

# MSBA

## SECTION OF ESTATE AND TRUST

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### Newsletter

Mary Alice Smolarek, *Editor*  
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### Notes From The Chair

*Sharon J. Ritter*

It is an honor to serve as the Chair of the Estate & Trust Law Section Council. Being on this committee has given me a chance to work with the “best and the brightest” of the Estates & Trusts bar and has been a very rewarding experience.

Throughout the year, the Council works on various projects and foremost of these is the legislation that affects the practice of estates and trusts lawyers. This year we have several bills we are considering.

One bill that the Council has been working on for many years is the Maryland Trust Act. This bill is a joint effort of the MSBA and the Maryland Bankers Association and the purpose is to create a comprehensive body of statutory trust law. Loosely based on the Uniform Trust Code, the Act codifies in one place existing Maryland statutes and common law and fills in the gaps where there is no clear trust law. Every effort has been made to “codify, not modify” Maryland trust law. Members of the Council have been meeting with legislators in the House and Senate and working with other sections of the MSBA in the hopes that this bill will pass in the upcoming session. Stay tuned.

Another proposed bill is a revision of Estates & Trusts Article Sec. 8-106 to

include in the term “funeral expenses” expenses for food and beverages related to a wake or other gathering at the time of a funeral. The addition of this language would make such expenses not only deductible on an administration account, but also for Maryland and federal estate tax purposes.

Last year Del. Kathleen Dumais sponsored HB 471 that would have required that an appeal to the Circuit Court from a final judgment of the Orphans’ Court be made on the record rather than de novo. The bill received an unfavorable report in the House Judiciary Committee. However, members of the litigation section of the MSBA believe that a de novo trial in the Circuit Court encourages game playing by some attorneys and creates added expense for the

parties. In general, the Council thinks that the current Orphans’ Court system works in that it is accessible for parties acting pro se, and issues can often be resolved in less time and with less expense. Del. Dumais is working on a compromise for review and comment by the Council in the next few weeks.

Legislation is only one of the activities undertaken by the Section Council. For example, the Council began to look into the commissions allowed to trustees on the sale of real estate when a member asked where to find the applicable circuit court rules. Estates & Trusts Article Sec. 14-103(d) provides that a trustee is entitled to a commission on the sale of real property “at the rate allowed by

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# 2011 Advanced Estate Planning Institute

By Diane K. Kuwamura, Esquire  
Feeney & Kuwamura, P.A.

On May 13, 2011, the Maryland State Bar Association presented the Advanced Estate Planning Institute, which was a full day session on estate planning issues under the new 2010 Federal Tax Act and legal and practical issues for contests of Wills and Revocable Trusts. Seven very distinguished and well recognized estate planning professionals were the presenters at the conference. The esteemed panel of speakers included Cristin C. Lambros, Esquire, founding partner of Cristin C. Lambros, LLC, Edwin G. Fee, Jr., Esquire partner at Whiteford, Taylor & Preston, LLP, Robert C. Young, Esquire, partner at Stewart, Plant & Blumental, LLC, Jonathan D. Eisner, Esquire, partner at DLA Piper, Matthew A. Mace, Esquire, partner at Ober Kaler, Charles Bagley, IV, Esquire partner at Bagley & Rhody, P.C. and Richard L. Lyon, Esquire, founding partner of the Law Offices of Richard L. Lyon.

**Where we came from, how we got here and an overview of the 2010 Tax Act: Gift, Estate, GST Taxes, automatic extensions and the September 15, 2011 due date.**

Cristin C. Lambros, Esquire began the morning by examining the history of the federal estate tax. Federal estate tax laws have changed over the years and were reflective of the political and economic condition of the country at the time. The federal estate tax began as a “war” tax and was enacted by Congress in 1916 to raise revenue near the beginning of World War I because of decreased revenue coming in from tariffs. The Revenue Act of 1916 created a tax on the transfer of wealth from an estate to its beneficiaries and was levied on the estate rather than of the beneficiaries. The 1916 federal estate tax applied to net estates, defined as the “total property owned by the decedent, less deductions.” The exemption at that time was equal to \$50,000 and the tax rates were graduated ranging from 1% on taxable estates over \$50,000 to the highest tax rate of 10% on taxable estates over \$10,000,000.

The first major change in the federal estate tax structure was the addition of a gift tax on inter vivos transfers. The gift tax became a permanent part of the transfer tax system in 1932. The transfer or gift tax was first introduced in 1924, was repealed in 1926, and was reintroduced in 1932. The reason for the imposition of the tax by Congress was that wealthy individuals were avoiding estate tax by making inter vivos gifts to friends and family members. Under the 1932 law, any donor could transfer an amount equal in value to \$50,000, free of tax, during his or her lifetime

and could also take advantage of the \$5,000 annual gift tax exclusion.

The events of the Great Depression led to an increase in estate tax rates to 45%, a reduction of the exemption amount to \$50,000 (down from \$100,000 in 1926) and the re-imposition of the federal gift tax at rates equal to three-fourths of the estate tax rates for cumulative lifetime gifts. In 1935, a revenue act introduced a new concept which we all now recognize as the alternate valuation date. In 1935, the alternate valuation date was one (1) year from the date of death while now the alternate valuation date is six (6) months from the date of death. The Great Depression provided many individuals with the opportunity to value estates at greatly reduced values after the date of death.

In 1941, the Second World War brought about an increase in estate tax rates with a top tax rate of 77% on transfers in excess of \$10,000,000. In 1942, Congress set the estate tax exemption amount at \$60,000, created a lifetime gift tax exemption of \$30,000, and reduced the annual gift tax exclusion amount from \$5,000 to \$3,000. However, the enactment of the Revenue Act of 1948 brought about the most sweeping change to the estate tax laws which resulted in the establishment of the estate and gift tax marital deductions. The estate tax marital deduction was limited to one-half of the decedent’s adjusted gross estate. The Revenue Act of 1948 also created a similar deduction for inter vivos gifts to a spouse.

The Tax Reform Act (“TRA”) of 1976 created a unified estate and gift tax system with a single graduated rate of tax imposed on lifetime gifts and testamentary dispositions. TRA also merged the estate tax and lifetime gift tax exclusions into a single, unified estate and gift tax credit amount. This amount could be used to offset gift tax liability during a donor’s lifetime with the unused amount preserved for use to offset the donor’s estate tax liability at death. The annual gift tax exclusion remained at \$3,000. TRA provided for annual increases in the estate tax filing exemptions beginning with an increase from \$60,000 to \$120,000 for decedents dying in 1977 and a filing threshold of \$175,625 for decedents dying after 1980. Generation skipping transfer taxes were introduced on transfers in excess of \$1,000,000 at the highest marginal estate tax rates. TRA also included changes to the carryover basis (which was repealed in 1980 but reinstated as modified carryover

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## 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:

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## Got News?

### MEMBER NEWS

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### Notes from the Chair...

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rule of court or statute" for the county where the property is located. This provision dates back to the days of "local rules" when the circuits throughout the state followed their own rules, but today, these rules can be difficult to locate. The Council is contacting Circuit Court clerks and auditors to find the rates for each of the circuits and intends to publish them so that they are readily accessible.

