from page 7)*

If the testamentary document contains a Maryland-only QTIP Trust to hold the gap amount (the amount between the Maryland \$1 million exemption and the federal \$3.5 million, or unlimited, exemption), the Maryland-only QTIP Trust will likely receive the balance of the assets, which is a good result in most circumstances. If the amount above the federal estate tax exemption amount is bequeathed directly to the surviving spouse, clients should consider instead placing these assets in a QTIP-eligible trust so the assets are not forced into the survivor's estate.

Another advantage of incorporating the Maryland-only QTIP is that the Personal Representative can decide whether to make the Maryland QTIP election to defer Maryland estate tax based upon the facts that exist at that time. These facts would include the relative wealth of the two spouses, the survivor's life expectancy, and, of course, the tax laws then in effect. A QTIP trust is not the perfect solution for all clients, because only the surviving spouse can benefit from such a trust. If clients want to maximize the dollars that could be available to the children during the surviving spouse's lifetime, a flexible disclaimer trust that benefits the spouse and the children should be created to receive any part of the QTIP trust that the surviving spouse disclaims.

As noted above, there is a question as to how to interpret formula clauses that refer to Internal Revenue Code concepts that arguably do not exist in 2010. If a client's estate planning document does not include the Maryland-only QTIP, or it does but the complications outweigh the benefits, have your client consider executing a codicil to provide a rule of construction. One example might be:

If my death occurs during a period in which the federal estate and GST tax laws are uncertain because the estate and GST tax are not applicable (which is the case at the date of the execution of this Will), the following rule of construction shall apply when interpreting provisions in this Will: All provisions hereunder shall be interpreted using the federal estate and GST tax laws that were applicable to estates of decedents who died on December 31, 2009.

The analogue provision for a Revocable Trust is as follows:

Provisions governing Trust during Period of Inapplicability of Chapters 11 and 13 of the Internal Revenue Code. If the Settlor dies before January 1, 2011, then

any reference to the Code or any formula that contains words or phrases relating to the federal estate tax or generation-skipping transfer tax, including, but not limited to 'generation-skipping transfer tax exemption,' 'GST exemption,' or 'amount that can pass free of federal generation-skipping transfer taxes,' shall be deemed to refer to the federal estate tax or generation-skipping transfer tax laws as they applied with respect to estates of decedents dying or generation-skipping transfers made on December 31, 2009. If a federal estate tax or generation-skipping transfer tax becomes applicable before January 1, 2011, then the reference to January 1, 2011 in the preceding sentence shall instead read 'the first date on which the estate tax or generation-skipping transfer tax becomes applicable'.

Instead of incorporating a rule of construction, a client could impose a cap on the bequest to the bypass trust, such as "the lesser of (a) \$3 million or (b) the maximum amount that can pass free of federal estate tax," with the balance of the assets passing to a marital trust or charity.

Legislation has been proposed in Maryland that would automatically construe formula clauses in testamentary estate planning documents that refer to the federal estate and GST tax laws. The legislation (which would become a new Section 11-110 of the Estates and Trusts Article of the Annotated Code of Maryland) provides that formula clauses will be construed under 2009 federal estate and GST tax laws, which should reduce the number of estate plans that materially deviate from the decedent's intent. The proposed Section 11-110 reads as follows:

§ 11-110. Certain formula clauses to be construed to refer to federal estate and generation-skipping transfer tax rules applicable to estates of decedents dying on December 31, 2009:

(a) (i) A will or trust of a decedent who dies after December 31, 2009 and before January 1, 2011, that contains a formula referring to the "unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST exemption," "marital deduction," "maximum marital deduction," or

*(continued on page 9)*

---

## Planning and Drafting . . .

(continued from page 8)

“unlimited marital deduction,” or that measures a share of an estate or trust based on the amount that can pass free of federal estate taxes or the amount that can pass free of federal generation-skipping transfer taxes, or that is otherwise based on a similar provision of federal estate tax or generation-skipping transfer tax law, shall be deemed to refer to the federal estate and generation-skipping transfer tax laws as they applied with respect to estates of decedents dying on December 31, 2009.

(ii) This subsection shall not apply with respect to a will or trust that is executed or amended after December 31, 2009, or that manifests an intent that a contrary rule shall apply if the decedent dies on a date on which there is no then-applicable federal estate or generation-skipping transfer tax.

(iii) The reference to January 1, 2011 in this subsection shall, if the federal estate and generation-skipping transfer tax becomes effective before that date, refer instead to the first date on which such tax shall become legally effective.

(b) The personal representative or any affected beneficiary under the will or other instrument may bring a proceeding to determine whether the decedent intended that the references under subsection (a) be construed with respect to the law as it existed after December 31, 2009. Such a proceeding must be commenced within twelve months following the death of the testator or grantor, and not thereafter.

Given the unpredictability of Maryland’s legislative process, it is unwise to rely on these provisions to address repeal issues in a client’s estate planning documents. Rather, attorneys should review and amend formula clauses that might be impacted by the 2010 repeal to minimize the potential confusion (and court proceedings) created by the current uncertainty.

[Editor’s Note: The emergency saving legislation was enacted into law after the writing of the article and before this issue went to press. See “Notes from the Chair,” earlier in this newsletter.]

### 3. Carryover Basis

In order to offset the loss of revenue under EGTRRA, Congress effectively eliminated Section 1014 of the Internal Revenue Code in 2010. Section 1014 previously provided that every asset (excluding assets that constitute “Income in Respect of a Decedent,” or “IRD”) received a stepped-up (or stepped-down) basis equal to the fair market value of the

asset as of the decedent’s death (or at the alternate valuation date, if alternate value is elected). Instead of the stepped-up basis that all estate planners are accustomed to, EGTRRA provides under Code Section 1022 that legatees will inherit assets with a carryover basis (subject to certain adjustments) equal to the decedent’s basis. Section 1022(a) specifically provides that “the basis of the person acquiring property from a decedent [who dies after December 31, 2009] shall be the lesser of: (A) the adjusted basis of the property, or (B) the fair market value of the property at the date of the decedent’s death.”

The lack of a stepped-up basis will likely create challenges for legatees who must determine the cost basis of assets that the decedent may have owned for many decades. In order to minimize headaches, planners should ask clients to prepare detailed lists of the basis of their assets.

Congress did provide some relief from complete carryover basis. Under Section 1022(b), a Personal Representative may increase the basis of property acquired from a decedent by \$1.3 million for assets that pass to anyone. It is important to note that the basis adjustment is not \$1.3 million of value, but \$1.3 million of additional basis, which is significantly more valuable. For example, if a decedent dies with \$2.8 million of assets with a cost basis of \$1.5 million, the basis of the assets may be adjusted upward by \$1.3 million so the decedent’s legatees will receive the assets with a basis of \$2.8 million.

In addition to the \$1.3 million basis adjustment available for property that passes from a decedent to anyone, EGTRRA also provides for a \$3 million basis increase for property passing to a surviving spouse or to a QTIP trust. Once again, the step-up relates to an increase in the basis, not fair market value. As an example, husband can leave \$10 million of property, with a basis of \$7 million, to wife, and (after the basis adjustment) wife will receive the \$10 million of property with a basis of \$10 million.

In both cases, the basis adjustment is limited to the fair market value of the assets. For example, if decedent leaves \$1 million of assets (cost basis = \$500,000) to his children and \$10 million of assets (cost basis = \$8 million) to a QTIP trust, the assets passing to the children will receive a basis increase of \$500,000, to \$1 million, while the QTIP trust will receive an increase of \$2 million, to \$10 million.

It is important to note that, before any applicable adjustments, the basis of property acquired from a decedent under

(continued on page 10)

---

## Planning and Drafting . . .

*(continued from page 9)*

EGTRRA equals the lesser of (a) the decedent's basis and (b) the fair market value of the property at the decedent's death. Therefore, certain property will receive a "stepped-down" basis after death. In light of the possible decrease and because of Section 1022(b)(2)(C), clients with limited life expectancies should consider selling assets at a loss prior to death. Section 1022(b)(2)(C) provides that any carryover capital loss can be used by the Personal Representative to further increase the basis of assets (presumably still limited to the asset's fair market value), in addition to the \$1.3 million and \$3 million basis adjustments. Prior to 2010, a decedent's carry-forward capital losses were lost forever.

Estate planning attorneys should suggest to clients flexible provisions in wills and revocable trusts that authorize the Personal Representatives and/or Trustees to adjust the basis under Section 1022 in a manner selected by the fiduciaries. This is especially important if a legatee is also serving as a fiduciary, so as to protect that legatee/fiduciary from this conflict of interest position. An example of such a clause follows:

In addition to any and all tax elections, my Personal Representatives may make under this Will, my Personal Representatives are authorized to allocate the basis increase described in Sections 1022(b) and (c) of the Code to any property acquired from a decedent, as set forth in such Section of the Code and any regulations thereunder, and, if any such election is available, to elect whether to have Section 1022(a) of the Code apply to the estate or to make any other election that effectively avoids the application of Section 1022(a). Any decisions concerning the allocation of basis increase (including, without limitation, (i) a decision not to allocate any such basis increase, and (ii) a decision to allocate basis increase to property passing to or for the benefit of the Personal Representatives individually) and any election which avoids the application of Section 1022(a) shall not be subject to question by any beneficiary and shall be based on information known to the Personal Representatives, with no requirement that such allocations or elections benefit the various beneficiaries equally, proportionately, or in any other particular manner."

To relieve the legatee/fiduciary from this conflict of interest, clients could also consider naming an independent Personal

Representative to be responsible for the basis allocation. This would remove the risks and potential problems inherent in placing a beneficiary in that position.

Similar to many of the 2010 provisions of EGTRRA, carryover basis is scheduled to sunset on December 31, 2010, thus causing headaches only for 2010 estates. We can also hope that Congress will consider retroactive legislation to eliminate carryover basis for decedents who die in 2010.