Members of the Council regularly meet with representatives of the Orphans' Court Judges and Registers of Wills. The purpose of these meetings is to discuss issues that arise rela-

tive to the practice and to keep each other informed as to the legislation that each group may be proposing.

Council members also work in close conjunction with the MSBA in creating, chairing and presenting CLE programs and keeping the website up to date so the information contained on the Estates & Trusts page is relevant and useful.

If you have an issue you think should be considered that would improve Estates and Trusts law in Maryland, please contact one of us.

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## Advanced Estate Planning Institute. . .

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basis in 2010) and a change to the marital deduction limit to an amount the greater of which is \$250,000 or one-half of the adjusted gross estate of the decedent.

The Economic Recovery Act of 1981 (“ERTA”) introduced the unlimited estate and gift tax marital deductions and allowed for a marital deduction for life interests that were not terminable as long as the property was “qualified terminable interest property” (“QTIP”). ERTA raised the annual gift tax exclusion to \$10,000 and allowed for an unlimited annual exclusion from gift tax on direct payments for donee’s medical expenses and tuition. ERTA increased the unified transfer tax credit from \$47,000 to \$192,800 over a 6 year phase in period which effectively raised the tax exemption from \$175,625 to \$600,000 during that same period. ERTA reduced the top estate, gift and generation skipping transfer (“GST”) tax rates from 70% to 50%. The top tax rate was later changed to 55%.

The Taxpayer Relief Act of 1997 provided for an incremental increase in the applicable exclusion amount from \$625,000 in 1998 to \$1,000,000 in 2006. Additionally, gift tax and lifetime GST exemptions were indexed for inflation.

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001 gave us the eventual repeal of the federal estate tax in 2010. EGTRRA provided us with periodic increases in the amount of the applicable exclusion amount for decedent’s dying after December 31, 2001 but before December 31, 2009. The effective filing threshold for 2009 decedents was \$3,500,000 with a top tax rate of 45%. EGTRRA set forth a repeal of the estate tax which would be effective for decedents dying during 2010. The reintroduction of the estate tax would be effective for deaths in 2011 and would include a drastically reduced applicable exclusion amount equal to the \$1,000,000 level of 2006, as if EGTRRA had never been enacted. Additionally, EGTRRA replaced the credit for death taxes paid to individual states with a deduction and increased the lifetime gift tax exemption.

EGTRRA did not repeal the gift tax because Congress wanted to discourage transfers of income producing or appreciated assets to avoid or reduce income tax liabilities. The gift tax rate in 2010 was reduced from 45% to 35% and the maximum gift tax exemption was \$1,000,000. EGTRRA also provided that for the tax year 2010 the carryover basis calculation changed to the lesser of the date of death value or the original basis in the property.

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (“the 2010 Tax Act”). Section 101(a) of

the 2010 Tax Act extends the sunset provision of the EGTRRA for two years ending on December 31, 2012. Section 302(a) of the 2010 Tax Act increases the applicable exclusion amount to \$5,000,000 and a maximum estate tax rate of 35%. Section 301(c) of the 2010 Tax Act provides the executor of an estate with the option to elect out of the reinstated stepped up basis estate tax provisions and into the carryover basis estate tax provisions. Under §302(b) of the 2010 Tax Act, the gift tax exemption amount is equal to the applicable exclusion amount and the tax rate is computed using the estate tax rates with a maximum of 35%. Section 302(b) applies only to gifts made in 2011 and 2012; gifts made in 2010 are limited to \$1,000,000 with a tax rate of 35%. Under the 2010 Tax Act, the Generation Skipping Transfer (“GST”) tax exemption amount is equal to the applicable exclusion amount and is indexed for inflation. The GST tax rate is based on the estate tax rates. Section 302(f) applies to generation skipping transfers made in 2011 and 2012 and under Section 302(c) for generation skipping transfers made in 2010 the GST tax applicable rate is zero. Section 301(d) of the 2010 Tax Act provides the due dates for certain acts the earliest of which would be September 19, 2011 (because September 17, 2011 falls on a Saturday). The acts extended were:

- a. the filing of an estate tax return for decedent dying after December 31, 2009 and before December 17, 2010;
- b. making any election on the estate tax return of a decedent dying after December 31, 2009 and before December 17, 2010;
- c. paying any estate tax for decedent’s dying after December 31, 2009, and before December 17, 2010;
- d. making any disclaimer an interest passing by reason of a decedent dying after December 31, 2009, and before December 17, 2010;
- e. filing a return to report any generation skipping transfer made after December 31, 2009, and before December 17, 2010 and making any election on such generation skipping transfer.

An important provision was introduced under Section 303 of the 2010 Tax Act, the portability of the applicable exclusion amount from a deceased spouse to a surviving spouse for decedents dying after December 31, 2010 but before December 31, 2012.

**Elective carryover basis regime for 2010, whether to elect into carryover basis examples and the new IRS Form 8939.**

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## Advanced Estate Planning Institute . . .

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Edwin G. Fee, Jr., Esquire, began his discussion by outlining the basics of basis. Internal Revenue Code (“I.R.C.”) §1014 provides that a decedent’s assets receive an automatic basis adjustment to the value of the decedent’s date of death. This section applies to decedents dying in any year prior to 2010. This concept is commonly referred to as a “step up” in basis. However, a step up is not always the case as we have seen in the recent past where a decline in asset value results in a “step down” in basis.

For decedents dying in 2010, the executor can elect to use the default rule which provides for the assessment of an estate tax using an applicable exclusion amount of \$5,000,000 and allowing for an automatic basis adjustment to date of death (which could be a step up or step down) or make an election to have no estate tax assessed but requiring the use of the modified carry over basis for the valuation of assets at a decedent’s death. Internal Revenue Code §1022 provides a modified carryover basis regime which requires the valuation of assets at the lower of the carryover basis or the date of death value. The use of the modified carryover basis regime provides two basis increases. The general basis increase applies to all estates and allows an aggregate basis increase of \$1,300,000 and a spousal basis increase of \$3,000,000. The spousal basis increase only applies to assets passing to the surviving spouse or to a qualified terminable interest property trust (“QTIP Trust”). The trust need only qualify for the marital deduction but a federal election to qualify the trust need not be made in order to apply the spousal basis increase. Certain assets do not qualify for the use of a step up in basis under the modified carryover basis rules such as income in respect of a decedent (“IRD”), power of appointment property and gifts made within three years of death, unless such gifts were received from the decedent’s spouse. In addition, revocable trust assets cannot qualify unless an election is made under I.R.C. §645 to treat the revocable trust as part of the estate for fiduciary income tax purposes. In order to allocate the basis increase, the executor must file an information return under I.R.C. §6018 with detailed information about the recipient’s name, decedent’s basis, date of death value, basis increase, decedent’s holding period and whether gain would be treated as ordinary income. Internal Revenue Code §6018 also requires that each recipient receive a copy of the informational return for his or her records.