### 4. Taxable Gifts

Having discussed the impact of EGTRRA on our traditional estate planning documents and ways to address that impact, we now discuss planning opportunities that may appeal to some of our clients, starting with taxable gifts. For wealthy clients who believe that an estate tax will likely exist at death, large taxable gifts have always been a tax-efficient technique to reduce overall transfer taxes, primarily because gift taxes are "tax exclusive," while estate taxes are "tax-inclusive."

As an example, assume that a client has already used her \$1 million of lifetime gift tax exemption, has a very large estate, and wants to transfer additional assets to her children. Let us further assume that the estate tax and gift tax exemptions are re-unified at the \$1 million exemption level. If she holds on to an extra \$3 million until she dies (and we assume that she will never need this \$3 million), and the effective estate tax rate is 50%, \$1.5 million of estate tax will be paid, leaving \$1.5 million for her children. If instead the client gives \$2 million to her children during her lifetime, pays \$1 million of gift tax, and lives three years after the gift (thereby avoiding the inclusion of the gift tax paid in her estate), the children will have received \$500,000 (or 33%) more. This result occurs because the federal estate tax imposes a "tax on the tax," whereas the federal gift tax does not.

For wealthy Maryland residents, large lifetime gifts are an even more effective estate planning tool, because Maryland imposes an estate tax, but not a gift tax. Under the 2009 tax rates, the combined federal and Maryland estate tax rates reach approximately 54%. (Because of the state death tax deduction, it is not higher.) The federal gift tax rate is only 45% and, if one factors in the tax exclusive nature of the federal gift tax, the effective rate is only 31%. When comparing a 54% rate against a 31% rate, large gifts may be very attractive to certain Maryland clients.

Under EGTRRA, the federal gift tax continues to exist in 2010. However, the gift tax rate is reduced to 35%. For

*(continued on page 11)*

---

## Planning and Drafting . . .

(continued from page 10)

clients inclined to make large taxable gifts, 2010 provides an opportunity for those gifts to be made at the 35% rate, which equates to a tax-exclusive rate of approximately 26%. Again, Maryland residents who face the Maryland estate tax at death (but no Maryland gift tax) may benefit greatly from substantial lifetime taxable gifts. Large gifts and the payment of gift taxes in 2010 might be a tax efficient strategy for some clients. It is critical to explain to such clients that retroactive legislation could increase the gift tax rate to 45% (or possibly even a higher rate). However, even with a potential, retroactively-imposed, higher federal gift tax rate, large taxable gifts may still be a viable technique for the right client because of the tax-exclusive nature of the federal gift tax and the lack of a Maryland gift tax. On the other hand, if the federal estate tax is permanently abolished at some point in the future, the payment of gift tax will have been foolish.

### **5. Generation-Skipping Transfer Tax**

The second planning area we will discuss relates to EGTRRA's repeal of the GST tax in 2010. This presents planning opportunities for grandparents who may wish to make large transfers to grandchildren or great-grandchildren. Clients must be aware, however, that Congress may attempt to retroactively impose the GST tax (as well as the federal estate tax).

The lack of a GST tax in 2010 leads to questions which do not have clear answers. If there is no GST tax in 2010, does the concept of GST tax exemption (and inclusion ratios) exist? Will these concepts exist in the future? The repeal of the GST tax also sunsets on December 31, 2010, which exacerbates the potential confusion.

If a 2010 gift is made directly to a grandchild, and the GST tax returns in 2011 (without retroactive application), we can feel fairly confident that this gift will have been made during the 2010 window, without adverse future tax consequences. However, many grandparents do not want to make outright gifts to grandchildren. One possible way to achieve the desired result of a large gift to, but limit access for, young grandchildren, is to create an LLC to hold assets and then transfer non-voting LLC interests to the grandchildren. Any large gift to a grandchild will of course still be subject to the gift tax (which continues to exist in 2010 under EGTRRA).

Gifts to trusts may prove more challenging. How will a 2010 gift to a trust that benefits grandchildren be treated in future years, assuming the GST tax is inapplicable in 2010 and Congress does not amend EGTRRA? Will

the trust be considered a grandfathered trust (similar to pre-1986 trusts) for GST purposes, so that all post-2010 distributions from the trust will not be GST taxable events? Or, because GST exemption was not (or could not be) allocated to the 2010 gift to the trust, will post-2010 distributions from the trust trigger taxable distributions under the GST tax regime? The answers are unknown and the planning opportunities for large gifts to trusts that benefit grandchildren are therefore perilous in 2010. For certain clients, these types of transfers may be appropriate, but it is very unclear as to how these trusts will be treated in the future. Regardless, clients should be very careful about making gifts in 2010 to pre-2010 trusts that have had GST exemption allocated to them.

EGTRRA sunsets on December 31, 2010, and it seems to mean that the law never existed. The exact language provides that EGTRRA shall not apply to "estates of decedents dying . . . [and] gifts made after December 31, 2010." Similarly, Section 901(b) of EGTRRA states that, in 2011, the provisions of the Code will be applied "as if the provisions and amendments described in [EGTRRA] had never been enacted." What does this mean for GST exemption that has been allocated to trusts between 2002 and 2009? Was the allocation of GST exemption ineffective? If someone allocated GST exemption in excess of the inflation-indexed level of 2011 (under pre-EGTRRA law), will that excess allocation be void starting in 2011? Until Congress passes additional legislation or Treasury promulgates clarifying regulations, these questions are not answerable.

Another area of confusion (and a possible pitfall) may be irrevocable life insurance trusts ("ILITs") that are set up as GST vehicles. With GST ILITs, many planners allocate GST exemption to the annual gifts to the trusts so that the life insurance proceeds will be exempt from the GST tax at the insured's death. This allows the ILIT to benefit multiple generations without the imposition of estate or GST tax. In 2010, when the GST tax does not exist, presumably there is no GST exemption available to allocate to these trusts. How do we counsel clients in 2010 to preserve the GST exempt nature of ILITs? Two options are (a) borrow against the cash value of the policy to pay the premiums or (b) treat any 2010 transfer to the ILIT as a loan until there is clarification in the future. We can hope that guidance will be provided soon to help solve some of these mysteries.

Finally, an aggressive 2010 planning opportunity is found with trusts currently in existence that will be subject to estate or GST tax when a child dies. If such a non-GST exempt trust

(continued on page 22)

---

---

# Issues Concerning Senate Bill 25: Preserving Tenants by the Entireties Protections in Revocable Trusts

By Frederick R. Franke, Jr., Esq.  
Law Office of Frederick R. Franke, Jr.

*[Editors Note: The following article was excerpted, with minor editorial revisions, from the author's April 15<sup>th</sup> comments to the MSBA's Estate and Trust Law Listserve.]*

Senate Bill 25 is indeed an interesting development. How this will be interpreted will be equally interesting. It may be interpreted as creating a virtual Tenancy by the Entireties ("T/E") substitute but merely one held by trustee(s) rather than spouses. The legislation, of course, seems to be careful not to say that the Husband and Wife need to remain the beneficiaries as to the T/E property at the first death. Presumably this will be seen as an improvement to T/E as one could keep the T/E "immunity" during the joint lifetimes but freeze in the treatment of the asset so it passes to someone else -- either at the first death or at the second death. Interestingly, (c)(2) says that the T/E immunity at the first death does not continue to work as to the surviving spouse's creditors "to the extent that the surviving spouse remains a beneficiary of the trust..." If the property in question passes to someone other than the surviving spouse, does the property pass free of the creditor claims against the survivor because the surviving spouse is not a beneficiary to the extent of that property or, say, only has a defeasible license in the property? "Cool stuff" if it works. Under existing law, one could only get that result by disclaiming and generally only to the survivorship interest.

That of course begs a question: how will the courts, particularly the bankruptcy court, interpret this? Cutting the property free from the constraints that exist for T/E property (requiring the survivor to end up with the fee at the first death subject to a disclaimer over-ride) would seem to be the point of the legislation. After all, T/E avoids probate initially anyway and it is only the secondary dispositions that have the probate issue unless action is taken by the surviving spouse. The danger, of course, is that a court might decide that the statute is meant to mimic T/E ownership so that any deviation as to who ends up with the property at the first death or even giving a vested right in the T/E property after the second death will defeat the immunity.

The history in this country of the development of T/E ownership provides, not a parallel, but at least a cautionary tale. In the not-so-good-old days, T/E widely existed but the husband effectively controlled all aspects of the tenancy (subject to some Equity Court over-rides). In some jurisdictions, this meant that the husband's creditors could get rents, etc. dur-

ing the husband's lifetime. In the mid-1800's, the Married Women's Property Acts were promulgated in the various states -- essentially becoming the law everywhere. As a result, the common law T/E tenancy started getting altered in the states that recognized the tenancy. Some states, like Maryland, said that all that changed was that neither could alienate during life. After the Act, some states held that either could now alienate thereby effectively destroying the effectiveness of the tenancy in those jurisdictions, while some states simply abolished the tenancy. This Act importantly states that it does not change the T/E rules so there is not that danger.

But how will the courts interpret a situation where the spouse is not entitled to anything as to that particular property after the first death or merely has a license to reside in the property for a while or for the rest of his or her life or, indeed, is a continuing beneficiary along with others? The usefulness of SB 25 is that it should not matter. A court seeing this as extending the T/E "immunity" because the trustee holding the same property is a mere change in form not substance might be tempted to hold that any deviation from a strict change of form model destroys the "immunity." Such a court would interpret the "spouse-must-be-a-beneficiary" requirement as "must be **the** beneficiary" as to that property. Also, it seems to me one of the nice things about T/E is that the bankruptcy code specifically refers to such a tenancy as being exempt to the extent honored by the appropriate state law. Will the bankruptcy court see this as like "a self settled trust **or similar device**..." subject to the 10 year look back rule? That would be my guess. I think that this is the provision meant to cover domestic asset protection trusts (think Delaware, Alaska, etc.) but broad enough to capture lots of other things. Why wouldn't it hit these trusts?

As I say, an interesting development. If the client wants to use a revocable trust for whatever reason anyway, it is certainly something to add in drafting. Perhaps we should be a little careful, however, what we tell clients as to whether it will work as well as T/E, if asset protection is the main motivation.

The MSBA and the Section will sponsor an asset protection seminar in November 2010, at which this development and other asset protection topics for estate planners will be discussed. ♦♦

---

---

# Weighing the New Planning Possibilities of Maryland's Senate Bill 25

By Richard T. Wright, Esq.  
Richard T. Wright, P.C.

Our friend and colleague, Fred Franke, raised a number of questions about Maryland Senate Bill 25\* in his April 15<sup>th</sup> thoughtful comments to the MSBA's Estate and Trust Law Listserve. [Editor's Note: Fred's comments are included earlier in this newsletter.] To answer these questions, I thought that it might be helpful to provide some of the thinking behind this bill.

## Executive Summary

I apologize in advance. This commentary is lengthy. The nature of the issues raised by Senate Bill 25 do not lend themselves to simple answers.

To summarize the points discussed below: Senate Bill 25 seeks to provide Maryland estate and asset protection planners with a new planning tool – trust property that will preserve the asset protection otherwise afforded by a tenancy by the entirety without the inflexibility of that tenancy. In particular, the legislation very carefully avoids saying that the surviving spouse needs to remain a beneficiary of the trust after the death of the first spouse. If the surviving spouse does in fact remain a beneficiary of the trust in question, Section 14-113(c)(2) limits the claims of the survivor's separate creditors in former tenancy by the entirety property "to the extent that the surviving spouse remains a beneficiary of the trust . . . ."

By the express provisions of Senate Bill 25, tenancy by the entirety property ceases its status as such when it is transferred to a trustee, and, in fact, Senate Bill 25 creates a type of property interest that is very different from a tenancy by the entirety. The property transferred and its proceeds merely enjoy the same immunity from claims of the separate creditors of the married conveying parties as does a tenancy by the entirety.

Bankruptcy proceedings are unlikely to pose any significant threat to the protections afforded by the new legislation for Senate Bill 25 Maryland situs trust property. First, Senate Bill 25

creates two new Maryland specific bankruptcy exemptions to protect such property upon transfer to a trustee. In addition, for a number of reasons, a transfer of entireties property to a trustee as contemplated by Senate Bill 25 is not a voidable fraudulent conveyance under the 2005 "Talent Amendment" even if a 10 year "lookback" rule is applicable under 11 U.S.C. § 548(e) (1). Finally, even if bankruptcy were to pose a problem for the protections afforded by Senate Bill 25, the husband and wife or the survivor of them will almost always be in control of the decision whether to expose this property to such a proceeding. Given an isolated creditor's difficulty and risks in bringing an action for involuntary bankruptcy, it is extremely unlikely that any risk posed by bankruptcy (if any) would need to be confronted unless the debtor chooses to do so.

These thoughts are discussed in much more detail below.

## Senate Bill 25's Purposes and Limitations

As originally proposed, Senate Bill 25 would have codified in Maryland certain language originally enacted in Virginia in 2001 (as amended by Virginia in 2006). See, Code of Virginia §§ 55-20.1, 55-20.2, and 55-21; 2001 Laws of Virginia Chapter 718; 2006 Laws of Virginia Chapter 281. After listening to criticisms of the Virginia statutes and the comments and ideas of other Maryland practitioners (including Mr. Franke), the author and David Scull drafted for the bill's sponsors the amendments that ultimately became the legislation passed by Maryland's Senate and House of Delegates.

In doing so, we sought to free Maryland estate planners from the inflexibility of tenancies by the entirety in situations where preservation of tenancy by the entirety-like asset protection is important. When Senate Bill 25 becomes law, no longer will planners in such situations be constricted to maintain the four "unities" (interest, title, time, and possession) that are required to support a tenancy by the entirety. No longer will joint lifetime ownership and/or benefit be limited to the married couple, and no longer need such benefit be equally shared by them. No longer need such ownership be affected by the incapacity of the husband or the wife, and couples will now be able to make better contingency plans if one or both of them becomes disabled (e.g., plans that need not rely on guardianship or powers of attorney). In addition, after the death of the first spouse, no longer must the surviving spouse either end up as the owner of what was previously a protected

(continued on page 14)

\*All Rights Reserved © Richard T. Wright, Esq., May, 2010

Gov. Martin O'Malley has not yet signed Senate Bill 25 at the time of this writing. As such, the legislation is referred to by its legislative number throughout this article, and tenancy by the entirety property transferred to a trustee in compliance with its provisions is referred to as "Senate Bill 25 property".

---

## Weighing the New Planning Possibilities...

(continued from page 13)

entirety asset or be forced to disclaim (a half interest in) such ownership to get it out of his or her name. (I admit to a bias against planning by disclaimer. In too many cases, a “Type A” surviving spouse will take actions on his or her own that will preclude the exercise of a planned appropriate disclaimer or, despite prior planning, will simply refuse to part with title to the property. Even in cases where the surviving spouse can and will make the disclaimer, this strategy requires that spouse to forego using any power of appointment that otherwise might provide flexibility in the disposition of property after his or her survivorship period. If we want effective planning, why build in such opportunities for failure?)

At the same time, the use of this new planning tool alone will *not* be appropriate in many situations. In particular, under Section 14-113(c)(2), after the death of the first spouse to die, the previously immune trust property will no longer be immune from the claims of the survivor’s separate creditors if it continues to be held by the trustee and to the extent that the surviving spouse remains a beneficiary of the trust. Importantly, this means that (like a tenancy by the entirety) if in such circumstances the surviving spouse has outstanding creditors, those creditors will be able to satisfy their claims from the former tenancy by the entirety property that was transferred to the trustee (or its proceeds).

In addition, even if the surviving spouse has no separate creditors, Section 14-113(c)(2) probably makes the use of Senate Bill 25 transfers inappropriate for estate tax avoidance planning purposes without further trust “bells and whistles”. If the surviving spouse is deemed to be a transferor under Internal Revenue Code Section 2036 and if, under Senate Bill 25, such a transferor’s creditors can reach the income of the trust, the surviving spouse will be deemed to have retained the income interest for purposes of Section 2036(a)(1). The resulting includability of the trust property in the survivor’s gross estate will limit the effectiveness of using former tenancy by the entirety property for funding a credit shelter trust (unless the trustee can distribute the trust property to third parties before the survivor dies). In addition, the fact that the separate creditors of the surviving spouse have claims against trust property under Section 14-113(c)(2) probably means that that surviving spouse has a general power of appointment in such property as a result of his ability to run up debt that can be satisfied out of it. For each of these reasons, estate tax avoidance planners desiring to maintain the asset protection features of Senate Bill 25 after the death of the first decedent spouse will probably need to devise methods for directing the transferred property out of the trust before or at the first decedent’s death.

### Why the Surviving Spouse Need Not Be a Trust Beneficiary After the First Death

As noted by Mr. Franke, the legislation very carefully avoids saying that the surviving spouse needs to remain a beneficiary of the trust after the death of the first spouse. To be immune from the claims of the decedent’s creditors, the only requirement in Section 14-113(c)(1) is that the property for which immunity is claimed must have been immune from such claims under subsection (b) immediately prior to the decedent’s death. When the House Judiciary Committee asked me about whether the survivor should be required to be a beneficiary after that death, I noted to them that, under *Watterson v. Edgerly*, 40 Md.App. 230, 388 A.2d 934 (1978), tenants by the entirety can give their property to whomever they choose (including the one of them that has no creditors) without having made a fraudulent conveyance as to separate creditors and that, in such circumstances, the decedent’s separate creditors would have no lawful claim to the property in question. Given this holding, I suggested that it should make no difference with regard to the decedent’s separate creditors whether the surviving spouse remains a beneficiary of the trust after his spouse’s death. In this regard, the Committee apparently agreed with me (although they did specifically request the language with regard to the survivor’s separate creditors that appears in subsection (c)(2)).

### Why Section 14-113(c)(2) Limits the Access of the Surviving Spouse’s Creditors to Trust Property “to the extent that the surviving spouse remains a beneficiary of the trust . . .”

As Mr. Franke notes, Section 14-113(c)(2) states that, after the death of the first spouse to die, the previously immune trust property is no longer immune from the claims of the survivor’s separate creditors “*to the extent that* the surviving spouse remains a beneficiary of the trust . . .” My original draft of this subsection for the Judiciary Committee (which it never saw) used the qualification “*if* the surviving spouse remains a beneficiary of the trust”, but the more I thought about this, under Restatement (Second) of Trusts § 156 and by extension of the holding in *Watterson v. Edgerly* (see also, *Wiltshire Credit Corp. v. Karlin*, 988 F. Supp. 570 (D.Md. 1997)), it seemed to me that the separate creditors of the surviving spouse should have access to trust property only to the extent that the surviving spouse could take benefit of it. Hence the change in language.

Once property is conveyed by a husband and wife to the trustee of a spendthrift trust, the separate creditor’s current hurdle when proceeding against the trustee (the owner of the

(continued on page 15)

---

## Weighing the New Planning Possibilities...

(continued from page 14)

target property) is the applicability of the spendthrift clause. However, both Restatement (Second) of Trusts § 156(2) and Restatement (Third) of Trusts § 58(2) provide that a restraint on the (voluntary or) involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid. In such circumstances, Restatement (Second) of Trusts § 156 provides that what the settlor's creditors can reach is "his interest". This is the point that *Wiltshire Credit Corp. v. Karlin* seems to make as well (without specifically saying so). Therefore, if under the terms of the trust the surviving spouse's access to the trust property is limited, that limitation would seem to place a limit on the extent that a creditor can avoid the effect of the spendthrift clause (or the limitations of the discretionary nature or ascertainable standards limitations for distributions from the trust to the settlor). If the surviving spouse merely receives a specific amount or a life interest, there appears to be no present legal rationale by which the creditors of the surviving spouse should have access to the totality of the trust property. Section 14-113(c)(2) therefore states that, after the death of the first spouse to die, the previously immune trust property is no longer immune from the claims of the survivor's separate creditors only "to the extent that the surviving spouse remains a beneficiary of the trust . . . ."

### Is the Surviving Spouse a "Settlor" with Respect to Formerly Tenancy by the Entireties Property Transferred by Both Spouses to a Trustee?