Mr. Fee indicated that the key to determining whether to elect out of the default rule is the consideration of income tax and estate tax implications. In general, estates under \$5,000,000 will obtain a better result with the default rule as they would owe no estate taxes and would receive an automatic step up in basis for the decedent’s assets. Estates over \$5,000,000 will require more consideration to determine whether modified

carryover basis is appropriate. Consideration must also be given to the decedent’s marital status and to the application of the state estate tax. Lastly, the federal estate tax and potential capital gains tax are the most significant factors in determining whether to elect the modified carryover basis regime. However, the difficulty in ascertaining the decedent’s basis in assets can be the determining factor. The IRS requires the use of a zero basis for an asset if the original basis of the decedent cannot be determined.

Mr. Fee reminded practitioners that IRS Form 8939 must be filed to elect out of the default rule and to elect modified carryover basis for a decedent’s assets.

### **Portability, continued use of Credit Shelter Trusts, State estate tax issues and State corrective statutes.**

Robert C. Young, Esquire, began his discussion on portability by describing it as “the most radical new feature added to the federal estate tax law by the 2010 TRA.” Amended I.R.C. §2010(c)(4) allows decedents dying after 2010 but before 2013 to transfer the estate tax exemption between spouses. Portability is currently applicable for only two years, 2011 and 2012. Mr. Young indicated that the concept of portability has existed for a few years, appearing in legislation in 2006, but is new to the law. Mr. Young cautioned that consideration must be made as to when to use portability, as it is not a permanent part of the tax law. He opined that portability will continue after the sunset if the estate tax continues to be in effect. Mr. Young provided a simple definition of portability: “on the death of the first spouse, after 2010 and before 2013, the deceased spouse’s executor can make an irrevocable election on a federal estate tax return preserving any unused portion of the deceased spouse’s federal estate tax unused exclusion amount for use by the surviving spouse for estate and gift tax purposes.” The deceased spouse’s unused exclusion amount or DSUEA is the lesser of the basic exclusion amount of \$5,000,000 or the excess of the basic exclusion amount of the last deceased spouse of such surviving spouse over the amount with respect to which the tentative tax is determined under I.R.C. §2001(b)(1) on the estate of such deceased spouse. Unlike the basic exclusion amount, DSUEA is not indexed for inflation. In addition, a surviving spouse can only use the DSUEA from the last surviving spouse so he or she cannot accumulate the DSUEA from multiple marriages. To claim DSUEA, the executor must file a formal federal estate tax return and make an affirmative election on the return to elect portability of unused exemption amount. Under the current law, there is no statute of limitations period on an adjustment of DSUEA by

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IRS. The IRS can audit the computation of the DSUEA up to the closing statute of limitations on the surviving spouse's estate tax return. DSUEA can be used against large lifetime gifts and Mr. Young indicated that practitioners may want to consider doing so to use up DSUEA before it expires or the surviving spouse remarries.

The 2010 Tax Act does not provide guidance on how portability is addressed when spouses die simultaneously. Mr. Young advised that it is prudent to include a simultaneous death clause in estate planning documents that takes into consideration the optimal order of death for use of portability. Mr. Young reminded practitioners that although portability is available for federal estate tax purposes, there is no provision for portability in the Maryland law for estate tax purposes. Additionally, he reminded practitioners that portability does not apply to the GST exemption.

Consideration must be given to marital agreements and the use of portability. Couples should consider the ramifications of such agreements on portability. Agreements already in existence may need to be reviewed to determine whether provisions may interfere with the executor of the first deceased spouse estate's ability to make effective use of the DSUEA.

Mr. Young indicated that several states, including Maryland, have moved to enact corrective interpretative legislation to resolve the problem of interpreting tax formula language during the months in which the federal estate tax and GST tax were repealed in 2010 under EGTRRA but before the reinstatement by 2010 TRA. The result of the Maryland's attempt to correct this issue can be seen in the Annotated Code of Maryland, Estates and Trusts Article §11-110 (2011).

### **Gift tax planning opportunities during a 2 year window.**

Jonathan D. Eisner, Esquire, began his discussion with an overview of the 2010 Tax Act. He outlined a number of provisions for use by affluent individuals and families and some background on the laws in effect prior to the 2010 Tax.

Mr. Eisner expressed his surprise that the 2010 Tax Act included a provision to increase the gift tax exemption to \$5,000,000 for 2011 and 2012. He explained that this increase to \$5,000,000 is a potential once-in-a-lifetime opportunity for clients to take advantage of making large transfers of wealth.

Mr. Eisner addressed some planning opportunities that can be utilized by many practitioners within the context of the \$5,000,000 gift tax exemption. He cautioned further that

utilizing them could provide many benefits but said that such benefits do not come without risks.

The technique of making large gifts to take advantage of the \$5,000,000 gift tax exemption now may be ideal for certain clients, as it is possible that future legislation may reduce the gift tax exemption to an amount lower than the present amount available for 2011 and 2012. Another benefit of making large gifts during this two year period is to remove future appreciation of gifted assets from inclusion in the donor's estate at a later date. Many states, such as Maryland, do not have state gift taxes and do not bring gifts back in at death for calculation of the state estate tax. Additionally, there is no way to predict the tax rates that will be in effect in the future, and it is possible that the rates could be much higher than they are at this time.

Mr. Eisner outlined two additional methods of taking advantage of the large gift tax exemption in the next two years. The first method would provide donors with a unique opportunity to equalize trusts created several years ago if younger beneficiaries were given less than older beneficiaries by making large gifts during the two year window. The second method would entail donors forgiving loans made to friends and family members.

Mr. Eisner reminded the group of the power of the rule of 72 and how incorporating it into large gifts during this two year period can provide a significant amount of appreciation. To emphasize the effect of the rule of 72, Mr. Eisner provided an example of a donor making a large gift of \$10,000,000 to a GST exempt trust in 2011 and using the assumption that the assets appreciate at an after tax rate of 6% per year. The result is that the value of the trust will have doubled every 12 years and in 36 years the \$10,000,000 will have grown to \$80,000,000.

Lifetime gifts to By-Pass Trusts ("LBTs") and Spousal Lifetime Access Trusts ("SLATs") can be used to lock in the \$5,000,000 exemption and let it grow. LBTs and SLATs are credit shelter trusts or by-pass trusts that are funded during lifetime that benefit the donor's spouse and descendants. LBTs and SLATs can also be effective tools for unmarried couples (same sex or heterosexual couples) that can be used in 2011 and 2012 to place substantially larger amounts of assets in trust for the benefit of the other partner. A consideration with SLATs is the possible inclusion of a donee spouse or partner power of appointment to allow the donee spouse or partner the ability to appoint assets back into trust for the benefit of the donor spouse or partner. Incorporating the

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power of appointment raises the question of whether or not such a power would trigger the inclusion of the SLAT assets in the donor's estate under I.R.C. §2036. Mr. Eisner indicated that there is little guidance in this area but that the answer appears to be that assets may be includable in the donor spouse's or partner's estate under I.R.C. §2036, if there was an express or implied agreement that the beneficiary would exercise the power and appoint the assets back to the donor. In P.L.R. 9141027, a donor spouse created a SLAT and gave his spouse a testamentary power of appointment. The donee spouse intended to create a codicil to her Will to exercise the power of appointment that would benefit the donor spouse at the donee spouse's death. The IRS found that there was an implied agreement between the spouses and concluded that the implied agreement constituted a retained interest by the donor spouse under I.R.C. §2036 even though the donor spouse had no definite right to reacquire the property. Mr. Eisner explained that since P.L.R. 9141027, there have not been any further IRS rulings or other legal developments with respect to this issue. Furthermore, he indicated that the view of most commentators is that as long as there is no express or implied agreement to appoint the assets back to the donor spouse, the assets should not be includable in the donor spouse's estate under I.R.C. §2036.

Sales to Intentionally Defective Grantor Trusts ("IDGTs"), transfers of illiquid and unmarketable assets, paying gift taxes, and creating Grantor Retained Annuity Trusts ("GRATs") and Qualified Personal Residence Trusts ("QPRTs") are common techniques that Mr. Eisner outlined

during his discussion. IDGTs allow donors to transfer very large assets out of one's estate using the increased lifetime gift tax exemption available in 2011 and 2012. The transfer of illiquid and unmarketable assets during this two year window provides an opportunity for donors to move larger amounts of illiquid or unmarketable assets utilizing discounts. Discounts are still available for properly drafted LLPs and LLCs with appropriate business purposes and for privately owned corporations.

Paying gift tax at the lower gift tax rates in effect until the end of 2012 allow wealthy clients to move assets in excess of the \$5,000,000 threshold. Mr. Eisner outlined three primary benefits of large gifts and the payment of gift taxes: (1) the avoidance of state estate tax; (2) avoidance of state and federal estate tax on the appreciation of transferred assets; and (3) the fact that gift taxes are exclusive while estate taxes are inclusive, assuming the donor lives three years after the date of the transfer. He clarified that the first two benefits apply to all gifts and transfers but that the third benefit is unique to the actual payment of estate tax.

Mr. Eisner indicated that GRATs are still alive and well and are useful in low interest rate environments such as our current economic situation. Mr. Eisner indicated that QPRTs are still available and are wonderful tools to use during this two year window. He cautioned that typically QPRTs don't perform well in low interest rate environments but he advised

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### Join the Estate and Trust Law E-mail List

The Estate and Trust Law Section offers an active e-mail list which is open to Section members. The e-mail list provides Section members the opportunity to post questions or comments concerning issues relevant to the practice of estate and trust law. Members may also use the e-mail list to communicate with other Section members on items of general interest to the membership.

To subscribe to the e-mail list, visit the Section's website at [http://www.msba.org/sec\\_comm/sections/estate](http://www.msba.org/sec_comm/sections/estate) and click on the "Email Lists" tab. On the next screen, click on the "Join List" tab to the right of "Estates and Trust Law Section." You will be asked to enter your name and email address. You will then receive an e-mail that you must reply to in order to verify your e-mail address. When you have been added to the email list, you will receive a welcome message.

Questions or comments about the e-mail list may be directed to the MSBA care of John Anderson at [janderson@msba.org](mailto:janderson@msba.org) or to the Estate and Trust Law Section care of Brian R. Della Rocca at [brian@del-laroccalaw.com](mailto:brian@del-laroccalaw.com).

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that today's current real estate market may be an opportune time to consider QPRTs since the values of houses will likely appreciate in the future. Therefore, a time such as the current economic environment could create an opportunity to move a potentially large asset out of a donor's estate.

Mr. Eisner indicated that there is the risk of a "claw back" for lifetime gifts made in excess of the federal estate tax exemption if the estate tax exemption is reduced below the current estate tax exemption. If such a "claw back" were to occur, the excess gifts would increase the amount of estate tax due at the donor's death. He opined that the "claw back" is highly unlikely at this point since a technical reading of the current 2001 and 2010 tax laws requires that Congress would have to enact a new law to allow for the "claw back" provision. Nevertheless, he indicated that practitioners should remain mindful of the concept of a "claw back" when discussing wealth transfers with clients.

### **GST Tax Planning Opportunities during a 2 year window**

Matthew Mace, Esquire, outlined some GST tax planning opportunities during the two year window. For generation skipping transfers made in 2011 and 2012 the GST exemption is \$5,000,000 with a 35% tax rate. The \$5,000,000 amount will be indexed for inflation beginning in 2012. Although the 2010 Tax Act provides for portability for the \$5,000,000 estate tax exemption, the GST exemption is not portable to a surviving spouse. Mr. Mace indicated that the combination of the increased GST tax exemption and the ability of a grantor to provide that an irrevocable trust will not be subject to the Rule Against Perpetuities ("RAP") (such as in Maryland where RAP can be waived) and therefore, will permit donors to create and fund trusts that are fully exempt from estate tax and generation skipping transfer tax over a long period of time.

### **Legal and Practical Distinctions between Will Caveat and Revocable /Intervivos Cases.**

Charles Bagley, IV, Esquire, began his discussion with Will Caveats followed by Revocable Trust cases. This summary will follow the same format.

Will Caveat cases are filed in the Orphans' Court, which has original and exclusive jurisdiction over these types of proceedings. The Orphans' Court maintains jurisdiction until the conclusion of the proceeding. A Will Caveat is filed in the county where the Will is being probated or in the county in which the Will should be probated if the Caveat is filed before the opening of the probate proceeding. Will Caveat cases have a six month statute of limitations which

begins at the date of the first appointment of the Personal Representative under a Last Will and Testament. There are exceptions for lack of notice or fraud, material mistake and substantial irregularity.

Mr. Bagley stressed the importance of the timing of the filing of the Caveat proceeding—filing before or filing after the opening of the probate proceeding. The Annotated Code Maryland, Estates and Trusts Article, §5-207(b) (2011) states that "if the petition for caveat is filed before the filing of a petition for probate or after administrative probate, it has the effect of a request for judicial probate." A benefit of filing prior to the opening of the probate proceeding is the possibility that the Court may appoint a Special Administrator to administer the Estate as a Will has not yet been probated, and a Personal Representative has not yet been appointed. In addition, it is also possible that if the Caveatee is the named Personal Representative in the Will contest, he or she may be unable to use estate assets to defend the Will. There is case law that provides that services of counsel rendered to heirs, distributees or devisees may not be allowed to receive compensation for such services from estate assets. (See *Koenig v. Ward*, 65 A. 345, 346 (1906)). The filing of the Caveat proceeding after the Will has been admitted makes it a duty of the Personal Representative to defend the Will. In so doing, attorneys' fees that are incurred during the Caveat proceeding can be paid from the assets of the estate. The payment of attorneys' fees is also allowed even if it is determined that the Personal Representative is found to have exerted undue influence or fraud.