Interestingly, there exists some question as to whether a creditor can invoke the "self-settled trust" exemption from a spendthrift clause. In Maryland, the asset protection attributes of tenancy by the entireties property stem from what Mr. Franke has previously described as "the separateness of the tenancy from its individual constituents". See, p. B-22 of Fred Franke's article, "Asset Protection: An Overview for Maryland Estate and Trust Lawyers" in MICPEL's October, 2007 Asset Protection Planning program materials (which is, incidentally a "must have" publication for any Maryland attorney who regularly deals with asset protection). As noted in *Beall v. Beall*, 291 Md. 224, 234 (1981), "Maryland retains the estate of tenancy by the entirety in its traditional form. . . . By common law, a conveyance to husband and wife does not make them joint tenants, nor are they tenants in common; they are in contemplation of the law but one person, and hence they take, not by moieties, but by the entirety. Neither can alienate without the consent of the other, . . . ."

If this is the case, are spouses individually settlors of a trust to which entireties property is transferred or as to such property is the settlor only the husband and wife acting together? At least two relatively recent out-of state cases respond to this question with the latter alternative answer. *Bolton Roofing*

*Co. v. Hedrick*, 701 S.W.2d 183 (Mo.Ct.App. 1985); *Security Pacific Bank Washington v. Chang*, 818 F.Supp. 1343 (D.Hawaii 1993), *revsd* 80 F.3d 1412 (9<sup>th</sup> Cir. 1996); see, Restatement (Third) of Trusts § 58, Comments f and f(1). Both of these cases involved claims by separate creditors while both spouses remained alive, so they aren't directly apposite to a situation involving the surviving spouse and his separate creditors. They do, however, provide food for thought, especially when, under Section 14-113(d) of Senate Bill, a couple might avoid the applicability of the surviving spouse's separate claims under subsection (c)(2) by waiving subsection (b) immunity just before the first decedent's death. My guess is that the Court of Appeals might react as did the U.S. Ninth Circuit Court of Appeals in reversing the District Court decision in *Security Pacific Bank Washington v. Chang*, but, given the nature of prior Maryland cases involving the separateness of a tenancy by the entirety from its individual constituents, this result is not certain. With such the case, to make sure that the trust property would be subject to the claims of the separate creditors of the surviving spouse, the Judiciary Committee was wise to recommend Senate Bill 25 with the addition of the Section 14-113(c)(2) text.

### Will Courts Construe Senate Bill 25 to Require Mimicry of Tenancy by the Entirety Property?

In his email, Mr. Franke worries that "a court might decide that the statute is meant to mimic T/E ownership so that any deviation as to who ends up with the property at the first death . . . will defeat the immunity." I disagree. Senate Bill 25 is very specific at Section 14-113(g) that "[a]fter a conveyance to a trustee described in subsection (b) of this section, the property transferred shall no longer be held by the husband and wife as tenants by the entirety." There is absolutely no pretext that the trust property retains tenancy by the entirety status; and nothing in the bill indicates that the property held in trust is meant to mimic a tenancy by the entirety. In fact, subsection (h) of the bill's Section 14-113 distances the section from tenancies by the entirety when it expressly indicates that "[t]his section may not be construed to affect existing State law with respect to tenancies by the entirety." (We added this subsection when we wrote the amendments because we knew that such potential effects were a worry to Mr. Franke and others.) The only operative references to tenancies by the entirety in the statute appear in Section 14-113(b). The references in that subsection to "tenants by the entirety" are merely references to the type of property that must be conveyed to the trustee and to the extent of the creditor immunity provided. They do not characterize the nature of the trust property interest after transfer.

(continued on page 16)

---

## Weighing the New Planning Possibilities...

*(continued from page 15)*

In fact, the whole point of Senate Bill 25 is to free marital property from the inherent limitations of tenancies by the entirety. Although the couple is required to remain married (see subsection (b)(1)), none of the tenancy by the entirety “unities” are required to be maintained. The couple need not continue to own the property as is required in Virginia (note the deletion of this requirement in the amended final text at page 3, lines 7-8 of the bill). They need not control the property as trustees. They need not even be the sole beneficiaries of the trust (*see*, subsection (b)(3)). Finally, unlike the tenancy by the entirety, the survivor of the couple need not become the owner or beneficiary of the trust property at the death of the first decedent spouse and, during their joint lifetimes, neither is required to be an owner upon distribution or withdrawal of the property from the trust. In its wisdom, the Legislature has determined to encourage marriages in a new and unique fashion. I think this legislation is very clear that Senate Bill 25 creates a very different type of property interest that merely enjoys the same immunity from claims of the separate creditors of married conveying parties as does a tenancy by the entirety.

### Senate Bill 25 Property in Bankruptcies

Mr. Franke has correctly pointed out that whether or not one recommends transferring tenancy by the entirety property to a trustee will in part depend on how such trust property will afterward be treated in a bankruptcy. This was a point to which we gave a lot of attention in drafting the amendments to the original language of Senate Bill 25. The bankruptcy problems of the Virginia legislation (at least to the extent posed for Maryland property in a Maryland bankruptcy were we to have adopted the Virginia language) are some of the problems that we sought to avoid with our amendments. These problems are two-fold: First, will Senate Bill 25 trust property be exempt from inclusion in a petitioner’s bankruptcy estate? Second, is a transfer to a trustee pursuant to Senate Bill 25 voidable as a fraudulent conveyance for ten years thereafter as provided in the 2005 “Talent Amendment”?

I address these questions separately below. Please bear with me. Estate and trust lawyers tend to head for the hills (or at least for separate bankruptcy counsel) when they hear the “B” word. In point of fact, the threat posed by bankruptcy to Senate Bill 25 immunity will depend on the extent to which bankruptcy exemptions are available for the Senate Bill 25 property and, if such exemptions are in any way limited, the likelihood that the debtor will lose control of the decision whether bankruptcy occurs. Hopefully, the commentary below will provide some comfort when answering these questions with regard to Senate Bill 25. Bankruptcy will pose some issues with regard to Senate Bill 25 trust property, but these issues should be largely avoidable.

### • Senate Bill 25 Creates New State Specific Bankruptcy Exemptions for Marital Trust Property

In his email, Mr. Franke aptly notes that one of the nice things about tenancy by the entirety property is that the bankruptcy code specifically exempts from a petitioner’s bankruptcy estate “any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety ... to the extent that such interest as a tenant by the entirety ... is exempt from process under applicable nonbankruptcy law; ....” 11 U.S.C. § 522(b)(3) (B). We wanted to provide the same feature for Senate Bill 25 trust property to the extent possible.

Section 522(b)(3)(A) of the Bankruptcy Code (which immediately precedes the subsection quoted above) also exempts (subject to certain limitations with regard to homestead exemptions discussed below) from a petitioner’s bankruptcy estate, any property that is exempt under ... State or local law that is applicable on the date of the filing of the petition at the place in which the debtor’s domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor’s domicile has not been located at a single State for such 730-day period, the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place; ....

Maryland law expressly provides that, in any bankruptcy proceeding, a debtor is not entitled to the federal exemptions provided in § 522(d) of the federal Bankruptcy Code, but that any individual debtor domiciled in this State may claim the exemptions provided in subsection Section 11-504(b) (and in other statutes of this State) in any federal bankruptcy proceeding. Md. Code Ann. Cts & Jud. Proc. Article § 11-504(g) and (f). Senate Bill 25 therefore includes amendments to Courts and Judicial Proceedings Article § 11-504(b) to create new subsections (8) and (9) as to claims by one spouse’s separate creditors and new state and federal bankruptcy exemptions (1) for an individual debtor’s beneficial interest in a trust with Senate Bill 25 immune property and (2) for the Senate Bill 25 trust property itself. Therefore, if the debtor spouse has been a domiciliary of Maryland for the requisite two year (or less) period, these property interests should be exempt from inclusion in his or her bankruptcy estate.

In addition, were a debtor to argue successfully that a trust’s spendthrift clause is enforceable under applicable non-bankruptcy law because he or she is not the settlor of the

*(continued on page 17)*

---

## Weighing the New Planning Possibilities...

(continued from page 16)

trust in question (as discussed above), a separate bankruptcy exemption may exist under 11 U.S.C. § 541(c)(2).

As noted above, 11 U.S.C. § 522(b)(3)(A) contains a couple of limitations pertaining to use of state homestead exemptions to increase state exemption property prior to the filing of a bankruptcy petition. 11 U.S.C. § 522(o) excepts from the § 522(b)(3)(A) state exemptions the value of a debtor's interest in a residence or burial plot to the extent that such value is attributable to any property disposed of by the debtor in the 10-year period preceding the filing with the intent to hinder, delay, or defraud a creditor (i.e., a fraudulent conveyance). This subsection should not apply to the transfer of tenancy by the entirety property to the trustee because, as noted above, as to the separate creditor of only one spouse, a transfer of tenancy by the entirety property by a husband and wife is not such a fraudulent conveyance. *Watterson v. Edgerly*, 40 Md.App. 230, 388 A.2d 934 (1978). This section could apply were the creation of the tenancy by the entirety itself to have been a fraudulent conveyance within the 10-year period, but this is a problem that would exist regardless of whether the transfer contemplated in Senate Bill 25 occurs.

Additionally, 11 U.S.C. § 522(p) imposes a "hard cap" of \$125,000 (as adjusted every 3 years) on §522(b)(3)(A) state homestead exempt property (other than the principal residence of a family farmer or any interest transferred from a debtor's previous principal residence located in the same State) used as a residence and acquired within 1215 days of the date of a bankruptcy filing. Because the Senate Bill 25 bankruptcy exemptions may be deemed to create a new kind of homestead exemption for residential (previously) tenancy by the entirety property, there may in fact be some instances where this limitation on the § 522(b)(3)(A) state exemption will need to be discussed with clients to the extent that additions to the value of a residence total more than \$125,000 (as adjusted) in the past 3½ years over the value transferred to the residence from the client's prior in-state residence(s). Arguably, with regard to one spouse as a bankruptcy debtor, his or her interest in the residence in question would only be one half of the total value of the residence, and each spouse will have a separate \$125,000 exemption. Note also that, because of the favoritism of transfers from residences in the same state, the constitutionality of this subsection has been questioned under the unenumerated by generally accepted right to interstate travel of the Fifth Amendment's Due Process Clause. While it is true that the tenancy by the entirety exemption under 11 U.S.C. § 522(b)(3)(B) is not subject to this limitation, we did not view this limitation as particularly burdensome for the majority of Maryland domiciliaries, especially after the

recent plunge in home prices and (as discussed below) the generally elective nature of bankruptcy itself.