Mr. Bagley indicated that in Will Caveat cases, one should always transmit issues to the Circuit Court for finding of fact by a judge or jury. He also cautioned that a downside to not transferring issues to the Circuit Court is that the losing party can appeal de novo to the Circuit Court which can add time and expense to the case while also providing the losing party with a preview of the case. Mr. Bagley indicated that recent legislation to change this rule and to provide for an appeal on the record to the Circuit Court did not pass. Maryland Rule 6-434 sets forth the rules regarding the transfer of issues to Circuit Court by the Orphans' Court. The Annotated Code Maryland, Courts and Judicial Proceedings Article, §12-308 provides that, in general, the Court of Special Appeals has exclusive initial appellate jurisdiction over any reviewable judgment, decree, order or other action in the Circuit Court or the Orphans' Court. However, it is important to note that the appellate process differs depending on whether the issues were transmitted first to Circuit Court or if the appeal is de novo from the Orphans' Court.

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The question of who has standing to file a Caveat is answered in Philip L. Sykes, *Contest of Wills in Maryland* (1941). Essentially, anyone who has a relationship to the decedent and anyone mentioned in the Will has standing to file a Caveat. Common grounds for challenging a Will are succinct in nature and include the following: (a) failure to comply with §4-102 of the Annotated Code of Maryland, Estates and Trusts Article; (b) revocation, republication; (c) fraud; (d) duress; (e) undue influence; and (f) lack of testamentary capacity. Mr. Bagley advised that the burdens of proof differ depending on the basis of the challenge to the Will. Clear and convincing evidence is required for issues regarding attestations. Preponderance of the evidence is required for issues of fraud, capacity and undue influence.

In reviewing the common grounds for challenging Wills, Mr. Bagley commented that fraud and undue influence are not the same issue but rather are two very distinct issues. He further commented that duress is a rarely raised issue. He advised that the seminal case in undue influence in the State of Maryland is *Moore v. Smith*, 321 Md. 347, 582 A.2d 1237, 1239 (1990) which sets forth the seven relevant factors for undue influence challenges to Wills.

Mr. Bagley provided some insight to obtaining pertinent information during discovery. He advised that most Caveats to the Will are based upon circumstantial evidence. He also reminded practitioners that the Dead Man's Statute does not apply in Caveat proceedings.

Mr. Bagley made a very important distinction between Will Caveats and Revocable Trust cases regarding statutes of limitations. Revocable Trust cases allow for a three year statute of limitations, which begins at the date of the Grantor's death. In addition, with Revocable Trust cases, one must be cognizant of Maryland's discovery rule, which tolls the limitation period three years from when the plaintiff discovers or, through the exercise of due diligence, should have discovered the injury.

With regard to standing in a challenge to a Revocable Trust, Mr. Bagley pointed out that a challenger does not have standing prior to the death of the grantor, as no interest has yet been conveyed by grantor. With irrevocable trusts, the main point to consider and analyze is whether the transfers to the trusts are completed gifts.

Mr. Bagley indicated that the grounds for challenging a Revocable Trust can be, the same as a Will contest, as outlined earlier in this article. Challenges to an irrevocable trust can be on equitable grounds such as capacity, undue influence or fraud. In addition, challenges to irrevocable trusts can

be made on tort grounds, such as breach of fiduciary duty, conversion and wrongful taking.

The burden of proof in a challenge to a Revocable Trust is a preponderance of the evidence. For irrevocable trusts, the burden of proof is clear and convincing evidence for the plaintiff. Mr. Bagley pointed out that the burden of proof can shift from plaintiff to defendant if a confidential relationship with the grantor can be proven. Once the plaintiff establishes that a confidential relationship existed at the time of the transfer, the burden of proof shifts to the defendant to uphold the transaction.

Challenges to Revocable Trusts begin in the Circuit Court. Appeals on Revocable Trust cases are made to the Court of Special Appeals. Courts and Judicial Proceedings Article §12-301 provides in part that a party may appeal from a final judgment entered in a civil or criminal case by a Circuit Court and that the right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction. The method and time for securing an appeal is set forth in Maryland Rules 8-201 and 8-202.

Mr. Bagley's presentation included a review of several pertinent sample forms that are included in the bound materials provided at the conference.

### **Drafting Techniques to Avoid Problems and Preparation and Filing of Legal Proceedings.**

Richard L. Lyon, Esquire, continued, the discussion of legal proceedings with regard to Wills and Trusts. He presented a practical discussion on avoidance of problems using common sense drafting techniques and an outline of the steps necessary to complete the preparation and filing of legal proceedings in this area.

Mr. Lyon opined that the area of fiduciary litigation has become more expensive and time consuming in recent years. Given the propensity of people to litigate issues, Mr. Lyon stressed the need for practitioners to recognize problem scenarios before they become litigated issues. He indicated that not all situations can be mitigated to avoid litigation because some members of society must be allowed their day in court. However, a practitioner's knowledge and awareness of potential issues at the planning stage can minimize time and expense down the road.

Mr. Lyon outlined several common scenarios that often give rise to challenges to Wills and Revocable Trusts, and which

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present difficult issues for scriveners. A few of those scenarios are the following: (1) the caretaker; (2) the unhappy sibling; (3) a family business; and (4) second and multiple marriages. Another common factor in challenges to Wills and Revocable Trusts which can envelope the entire process is the zealous challenger who will fight to the end and who has no inclination to settle. These people are often irrational and will pursue legal proceedings despite all obstacles. Mr. Lyon indicated that he sees second and subsequent marriages of a testator or grantor leading to more elective share filings, claims against estate and questions of funding marital trusts.

Mr. Lyon indicated that there is a wealth of case law, commentary and treatises on the postmortem challenges to Wills and Revocable Trusts. He indicated that an interesting approach to minimize later challenges to Wills and Revocable Trusts is for the testator or grantor to file a petition for a declaration by a Court that a Will or Trust is valid. He did caution that this approach could be fraught with danger and difficulty. He pointed out that Arkansas, Ohio and North Dakota have statutes that specifically authorize a declaratory judgment proceeding for the validity of a Will. Mr. Lyon advised the group that while Maryland does not have an Ante-Mortem Statute, a review of the Declaratory Judgment Statutes of the Annotated Code of Maryland, Courts and Judicial Proceedings Article may provide a mechanism to obtain declaratory relief.

Mr. Lyon briefly reviewed the technique of videotaping the execution of Wills and Trusts as a means of avoiding future Will and Trust challenges. He pointed out that a very practical concern to the scrivener and testator/grantor is the ultimate effect a videotape can have on the issues of competency and undue influence raised in a Will or Trust challenge. Further, Mr. Lyon cautioned that the use of this technique requires a careful risk analysis since engaging such a technique can backfire as it did in *Geduldig v. Posner*, 129 Md. App. 490, 743 A. 2d 247 (1999).

Mr. Lyon then discussed the use of In Terrorem provisions in Wills and Trusts. The use of an In Terrorem provision has become a popular means to discourage challenges to Wills and Trusts and to encourage early settlements of these types of challenges. Mr. Lyon referred to §4-413 of the Annotated Code of Maryland, Estates and Trust Article to see how Maryland addresses the use of an In Terrorem provision in a Will. He advised that the clear terms of the statute do not provide any application to use of such provisions in Revocable Trusts. Mr. Lyon advised that as of the date of the conference there were no reported decisions in Maryland on In Terrorem clauses. However, he indicated that in his view there is no reason why Maryland courts should not enforce

an In Terrorem provision. American Law Reports (A.L.R.) 4<sup>th</sup> 369 entitled “Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary” provides a review of cases in other states to show how those states have addressed In Terrorem provisions.