- **Is a Transfer to a Trustee under Senate Bill 25 Voidable by a Bankruptcy Trustee as a Fraudulent Transfer under 11 U.S.C. § 548(e)(1)?**

Bankruptcy Code Section 548(e)(1) provides that a bankruptcy "trustee may void any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if –

- A) such transfer was made to a self-settled trust or similar device;
- B) such transfer was by the debtor;
- C) the debtor is a beneficiary of such trust or similar device; and
- D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted."

The applicability of this subsection to Senate Bill 25 transfers is questionable. First, there exists the question noted above as to whether the transfer of tenancy by the entirety property by a husband and wife to a trustee creates a "self-settled trust" as to the separate creditors of either the husband or the wife. Second, as noted in *Watterson v. Edgerly* and *Beall v. Beall*, the transfer of tenancy by the entirety property to a trustee is not the separate act of a husband or a wife. It is a transfer by the entirety of both of them. Thus, if a single spouse declares bankruptcy, it is hard to argue under existing Maryland law that he or she made the transfer. Third, and most important, as to either individual spouse (but not both of them), *Watterson v. Edgerly* makes it difficult to argue that a transfer of entireties property to a trustee can be deemed to have been made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted." Thus, although the "or similar device" language of subsection (e)(1)(A) is certainly troublesome, it is hardly determinative. As long as *Watterson v. Edgerly* remains good law, it seems highly unlikely that a transfer of tenancy by the entirety property to a trustee will be voidable under 11 U.S.C. § 548(e)(1) when only one spouse is the bankruptcy debtor.

- **How Likely is it that Senate Bill 25 Property Will be Exposed to Bankruptcy Court Jurisdiction?**

Even if Senate Bill 25 trust property falls partly outside the intended Bankruptcy Code §522(b)(3)(A) state exemptions because of the 11 U.S.C. § 522(p) limitation and/or even if a

(continued on page 19)

# MSBA ANNUAL MEETING OCEAN CITY, MARYLAND

The MSBA annual meeting in Ocean City will be held from  
Wednesday, June 9 through Saturday, June 12, 2010.

For more information, visit [www.msbaannualmeeting.org](http://www.msbaannualmeeting.org) or call  
Wanda Claiborne of the MSBA at 410-685-7878.



## SEA. YOU. THERE.

### Join the Estate and Trust Law Email List

Make sure you are a member of the email list. The Section of Estate and Trust Law has a very active email list that is open to section members. The focus of the MSBAETL list is a discussion of issues relevant to Maryland estate and trust lawyers. The MSBAETL list also is intended as a means for members of the Section to communicate among themselves on issues of importance to the Section.

To subscribe to the MSBAETL list, go to the home page of the Section's web site and use the link marked: "Click Here to join the Estate & Trust Email List." The link will take you to a page where you can enter your name and e-mail address. The person signing up will then receive an e-mail that they must reply to in order to confirm their address. They will then be a member of the list and receive a welcome message.

Questions or comments about the list may be directed to the MSBA care of John Anderson at [janderson@msba.org](mailto:janderson@msba.org) or to the Section of Estate & Trust Law care of Richard T. Wright at [richard@rtwrightpc.com](mailto:richard@rtwrightpc.com).



---

---

## Weighing the New Planning Possibilities...

(continued from page 17)

transfer of tenancy by the entirety property to a trustee is, in fact, voidable under 11 U.S.C. § 548(e)(1), it is important to remember that these problems only exist in a federal bankruptcy context. Outside that context, Senate Bill 25's new Courts and Judicial Proceedings Article §11-504(b)(8) and (9) will preclude the separate creditor of either spouse from executing on trust property on a judgment.

Bankruptcy is normally a voluntary process undertaken at the election of a debtor. Although involuntary bankruptcies may theoretically be commenced under Chapter 7 and Chapter 11 if enough creditors have standing to do so, such involuntary bankruptcies are rare. Under 11 U.S.C. § 303, if a debtor has 12 or more potential creditors, involuntary bankruptcy requires at least three creditors holding unsecured claims totaling at least \$13,475 that are both not contingent as to liability and not then the subject of a bona fide dispute as to liability or amount. Who now doesn't have at least 12 creditor accounts? Moreover, even if a debtor has fewer than 12 potential creditors, the debtor may avoid potential involuntary bankruptcy by alleging a bona fide dispute as to liability or amount. Bankruptcy courts refuse to adjudicate what are believed to be two-party disputes between a debtor and petitioning creditor that a state court could better handle. *See, generally, In re Mountain Dairies, Inc.*, 372 B.R. 623, 634-35 (Bankr. S.D.N.Y. 2007). In addition, to invoke involuntary bankruptcy jurisdiction, the creditor or creditors must prove that the debtor is generally not paying his debts as they come due, unless such debts are subject to a bona fide dispute as to liability or amount. *See, In re Euro-American*

*Lodging Corp.*, 3 B.R. 700, 712 (Bankr. S.D.N.Y. 2007); *In re Amanat*, 321 B.R. 30, 35 (Bankr. S.D.N.Y. 2005). Not paying one or a few creditors is insufficient. The debtor must be generally not paying his debts as they come due. Finally, the kicker: if a creditor unsuccessfully attempts to commence an involuntary bankruptcy and fails to prove these requisite facts, under 11 U.S.C. § 303(i), the debtor is entitled to receive reasonable attorneys' fees and its costs in obtaining dismissal. No wonder involuntary bankruptcies are relatively rare.

My point in reciting this law is that, notwithstanding the minimal risk of potential problems posed by bankruptcy to the immunity of Senate Bill 25 trust property to the claims of separate creditors, the husband and wife or the survivor of them will most likely be in control of the decision whether to expose this property to these risks. Given the creditor's difficulty and risks in bringing an action for involuntary bankruptcy, it is extremely unlikely that these potential problems will need to be confronted unless the debtor chooses to do so.

In conclusion, as with any new concept, the impacts of Senate Bill 25 are not completely without uncertainties, and these uncertainties should always be discussed with clients before utilization of the bill's possibilities. Courts will no doubt weigh in on these questions in the future to provide greater certainty than what we now know. However, for now, we believe that this new planning tool is sufficiently planted in existing federal and Maryland law to encourage Maryland planners to take advantage of its dramatic new benefits. ♦♦

---

---

### SEARCHING THE MSBA ESTATE AND TRUST LAW EMAIL LIST ARCHIVES

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

1. Enter the following address in your Internet browser: [http://lists.msba.org/scripts/lyris.pl?enter=msbaetl&text\\_mode=&lang=english](http://lists.msba.org/scripts/lyris.pl?enter=msbaetl&text_mode=&lang=english)
2. When the log in screen appears, type your email address into the requested box and leave the password box blank
3. Click on "Click here to enter msbaetl"
4. This leads to the "msbaetl" screen.
5. Click on "Search" leaving empty the box to the left of this button.
6. At the "Read Messages" screen, you can search the archives for particular words, for messages from a given date, or for a designated number of archived messages sorted by date, author, or particular subject threads. To review a designated number of archived messages sorted by date, author, or particular subject threads, you merely designate the number of messages to be show, how these messages are to be organized, and click on the "Show" button.
7. Showing messages sorted by subject matter thread is particularly helpful because you see the original inquiry and all the responses sent to that inquiry.



---

# Fred Franke Responds...

## Better Than Sliced Bread? - A Reply to Richard Wright

By Frederick R. Franke, Jr., Esq.  
Law Office of Frederick R. Franke, Jr.

By its terms, S.B. 25 purports to permit self-settled asset protection trusts for married couples. Unlike domestic asset protection trusts (DAPTs) elsewhere, the settlor may be sole trustee, the trust need not be irrevocable, and the settlor may retain a non-testamentary general power of appointment.<sup>1</sup> As I mentioned in my Listserv post: "cool stuff if it works!"

Assume an example that may meet all of the requirements of S.B. 25. Husband ("H") and Wife ("W") hold as Tenants by the Entireties ("T/E") two residences ("Blackacre" and "Whiteacre") and a brokerage account worth \$4 million. They transfer these assets into two revocable trusts: H's Trust and W's Trust. H's Trust holds Blackacre and \$2 million of the securities and W's Trust holds the remainder. Each Trust provides a death payout to the surviving spouse of \$10,000 (or something not de minimis). Each spouse is the sole Trustee of his or her respective Trust and each has extensive rights over this separate Trust during life (including, a general power of appointment) and each has extensive powers to appoint at death (subject to the \$10,000 payout override). Perhaps these Trusts are backstopped by a marital agreement so as to preclude the assertion of an elective share against the Trusts at death instead of blind reliance on *Karsenty v. Schoukroun*, 406 Md. 469, 959 A.2d 1147 (2008).

But for S.B. 25, H & W would have created self-settled trusts which are ineffective as to the settlors' creditors.<sup>2</sup> This principle is based on the old-fashioned idea that people (unlike governments, perhaps) should pay their debts.

The treatment afforded T/E is not an exception to the general rule disfavoring self-settled trusts. Instead, the T/E property is seen as owned 100% by both H & W. Thus, the separate creditors of each spouse cannot attach an individual interest because there is deemed to be no individual interest. Such attachment would prejudice the non-debtor spouse. Historically, it was the survivorship interest that was protected, so before women had extensive property rights, and the husband had control of the property during his lifetime, the husband's creditors could attach the life interest. After the Married Women's Property Acts in the late 1800's, however, both the life interest and the survivorship became equally protected in most jurisdictions.