Mr. Lyon then outlined some practical aspects of Will Contests. A Will contest is an action in rem which is instituted by the filing of a Petition to Caveat a Will in an Orphans’ Court in the county in which the decedent is domiciled at the time of his or her death. A Will contest does not seek in personem jurisdiction or relief such as a money judgment against a particular person. He pointed out that a nominated Personal Representative does not have standing to caveat a Will or Codicil unless the nominated Personal Representative is also an heir or a legatee, but that the Personal Representative has the unquestionable duty to defend the attacked Will.

Mr. Lyon advised that the issues of testator competency and his or her freedom from undue or improper influence are of great practical importance to practitioners. He reminded us that there are several safeguards that we can use to minimize these issues at later challenges. A critical and very basic requirement of each scrivener is to meet with the testator privately and separately from anyone who may accompany the testator to the attorney’s office. Mr. Lyon indicated that if the scrivener has any doubts as to the testator’s competency and believes that there may be a challenge to a Will at the testator’s death, he or she should consider advising the testator to contact a physician to complete a competency examination. A Mini Mental Status Exam (MMSE) is often used by physicians in making a determination on the issue of competency. If using this process, he advised that it is often a good idea to provide the physician with the legal standard for competency to make a Will so that the physician can integrate those criteria into his or her examination of the testator.

Mr. Lyon advised that an attorney should maintain a separate file of his or her notes and observations regarding conversations and meetings with the testator. In addition, he indicated that it is highly advisable to send a draft of the Will or Codicil to the testator with an explanatory cover letter prior to the execution meeting and that it is important for the scrivener to document subsequent conversations with the testator as a confirmation that the testator read and reviewed the document. He stated that, in general, it does not look good if the client did not get a copy of the Will or Codicil prior to the execution date. He emphasized the point that documentation of conversations with the testator can provide a crucial ele-

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ment for the defense to a later challenge. Mr. Lyon reminded us that since the scrivener is undoubtedly a critical witness in any challenge, it is inappropriate for him or her to represent any party to a Caveat litigation case. (See Rule 3.7 of the Maryland Rules of Professional Conduct).

Mr. Lyon stated that if a testator is omitting a natural object of his or her bounty, the scrivener should document the reasons for such omission in his or her notes and should have the testator prepare and sign a separate writing setting forth the reasons for such omission. Another issue to consider in this context is whether or not to keep prior Wills once the new Will is signed. Mr. Lyon indicated that one may wish to consider keeping the older Will if it is similar to the new Will because it increases the burden of the challenger but consideration should be given to allowing the testator to destroy any older Wills that greatly differ from the new Will.

Lastly, Mr. Lyon stated that a ward under a guardianship proceeding can make a Will and doing so is not conclusive proof that the ward lacks testamentary capacity. Rather, it is prima facie evidence of a lack of testamentary capacity and creates a rebuttable presumption of a lack of testamentary capacity. Moreover, the defender of a Will made by a ward during any period of a guardianship bears the burden to prove that the ward possessed testamentary capacity at the time the Will was executed.

Mr. Lyon then moved on to a short discussion on the topic of challenges to Trusts. He reminded practitioners of the rules and timing regarding the filing of challenges to Trusts that were previously outlined by Mr. Bagley. With regard to breaches of trust, Mr. Lyon's written materials make reference to the Uniform Trust Code §1005 (which has not yet been adopted in Maryland) and which states that a beneficiary may not commence a proceeding against a Trustee more than one year after the date the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. He also raised the question of limitations available for claims by creditors against trusts. The Annotated Code of Maryland, Estates and Trusts Article, §8-103 provides protection for the Personal Representative but that section does not apply to Trusts. He indicated that it appears that a creditor of a grantor may have three years from the date of the grantor's death to assert a claim. See Annotated Code of Maryland, Courts and Judicial Proceedings Article §5-101 (2011).

With regard to court jurisdiction of trust estates and related relief, Mr. Lyon discussed situations where it may be appropriate for a Trustee or a beneficiary to request a court to assume jurisdiction over a trust. He stated that it may be

appropriate in situations where a Trustee is unable to effectively administer a trust because of a recalcitrant beneficiary or where a beneficiary cannot obtain a distribution or an accounting from a Trustee.

The mechanism used to request court assumption of jurisdiction is to file a Petition for Assumption of Jurisdiction of a Trust Estate in a Circuit Court pursuant to Maryland Rules 10-501 through 10-505. Among other matters, these rules also provide the basis for the filing of an Inventory and an annual Accounting and Information Report, as well as for the removal of a fiduciary and the appointment of successor fiduciary.

Mr. Lyon outlined two examples of when these rules can be used by a Trustee and a beneficiary. A Trustee can seek relief under these rules in situations where he or she proposes a final distribution and a beneficiary contests the distribution and threatens litigation. If the Circuit Court has assumed jurisdiction, the Trustee can simply file an accounting and propose a final distribution and the beneficiary can then file an objection to the accounting and/or distribution. The Circuit Court having assumed jurisdiction will then determine the matter. Likewise, if a beneficiary is unable to obtain a distribution or an accounting he or she can file a Petition for Court Assumption of Jurisdiction of a Trust Estate and request removal of the Trustee and related relief.

Mr. Lyon advised that some trust documents relieve the Trustee of providing an accounting to beneficiaries. However, the case of *Jacob v. Davis*, 128 Md. App 433, 738 A. 2d 904 (1999) ( cert. denied) 357 Md. 482, 745 A. 2d 436 (2000) the court determined that even if a settlor does not want the Trustee to provide an accounting to remaindermen, the Trustee must nonetheless provide such an accounting if requested by the beneficiary. The court further declared that provisions which excuse a Trustee from filing any account with any court does not mean that the testator/grantor intended to remove the jurisdiction of the court to require an accounting. Mr. Lyon referred to his written materials to point out that *Jacob v. Davis* makes clear that a disgruntled beneficiary or, in the right circumstances, a disgruntled fiduciary can file an action in Circuit Court and seek equity jurisdiction for an accounting or similar equitable relief. Mr. Lyon cautioned that before initiating such a petition, a litigant should carefully consider whether he or she should institute a Petition for Court Assumption of Jurisdiction of a Trust Estate and combine such action with a request for declaratory or equitable relief.