In *Watterson v. Edgerly*, 40 Md. App. 230, 388 A.2d 934 (1978), it was held that the transfer by the husband of all of his interest in the T/E property to the wife did not constitute

a fraudulent conveyance because the judgment creditor of the husband did not have an attachable interest in the T/E property. In "full bar" jurisdictions, this treatment is the general rule.<sup>3</sup> That is not the same as saying that the marriage as an entity makes the transfer. Indeed, there are numerous bankruptcy cases bringing back into the bankruptcy estate *Watterson*-type pre-petition transfers (ones occurring within two years of the filing of the petition). This is because of the sweeping authority given to the trustee to avoid transfers under U.S.C. § 548(a)(1). The result is that the previously exempt property comes back, not as a T/E exempt interest, but as a one-half tenant in common interest because when it comes back it goes to the bankruptcy estate, *not* the debtor/spouse as spouse.<sup>4</sup> There is little question but that a bankruptcy court would view the transfers by husband and wife into an S.B. 25 trust as self-settled. I doubt whether any Maryland court would take an opposite view.

The cases cited by Mr. Wright do not give much comfort. It is true that *Bolton Roofing Co. v. Hedrick*, 701 S.W.2d 183 (Mo. App. 1985) held that the creation of a spendthrift trust by the transfer of T/E property was not "self-settled" because neither individual spouse was the settlor. In a later case, however, the Eighth Circuit (which includes Missouri) rejected the argument that the unity of the husband and the wife meant that neither was the settlor (the argument had "serious flaws") and it held, in that subsequent case, that the husband was indeed the settlor. *In Re Markmueller*, 51 F.3d 775, 776 n.3 (8th Cir. 1995). His second case, *Security Pacific Bank of Washington v. Chang*, 818 F. Supp. 1343 (D. Hawaii 1993) was, as Mr. Wright noted, reversed on this very point at 80 F.3d 1412 (9th Cir. 1996). I do not think that there is much real doubt as to the self-settled nature of S.B. 25 trusts.

As long as S.B. 25 is seen as reversing the prohibition against settlors sidestepping creditors with self-settled trusts, it would permit sweeping DAPTs that would offer great creditor protection. In my above example, this protection would follow Blackacre and the husband's one-half interest in the brokerage account regardless of whether the wife had any further interest in that property. If H & W had severed the T/E property to accomplish this same result, of course, they would no longer have the T/E "immunity." What will a court decide the "same immunity" means under facts similar to those of my example? How enthused will a court be to interpret S.B. 25 in a way, to paraphrase Senior Circuit Court Judge Hainsworth in *Robbins*,

(continued on page 21)

---

## Fred Franke Responds. . .

(continued from page 20)

826 F.2d 293 (C.A. 4th 1987), so that the settlors/debtors "can have one's cake and eat it too"?

The pivotal question is whether S.B. 25 reverses the long-standing rule against denying creditors the absolute right to attach assets controlled by a settlor/debtor. In Maryland, "the cardinal rule of construction of a statute is to discover and carry out the real legislative intention." *Maryland Medical Service, Inc. v. Carver*, 238 Md. 466, 477, 209 A.2d 582, 588 (1965). Obviously, one begins to construe a statute based "on the tacit theory that the Legislature is presumed to have meant what it said and said what it meant." *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002). But where the statute alters the common law, it is interpreted very narrowly. *Id.* at 369 Md. 533 and 801 A.2d 169. *Lutz v. State*, 167 Md. 12, 172 A. 354, 355-6 (1934): "As a rule of exposition, statutes are to be construed in reference to the principles of the common law. For it is not presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than which is specified, and besides what has been plainly pronounced." (court quoting from another case which, in turn, quoted from a treatise.) In short, the common law "will not be repealed by implication." *Suter v. Stuckey*, 402 Md. 211, 232, 935A.2d 731, 743 (2007).

It is probable that a court will try to determine the legislative intent. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 525 A.2d 628 (1987). As with most state legislation, I doubt that there will be an unambiguous legislative history as to S.B. 25. S.B. 25 appears, however, to have been presented as a way of remedying the unfairness that would occur when spouses change the ownership of their T/E property by transferring it into their trusts for estate planning. One might speculate that the Legislature did not understand this Bill as creating a super DAPT available to married couples with property in Maryland. It is not irrational to fear that a court may interpret this supposed benefit of S.B. 25 into oblivion.

In my opinion, courts may interpret S.B. 25 to mean that T/E protection survives the transfer into a trust or trusts to the extent that the interests of the spouses mimic their pre-transfer interests. It would be rare indeed if the revocable trust terms actually mimicked the T/E ownership attributes. Many trusts, for example, may continue the property in trust for the benefit of the surviving spouse over his or her lifetime, then provide for it to pass to a remainderman without giving the surviving spouse a general power to direct (or redirect) that asset. Such an arrangement would not mimic T/E ownership. Thus, a restrictive interpretation of S.B. 25 could limit its operation to only the narrowest of situations.

I stand by my informal opinion in my Listserv post that S.B. 25 constitutes an interesting development. I also stand by my opinion that one should be cautious in using this technique for clients where asset protection is a serious concern. For the high risk client who is concerned about asset protection (for example, a lawyer, a doctor, a corporate executive with Sarbanes-Oxley exposure), I would not be comfortable relying on the "immunity" offered by S.B. 25. The technique of leaving the property as T/E for such clients and relying on a disclaimer for the estate planning works. We have not had any difficulty (even with Type A folks) effectuating such plans. I do not share Mr. Wright's bias against disclaimer planning. Indeed, it seems that such planning is in keeping with preserving client autonomy and permitting the clients to ultimately make their own decisions, even estate planning decisions.<sup>5</sup> Nor do I find that foregoing a power of appointment in the credit shelter trust is a significant element for the majority of families. Until the impact of S.B. 25 becomes clear, I think it prudent to stick to planning with a proven track record and high certainty of success.

On the other hand, for married couples with low risk profiles who want to create revocable trusts for whatever reason (disability planning, avoiding probate) using S.B. 25 will not hurt and may, in fact, prove to be a benefit. In those circumstances, I would recommend using S.B. 25 techniques to layer whatever immunization may exist onto those trusts.

### Footnotes:

<sup>1</sup> See generally, Richard W. Nenno, *Planning with Domestic Asset-Protection Trusts: Part II*, 40 Real Prop., Prob. & Trusts J. 477, 512-520 (Fall 2005) for a (slightly out-of-date) summary of DAPTs in the various states where permitted by statute.

<sup>2</sup> Restatement (Second) of Trusts, § 156(1) ("Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interests, creditors can reach his interests.") and § 156(2) ("Where a person creates for his own benefit a trust for support or a discretionary trust ... his creditors can reach the maximum amount which the trustee ... could pay to him ...").

<sup>3</sup> See Fred Franke, *Asset Protection and Tenants by the Entirety*, 34 ACTEC J. 210 (2009).

<sup>4</sup> Dana Yankowitz, "I Could Have Exempted It Anyway": Can a Trustee Avoid a Debtor's Pre-Petition Transfer of Exempt Property?, 23 Emory Bankr. Dev. J. 217 (2006).

<sup>5</sup> Mr. Wright and I are both in the Boomer generation (he younger than I) who recognize that many clients want to have the surviving spouse retain control over his or her

(continued on page 22)

## Planning and Drafting . . .

(continued from page 11)

permits liberal distributions to the grandchild, the Trustees could distribute all of the trust assets to the grandchild in 2010, which would not trigger any GST tax under current law. If the GST tax is retroactively re-enacted, however, this transfer could accelerate the GST tax. This is obviously a substantial risk and should be discussed in detail with a client before proceeding.

## 6. Conclusion

It is impossible to anticipate what Congress will do about the confusion that exists currently. Few estate planners believed that Congress would fail to act before January 1, 2010 and predicting future actions inside the Capital Beltway is nearly impossible. In the meantime, it is important to notify clients of the potential pitfalls under current law. Planning opportunities exist in 2010, but many are problematic because of the risk of retroactive legislation. ♦♦

## Fred Franke Responds . . .

(continued from page 21)

own destiny. See Jeffrey N. Pennell, *Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick, Anymore*, 34 ACTEC J. 2, 9 (2008) ("I expect Boomer surviving spouses - men and women alike - to be very much less passive than their mothers in accepting a plan that is offensive to the surviving spouse.") and also Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 Real Prop. Prob. & Trusts J. 313, 356 (1996). ("Those norms (trusts without the surviving spouse as sole or at least co-trustee) suit best the needs of institutions that depend upon post-death control of wealth for their livelihood rather than the needs of an adult society in which both sexes, without regard to their role in the family, participate meaningfully in the management and transmission of wealth for the benefit of the family.") I see disclaimer planning as a piece of that approach. ♦♦

The screenshot displays the website for the Maryland State Bar Association (MSBA), specifically the page for the Estate and Trust Law Section. The page features a navigation menu on the left with links such as 'Home', 'About Us', 'Contact Us', 'Join Section', and 'Email Lists'. The main content area is titled 'Estate and Trust Law' and includes several sections: 'CHAIR' (Richard T. Wright), 'EVENTS' (MSBA 2010 Annual Meeting), 'MEETINGS' (Monthly Meetings), 'PURPOSE' (The purposes of this Section are to bring together for furtherance of their mutual interest members of the Maryland State Bar Association interested in the areas of estate and trust law), and '2009-2010 ANNUAL REPORT'. A search bar is located at the bottom left, and a 'Done' button is at the bottom right.

DON'T FORGET  
TO VISIT THE  
SECTION'S  
WEBPAGE AT:

WWW.MSBA.ORG

---

---

# REALITY BYTES 9.0

*By Robert C. Young, Esq.  
Stewart, Plant & Blumenthal, LLC*

**Read these posts online as they are released at <http://technobytesmd.blogspot.com/> or from the link on the homepage of the MSBA Estate & Trust Law Section Website. The online version of Reality Bytes contains links to related stories on the Internet.**

## **Tuesday, April 20, 2010 Supremely Clueless?**

The Wall Street Journal's Law Blog ran a story yesterday on the seemingly clueless questions asked by some of our Supreme Court Justices during the oral arguments in *City of Ontario v. Quon*. Broadly stated, in *Quon* the Court is being asked to determine whether there is a constitutional right of privacy that protects text communications when the text messaging is done on devices and service plans provided by an employer.