Settlement of Will contests should be in the form of a written Settlement Agreement and should be signed by the caveator

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and the caveatee and should be, under normal circumstances, submitted to the Orphans' Court for approval. Mr. Lyon outlined several key elements that should be included in a Settlement Agreement and referred to his sample Will Contest Settlement Agreement in the bound materials. He recommended that a written Settlement Agreement should be conditioned upon the approval of the Orphans' Court after the filing of the appropriate Petition and notice to all interested persons. The State of Maryland does not have any statutes that require that Settlement Agreements must be submitted to or approved by an Orphans' Court. However, in *Brewer v. Brewer*, 386 MD 183, 872 A.2d 48 (2005) the Court highlighted two good reasons for Orphans' Court approval of a Settlement or Redistribution Agreement. The first reason is to prevent fraud and to assure regularity and consistency in the Orphans' Court proceeding including the obligation of the Personal Representative to carry out his or her duties in accordance with the terms of the Will and the Maryland law. The second reason is where a Settlement or Redistribution Agreement concerns real estate. Personal Representative's deeds are vital links in the chain of title and serious title issues can arise if a court approved Redistribution Agreement allowing a Personal Representative to convey good title to the real estate is not properly recorded.

Regarding Settlement or Redistribution Agreements in the context of trusts, the Trustee or a beneficiary can petition the Circuit Court for approval of such an Agreement. The same considerations which affect a Personal Representative also affect a Trustee and other fiduciaries. In short, Mr. Lyon indicated that it never hurts to get the approval of the court on Settlement and Redistribution Agreements to avoid questions and issues being raised at a later date.

Mr. Lyon discussed the representation of clients and specifically, the question of "Who is the Client?" The general rule in Maryland is that an attorney who represents a Personal Representative or a Trustee does not represent the beneficiaries of an estate or a trust. Of course, there are exceptions to the general rule. One such exception is the situation whereby an attorney who represents a Personal Representative or a Trustee can contract to represent him or her as a beneficiary of the estate or the trust. The key to avoiding the inherent conflict of interest is to provide notice to the other beneficiaries of such dual representation that includes an indication to such other beneficiaries of their right to obtain independent counsel for their own interests. Maryland adheres to the strict privity rule in the area of attorney-client relationships. The attorney owes a duty only to his or her client and only that client can recover from him or her for a breach of that duty. The only exception to this rule is the third party beneficiary theory based on the clients' intent to benefit a non-client and an attorney's failure to fulfill such intent.

Mr. Lyon reviewed two cases on client representation, decided on the same day, that are still good law today: *Ferguson v. Cramer*, 349 Md. 760, 709 A.2d 1279 (1998) and *Noble v. Bruce*, 349 Md 730, 709 A.2d 1264 (1998). In *Ferguson*, beneficiaries of an estate filed suit against attorneys for negligence and legal malpractice. The Court of Appeals affirmed the Court of Special Appeals which affirmed the trial court's grant of a motion to dismiss a complaint against the attorneys who represented the Personal Representative of an estate. In *Noble*, a non-client testamentary beneficiary filed a malpractice suit against an attorney for alleged negligence in the estate planning and the drafting of a Will. The Court of Appeals declined to make a new rule in Maryland governing the liability of an attorney to non-clients arising out of Will drafting or estate planning and held to the traditional rule of strict privity.

Mr. Lyon wrapped up his discussion with a brief review of the tort of intentional interference with an expected inheritance in Maryland. Mr. Lyon indicated that at the time of the conference, Maryland does not recognize such a tort, but he opined that it may not be too far in the future that Maryland does recognize this tort in litigation cases to challenge Wills and Trusts. He cautioned that any new cause of action such as tortious interference with an expected inheritance will likely require the plaintiff to exhaust all traditional remedies or to show that such remedies are not otherwise available to the plaintiff through no fault of his or her own. In the end, regardless of the expansion of any of these causes of actions, the basic duties of the fiduciary remain the same, and those duties should be faithfully carried out by the fiduciary to reduce or minimize the opportunities for plaintiffs to exploit his or her actions as a fiduciary to make new law.

## ANNOUNCEMENT

Brian R. Della Rocca proudly announces the opening of his firm, **Della Rocca Law, LLC**, in Rockville, Maryland. Della Rocca Law, LLC provides probate, estate planning and business planning services. Brian's new contact information is as follows:

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600 Jefferson Plaza, Suite 402  
Rockville, MD 20852

Main: (301) 637-2889  
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brian@dellaroccalaw.com

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## Section Council Committees

Listed below are some of the Section Council Committees for which Section members may wish to volunteer their time. Please contact the individuals listed below or the Section Chair if you have suggestions or are interested in helping out.

### Committee

### Contact

Chair

Sharon J. Ritter

Legislation

Deborah A. Cohn

Website/Technology

David C. Dembert

Publications

Mary Beth Beattie

Mary Alice Smolarek

Probate Rules/Reform

Allan J. Gibber

Programs

Frank S. Baldino

Section Meetings

Eileen O'Brien

Natalie B. Sherman

Orphans' Court liaison

Jay M. Eisenberg

Registers of Wills liaison

Jonathan D. Eisner

Estate and Gift Tax Study Group Liaison

Danielle Cruttenden

Brian R. Della Rocca

Elder Law Section Liaison

Danielle Cruttenden

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## 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.



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# REALITY BYTES 12.0

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

*(Reality Bytes, complete with many imbedded links that could not be displayed meaningfully in a newsletter text format, can be found on the Internet at: <http://technobytesmd.blogspot.com/> or by going to the MSBA Estate & Trust Law Section webpage at: [http://www.msba.org/sec\\_comm/sections/estate/default.asp](http://www.msba.org/sec_comm/sections/estate/default.asp) and following the link on that page.)*

## Spot You One: Spotify vs. Pandora

One recent evening, a colleague sent me the following email:

"Sitting at desk at office finishing up a few things, playing my U2 Pandora station, enjoying Radiohead's "High And Dry"!"

Pandora is a "free" Internet music service. It allows you to create "channels" by selecting one or more artists of your choice. These artists can be popular, rock, rap, folk, classical, jazz; you name it. Even local artists may show up on Pandora if they have an identifiable musical style and recorded music available. Pandora then streams music to you from those artists and other artists that it deems similar to the ones that you selected.

I use Pandora. As I began writing this column, my Bela Fleck channel was playing, and the current selection was a piece by the preeminent jazz bassist Stanley Clarke called "Rite of Strings". (Bela Fleck is a banjo player extraordinaire whose work has spanned genres from bluegrass to folk to jazz fusion to classical. He has been nominated for Grammys in more different categories than anyone else. His band the Flecktones features another preeminent bass player, Victor Wooten. This may give you some idea how well Pandora's software works at finding affinity between your musical selections and its suggestions.)

I have numerous Pandora channels. You can use different Pandora channels to create a musical backdrop while using your computer at work or at home or on the move. You can add different artist together to "mix" a channel to your tastes. These channels can be shared through Pandora with your friends.

You get to listen for 30 hours each month free with advertising announcements occasionally dropped into your music stream. For a monthly payment you can upgrade to unlimited service and no advertising. You do not get to "keep" this music, either by download or playlist, but you can take Pandora

anywhere for free and play your channels or create new ones because there is a mobile application for iPhones and Android phones. (See the discussion below about the potential costs of streaming music on a mobile device.)

Pandora has been in the financial news lately because it is very popular, but has not found a way to "make money". In other words, advertising revenue (often a key source of Internet revenue) and user fees are not paying for the cost of the service.