*Quon* is Sgt. Jeff Quon of the Ontario County, California Police Department. Quon "exchanged hundreds of sexually explicit messages with his estranged wife, his girlfriend and a fellow SWAT officer" using department devices. The police department authorities issued somewhat conflicting pronouncements and procedures on the personal use of department devices. For more on the case, see Nina Totenberg's "Should Personal Texts From Work Devices Be Private" on the NPR website.

During oral argument, the WSJ Law Blog states:

"According to this post, at DC Dicta, the Court asked some questions of the lawyers which, well, the justices' kids and grandkids could have answered while sleepwalking."

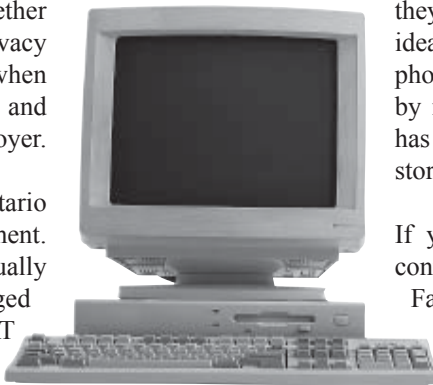
Further along, Justice Scalia's questioning is reported as follows: "Justice Antonin Scalia stumbled getting his arms around with the idea of a service provider. 'You mean (the text) doesn't go right to me?' he asked. Then he asked whether they can be printed out in hard copy. 'Could Quon print these spicy little conversations and send them to his buddies?' Scalia asked."

Given the current and future importance of electronic business and personal communication, we should all hope that the Court decides the legal issues correctly.

Regrettably, the Justices may need a crash course in understanding the technology first. Perhaps their law clerks will be able to help.

## **Sunday, February 28, 2010 I've Just Seen a Face(Book)!**

Facebook is one of the biggest social media phenomena of the early 21st century. Launched out of a dorm room at Harvard on February 4, 2004 by founder Mark Zuckerberg and some classmates, it started out as an Internet directory for college kids and has mushroomed into a destination where seemingly everyone wants (or feels they have) to be. Zuckerberg's original idea was to replicate on the Internet the photographic student directories published by many colleges and private schools. It has become perhaps the premier success story of social networking on the Internet.



If you have a computer and an Internet connection, you can have a presence on Facebook, creating your own profile and connecting with friends, joining fan clubs, becoming part of groups. You can be serious or silly or anything in

between (within limits). Grandparents and parents have joined Facebook, following their children and grandchildren, who originally popularized the site as college and high school students. Politicians and pundits and musicians are there too, connecting with their followers and fans. From humble beginnings, Facebook is now a worldwide phenomenon. On December 1, 2009, Facebook founder Zuckerberg wrote in an open letter to Facebook users:

"It has been a great year for making the world more open and connected. Thanks to your help, more than 350 million people around the world are using Facebook to share their lives online."

You can read more about the history of Facebook on Wikipedia.

For the young people who originally popularized Facebook, it remains primarily a social hub, a way for friends to stay in touch by posting status reports about their lives. Twitter

*(continued on page 24)*

---

## Reality Bytes. . .

(continued from page 23)

may be grabbing some market share in this department, but Facebook is a premier site for this interaction. It offers the ability not only to post text (in longer doses than Twitter's 140 character limit), but also pictures and links and applications that friends can play together. In a student newspaper from my daughter's school, an article about social media largely focuses on Facebook, MySpace and Twitter. A senior at a neighboring school cites Facebook as his favorite site and is quoted as saying:

*"Humans are social by nature and whatever means we create to communicate with each other, we're going to use it excessively."*

Another senior says:

*"When I go on Facebook, it's a 'de-stresser,' and I'm able to get my mind off of school and just talk to my friends."*

(Sorry, no link for this, as the student newspaper is not online.)

Facebook is "free." None of those 350 million users are paying any money to Facebook. This is not uncommon on the Internet. Google is free. YouTube (now owned by Google) is free. Wikipedia is free. But then, Wikipedia is run by a non-profit foundation. Facebook and Google are very much for-profit businesses. So, is Facebook really "free"?

Facebook and Google make money from advertising. Many businesses pay to have ads and links placed on "your" Facebook page (or your Google search result page). The Wall Street Journal recently reported that Facebook is going to integrate PayPal, so that it can attract more international advertising in countries where credit cards are not widely used. The article notes that currently 70% of Facebook's users (now 400 million strong in February of 2010) live outside the U.S. PayPal, a subsidiary of eBay, covers 24 currencies in 190 markets. See Facebook's announcement on PayPal.

The popularity of these sites certainly makes them attractive for advertising. There is something even more attractive to advertisers in social media sites: your personal information.

I have been using Facebook for about six months now. Following a notable high school reunion last summer, I found that it was a way to keep in touch with friends that I had not seen in years. Next, I started connecting with college classmates and friends. This is really what attracts many to Facebook: the ability to stay in touch with friends and family. (It is embedded in the architecture of Facebook itself, which labels individuals with whom you chose to associate on Facebook as your "Friends".) I have seen

criticism that Facebook is really becoming just one giant reunion site, with people of all ages joining to keep in touch. I suppose that is at least partly true, but I am not convinced that it is completely accurate or necessarily a bad thing if it were true. There is nothing wrong with people keeping in touch through this or any other site on the Internet. Human communication, even the frivolous kind, is part of the fabric of social interaction.

Nobler aspirations for Facebook should not be discouraged either. I am not sure that Facebook or Twitter or any other Internet site is going to overturn a brutally repressive government (e.g., Iran) any time soon, but Facebook certainly is capable of meaningful dialog on social and political issues. With the reservations noted later in this article, however, you should understand that Facebook is a user-controlled media. It is what its users make it. Critics who scoff and shun Facebook because they are looking for more relevant dialog on social and political issues are missing the point. They should get on Facebook and start their own discussions and groups. There is plenty of diversity of opinion on Facebook about issues more pressing to our times than reunions, boy/girl friends, etc. Here are some examples: political satirist Barry Crimmins (who happens to be a high school friend), British folk singer and political activist Billy Bragg (recently campaigning at Speaker's Corner in Hyde Park and on Facebook against bonuses for the bankers at the Royal Bank of Scotland), tax lawyer and blogger Kelly Erb (who uses the name "TaxGirl"), Facebook pages for Maryland organizations like The Walters Art Museum, The Creative Alliance, The Mount Vernon Cultural District, new services like The Wall Street Journal, NPR, PBS, a daily blessing from my wife's cousin's husband and a weather forecast, Foot's Forecast, from a local high school teacher and students (which has pretty much been spot-on in predicting our Snomaggedon winter in the Mid-Atlantic). So, Facebook can be what you make it and each user adds something else to the mix. It may have aspects of an evil empire behind the curtain, but the critics should stop complaining about the problems and start becoming part of the solutions.

Facebook is also a *tabula rasa* where users can create a body of portrait of themselves and can find similar collections of information about their friends. Facebook encourages and facilitates this exchange of personal ideas, thoughts and information by providing ways to post and share pictures, notes, links to the Web, books that you have read, etc. Every user has his or her own "Wall" on which their status updates, shared links or other postings can be found and on which friends can (and are encouraged by Facebook) to write.

(continued on page 25)

---

## Reality Bytes. . .

*(continued from page 24)*

These posts go out to friends and others and are displayed on each user's News page. There are also third party applications that provide games or other interactive ways for self-expression through Facebook. I use Facebook, in part, as an online archive of interests and thoughts. Many other users do the same, in their own personal and distinctive way. Facebook is a wonderful tool for self-expression. I really mean that in a very positive sense.

There is a commercial side, however, to all this self-expression. Remember that Facebook is not a non-profit. Underneath the social veneer, Facebook is trying to make money. The Los Angeles Times recently reported on one of Facebook's more popular applications, Farmville. Farmville is played by 31 million people a day. According to the Times, it cost around \$300,000 to make and brings in around \$113 **million** a year!

Although Facebook is built on the premise that you choose those with whom you wish to associate and share information, Facebook also subtly (or perhaps not so subtly) pushes users to share more information with more people. It begins with what happens on the right hand side of your Facebook page. There you find various things, like requests from others to connect as a friend, suggestions from Facebook of people that you might want to "friend" (now officially a verb, along with "unfriend"), and reminders about the birthdays of your friends. There are also advertisements, suggestions of birthday gifts for friends, and other suggested ways for you to connect or find new "friends", like a Facebook solicitation that asks you to invite friends who are not on Facebook to become users. There is a Friend Finder search. On your Profile page, you are encouraged to put information about yourself, your family, your likes and interests.

Sharing is a very important part of Facebook (and the Internet in general) these days. As a Facebook user, you can join "Groups" or become a "Fan". Groups can be established on Facebook as a way for people with a common interest to share and discuss that interest, whether serious or frivolous. Organizations and artist or authors or bloggers or others can set up a public page on Facebook that requires you to associate yourself by being a becoming a "Fan". Once part of a Group or a Fan of an organization, etc., you will begin receiving postings for these sites. They will appear on your (recently redesignated) "Top News" and "Most Recent" pages.

Facebook has been reconfiguring its pages recently. Although you have settings to control these features and the content that you see, Facebook exercises some manipulation behind the curtain, particularly in the "Top News" feature. The "Top News" is now managed by some programming function of Facebook that selects postings to be displayed

based in some way on your designated preferences and usage patterns. There is some user control over this, but in my experience it has limited effect in overriding Facebook's own program. I am not sure why Facebook thinks that this kind of selectivity (censorship?) is a good thing for us or if it has fully explained its operative characteristics, but it makes me feel manipulated. The "Most Recent", on the other hand, is supposed to be everything from everyone in your social circle. (Given the manipulation going on with the "Top News", however, I am not sure that I trust that the "Most Recent" feed is complete.)

When one of your friends or groups or fan sites posts a message or shares a link with you, you are encouraged to respond by either making a "Comment" or click to register that you "Like" the post. (Many Facebook users (in the millions) are campaigning for Facebook to add a "Dislike" response. (I became a fan or joined three of these campaigns as I wrote this column.) You also may have the option to "Share" a post with your friends.

Many Internet sites also now encourage you to share reports or other information on their websites with your friends on social media sites like Facebook. So, if I am reading an interesting piece on the Internet site at NPR or The New York Times or The Wall Street Journal, there may be a button on that site that allows me to share a link to the article and a brief introduction with my friends on Facebook or other social media sites. Even if the website does not have a function to do that, I have an application on my browser that will automatically set up a Facebook link to the page that I am viewing and share it on Facebook.

Facebook shares with your friends information on whom you have recently "friended." It also tells your friends sites on Facebook that you recently have joined or of which you have become a fan. This, of course, encourages your friends to follow your lead and make new friends or join new groups or become fans of other sites. In effect, much of what you do on Facebook is being used by Facebook to influence your friends to expand their usage of Facebook.

All this connection with others and interchange and sharing of information is wonderful. It is what makes the Internet such a powerful piece of technology today. For Facebook, it also is a goldmine. Whether you share your information with the whole world or not, you are sharing it with Facebook. Facebook uses what you post and what you do to target its approach to you as a user. List your favorite music or bands, and you will start to see ads posted on your page for related

*(continued on page 26)*

---

## Reality Bytes. . .

*(continued from page 25)*

products or programs. I listed Little Feat as a favorite band. I now get ads for t-shirts of the late Feat guitarist Lowell George. I listed Los Lobos, and got promotional ads from PBS for a recent performance of Los Lobos at The White House. Facebooks cross-references your Friends list with the Friends lists of each of your friends and suggests new friends. In the part of your page that Facebook reserves to suggest Friends, you will get a message:

John Smith  
5 mutual friends

If you want to use one of those third-party applications that abound on Facebook, you will notice that the application asks for access to your personal profile information before you can use the application. This is partly because the application may need certain information about you to operate effectively, but it also means that your personal information may be used other ways, to target advertising through the application, to solicit your friends to use the application, etc. I have a friend whose husband signed her up for an application called Mafia Wars. I started getting all kinds of postings from Mafia Wars asking that I "help" my friend achieve some level of accomplishment within Mafia Wars. In order to do so, however, I had to give Mafia Wars access to my information. It was an offer I chose to refuse.

Facebook is not unique in using your information and usage patterns to target its advertising and business development. Google does the same thing when you use it to search or as a home page. Google is trying to encourage social networking through its homepage and its social networking site Google Buzz, but Facebook is far ahead in this area.

Facebook is also an entirely different environment from Google. Search on Google can be informative, but it is also episodic and limited. Social networking on Facebook is a more pervasive and personal. Because of its ability to draw you into interaction with others, social networking sites, by design, seek to become a integral part of your life. In the process, such sites expect us to share more and more information with one another. What it means, however, is that you should be careful what you do and share on these sites.

Mark Zuckerberg's open letter mentioned above seems to focus on issues of privacy on Facebook. It largely addresses changes that Facebook made at the end of last year in its privacy settings. Zuckerberg talks about this as "empowerment" of Facebook users, giving them more

control over who sees what information about the user. These new settings do give the user a wider range of options for sharing the various types of information posted to Facebook. The new settings also are more complicated, requiring the user to go through several menus and select what level of privacy they want for status information, shared links, photographs, etc. This can be daunting at times. Now, when you post on Facebook, you are often give a menu for that posting which allows you to expanded or limit who sees what you share.

The problem here may be remembering to do this each time you post. I often forget, because my primary intent is to get my thought or link out. Thus, your defaults settings become all important. Zuckerberg's letter also makes clear that the good folks at Facebook have given your privacy considerable thought and "concluded" certain changes were in your best interests. Zuckerberg and Facebook clearly think they have figured out what you need and want. That kind of approach troubles me, containing a touch of "Big Brother". Zuckerberg pulls back from the edge toward the end of the letter: "We'll suggest settings for you based on your current level of privacy, but the best way for you to find the right settings is to read through all your options and customize them for yourself. I encourage you to do this and consider who you're sharing with online."

This is probably a fitting conclusion for a user driven site like Facebook. You, the user, need to protect your privacy, not simply assume that Facebook is going to do it for you. Future Tense recently reported that social media like Twitter and Facebook have become popular with Internet criminals who are running scams to get a hold of your identity and financial information. The New York Times recently ran a report on three essential steps to protect your privacy on Facebook. These are checking the settings on (1) who is allowed to see your posted status updates, photographs, videos, etc., (2) who is allowed to see your profile information and (3) whether your information is available to public search engines like Google or Bing or Yahoo. Similarly, the ABA Journal recently ran an article, "Saving Face" by Dennis Kennedy, which discussed ways to protect your privacy and identity on Facebook.

If you use Facebook, be sure you check all of your privacy settings under the various submenus of the "Settings" menu, not just the "Privacy Settings" submenu. Consider carefully what information you post on Facebook and just you want

*(continued on page 27)*

---

## Reality Bytes. . .

(continued from page 26)

to see that information. Consider also what sharing your information with "Everyone" really means -- basically that anyone, anywhere may be able to access what you are posting and harvest information from it. Having friends is a great thing, but be careful to check out people seeking to become your friend before you open up your information to them. Also, beware of communication that looks like it comes from a friend, but may contain links that lead you to sites where you may be tricked into giving out your personal and financial information.

**Tuesday, December 22, 2009**

### Connected in the Jury Box

There appears to be a growing problem with the interface between technology and the jury box. In Maryland alone, we have two high profile situations that illustrate the problem. The Daily Record has reported both of these incidents. Both the Baltimore Sun and the ABA Journal have picked up the story.

The Court of Appeals recently threw out a first-degree felony murder conviction because a juror conducted an independent search on the Internet for information to answer questions that the juror had about the case. It was the second time this year that that Court of Appeals has ruled that outside research tainted a jury decision.

In Baltimore, we have just witnessed media frenzy over the corruption trial of Mayor Shelia Dixon. Jurors in the case were given the usual instruction not to discuss the case outside of the jury room. This includes a specific warning about using social media like Twitter. After the verdict, reports circulated that jurors had been communicating with one another through Facebook outside of the courthouse.

The legal principles here are time honored. What is new is that the rise of technology and Internet search make it so easy to communicate and access information outside (or even inside) the courtroom. Internet search is one of the most powerful developments to come out of the Internet Age, making enormous amounts of information available and manageable with a few keystrokes and clicks of a computer. Social media like Twitter and Facebook make communication easier and a part of our lives. Both of these developments are becoming a fundamental part of modern life. Technology has now made them ubiquitous by putting these tools in our hands in the form of texting, smartphones, devices like the iPod Touch, and netbooks. We no longer need to get to a computer at home or at work to search the web or communicate with others.

**Tuesday, November 17, 2009**

### Quick Bytes: Online Wills

Professor Gerry Beyer reports today in his Wills, Trusts & Estates Prof Blog on a Wall Street Journal article by Jane Hodges about online wills, *Before It's too Late: A Test of Online Wills*, WSJ, Nov. 12, 2009. The Journal article reviews various online will preparation software, using a hypothetical married couple to test the products. Beyer notes that the article has already been roundly criticized, particularly in a blog post by David A. Shulman, a South Florida estate planning attorney, entitled *The Wall Street Journal Totally Bloes it on Online Wills*. Beyer concludes by saying, "Maybe the real test will come when the hypothetical couple hypothetically passes away."

**Friday, November 13, 2009**

### Dying in the Digital Age

I may not be the first to call your attention to this, but I have written before about the issues associated with our cyberspace identities when we die. Increasingly, we have multifaceted virtual identities through our computers and the Internet. We have passwords for accessing everything from bank accounts, to email accounts, to Facebook pages, to Twitter, and everything in between and beyond. Some of these facets of our virtual selves may be more meaningful than others. Social networking pages on sites like Facebook or My Space may carry with them many memories and emotional ties. Other accounts on the Internet may contain important financial information.

So, you may be interested in a number of new articles that I came across today through Prof. Gerry Beyer's *Wills, Trusts & Estates Prof Blog* in a post entitled "Accessing Email & Social Networking Accounts After A Loved-One's Death". Beyer begins by asking the question: "What happens to an email or social networking account when the account owner dies?" He follows that by discussing another article by Andrew Ramadge in news.com.au entitled "Whaty Happens to Your Email When You Die?" For good measure, Beyer links to his own earlier post on "What to Do When a Facebook Friend Passes Away." These are both worth reading.

Also of interest may be Jon Gordon's piece on *Future Tense* entitled "The Death Switch," which discusses an online service, Deathswitch, which provides a way for your family and others to access critical information after death. Deathswitch operates by setting up certain protocols and checks to determine if it is likely "you've gone toes up" (Gordon's phrase). ♦♦

# **NOMINATING COMMITTEE REPORT**

The following is the report of the nominating committee for the Estates and Trusts Section of the Maryland State Bar Association (MSBA) for positions to be filled for the 2010-2011 fiscal year:

Nominations for officer positions with the Estates and Trusts Section Council of the MSBA for a one-year term for fiscal year 2010-2011 are as follows:

Chair	Matthew A. Mace (without election)
Chair-Elect	Sharon J. Ritter
Secretary	Eileen D. O'Brien

Nominations for Council Member positions with the Estates and Trusts Section Council of the MSBA for a two-year term for fiscal years 2010-2012 are as follows:

Frank S. Baldino  
Deborah A. Cohn  
Danielle M. Cruttenden  
David C. Dembert  
Brian R. Della Rocca  
Jonathan D. Eisner  
Natalie B. Sherman

Nomination to fill remaining term of nominated secretary (2010 – 2011):

Anne W. Coventry

Other nominations for officers and members may be made by written nomination signed by not fewer than 15 members of the Section. Any such nomination(s) must be submitted to the current Secretary, Sharon J. Ritter, not later than June 1, 2010, ten (10) days before the Section's annual meeting, which will be in Ocean City, Maryland on June 11, 2010.

SUBMITTED BY: Edwin G. Fee, Jr.  
Richard F. Lindstrom  
John P. Edgar

Nominating Committee