Spotify, which has proved wildly successful abroad, finally has entered the U.S. market. You need an "invitation" to get it, but you can request one online from [Spotify.com](http://Spotify.com). Spotify is a separate music player that loads outside your browser, like iTunes. (Pandora runs inside your web browser as a separate tab.) Spotify recognizes and plays your iTunes and Windows Media Player libraries as well as its own music catalog.

Spotify also recognizes mobile devices that you have connected to your computer, such as an iPod and iPhone and Android phones, so you can sync MP3 files. (You will need to have the Spotify app on these devices to take advantage of this feature. To sync with a mobile phone you must use a WiFi connection.)

Spotify lets you listen to tons of steaming music, even new releases, without downloading. You can create playlists or listen to entire albums. And Spotify is "FREE"! That's right, the basic service is free and you get access to all kinds of music that the record companies have previously tried to hold back. (Yes, there are exceptions: no Beatles, Led Zeppelin, etc.)

This is a BIG step forward with respect to Internet music distribution. For more on this development, see David Pogue's column in the New York Time at this link ([David Pogue's column on Spotify](#)).

There are paid upgrades for Spotify. Like Pandora, the upgrades remove commercials, but the free player is great. The only negatives I have found so far are that you have to have a premium service plan at \$10 a month to stream music on your phone or other mobile device and that search function on the player for finding music could be better at getting you to the

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music that you want to hear. The premium plan for mobile streaming likely will hold down mobile usage.

A note of caution about streaming music on a mobile device: streaming music on a mobile device usually sucks up significant bandwidth. No matter what device you use, if you are using your cellular carrier's data service to stream the music and you do not have an unlimited data plan at a monthly fee, you may see significant data charges on your bills. With the predicted demise of unlimited broadband plans from cellular services, mobile users could be paying a lot more than \$10 a month to stream music when data plan charges are considered. If you are streaming music on a mobile device, it is best to do it over a WiFi network to avoid cellular data charges.

Finally, you may want to consider your personal listening preferences. I like lots of different music, but I generally like to select music from a wide range of sources. In earlier columns I have written about the music on my iPod. To get music onto an iPod, you must use iTunes. Whether you use iTunes as a music player on your computer is up to you, but it is a very good music player. By default, I end up using iTunes as a music player as well as a way to make playlists for my iPod or for burning to disks.

I generally have my iPod on the "shuffle" setting and I get a very interesting music mix. Let's first compare this approach with my experience with Pandora.

Recently my iPod was playing "New South Africa" by Bela Fleck and the Flecktones, a rather jazzy banjo driven song, with strong bass lines from Victor Wooten. My iPod then shuffled the following songs (remember that shuffle is a random selection): "Back in the U.S.S.R." by The Beatles from the Love soundtrack, "Send in the Clowns" by Frank Sinatra, "For the Turnstiles" by Neil Young (which features a banjo), "Blackbird/Yesterday" by The Beatles from the Love soundtrack, and "Beeswing" by Richard Thompson. I was quite pleased with all of this and the random selection did not bother me. (Please note that iTunes now has a "Genius" feature that goes through your music library and makes intelligent suggestions for playlists.)

Pandora operates differently. You cannot decide to listen to an entire recording by Bela Fleck or just music by Bela Fleck. When you create a channel, Pandora will play music from the artist or artists that you have selected each time that you start playing that channel and then intermittently as the channel continues to play. It will select other similar artist to play in between. So, my Bela Fleck channel will follow a song by Bela Fleck with music from Stanley Clarke, David Grisman, Jerry Douglas, or Edgar Meyer or groups that I have not heard, like Quintet Of The Hot Club Of San Francisco,

which share thematic elements with Bela Fleck. You can skip forward on Pandora, but not backwards. Pandora also provides a wealth of information about the artists and the recording from which the music comes. Most importantly to Pandora's business model, it provides links to buy the music to which you are listening. Pandora's deal with the music industry in providing this music free is that in return it will promote sales of the music.

Spotify has a different approach. It is similar to going into a large music library (like the iTunes online music catalog) and listening to whatever you want. For free. "Free" is the big difference between the Spotify music catalog and the iTunes music catalog. You can sample things online with iTunes, but you have to buy to listen to the complete recording.

On Spotify, you can pick one song by an artist or a whole album and listen as much as you want. Recently, I listened to Emmylou Harris' latest release *Hard Bargain* in its entirety. Someone recommended the group Airborne Toxic Event to me. I went and listened to its most recent release on Spotify. My daughters and I were going to an O.A.R. (Of a Revolution) concert. Never having heard any of O.A.R.'s music, I listened to a live concert recording on Spotify. You can build playlists of songs you like on Spotify, just as you can in iTunes. Over time you can build your own library of music by creating such playlists. (When I first connected, Spotify sent me a link to a playlist that it has created called "Hello America" that I could download in Spotify to get started.)

Spotify does not let you move this music around unless you buy it. You cannot download your online playlists to a mobile device. You cannot burn them to disk. As with iTunes, you have to own the music to do that.

Also, Spotify does not have a shuffle feature. This makes sense, as Spotify offers you the whole universe of music, unlike iTunes, which shuffles only the songs that you have loaded into a library.

So Spotify is the next big thing with respect to Internet music. The question remains whether it will make money. Spotify does have the distinction, however, of finally getting the music industry to loosen up and let people access great music on the Internet. Let's hope that lasts.

### **Baidu-Bing?**

The Marketplace Tech Report had an interesting story on Wednesday, July 6, about Microsoft's deal to provide Bing

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# ESTATE AND GIFT TAX STUDY GROUP UPCOMING EVENTS

2011 - 2012

The MSBA Estate and Gift Tax Study Group now meets in three locations; Ober Kaler, 100 Light Street, Baltimore, Maryland, Shulman Rogers, Gandal, Porty & Ecker, PA, 12505 Park Potomac Avenue, 6<sup>th</sup> Floor, Potomac, Maryland, and, as of January, meetings will be added at the Anne Arundel Circuit Court's Law Library in Annapolis, Maryland.

| <u>DATE</u>       | <u>TOPIC</u>   | <u>SPEAKER</u>                               |
|-------------------|--|--|
| November 17, 2011 | How Annuities Fit (and don't fit) into Estate Planning | Tim Malarkey<br>JKJ Financial Services       |
| December 15, 2011 | Considerations in Being the Trustee of an ILIT         | Jay Eisenberg<br>Shulman Rogers, et al.      |
| January 19, 2012  | Tax Update   | Michael E. Kitces<br>Pinnacle Advisory Group |
| February 16, 2012 | Review of Heckerling                                   | TBA  |
| March 15, 2012    | TBA  | TBA  |
| April 19, 2012    | TBA  | TBA  |
| May 17, 2012      | TBA  | TBA  |
| June 20, 2012     | TBA  | Howard M. Zaritsky                           |

To volunteer to speak or for additional information please contact the co-chairs:

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## Reality Bytes. . .

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searches to China's biggest search engine, Baidu. Here is what is interesting:

The second line of the web post makes one thing very clear:

"That arrangement means going along with the Chinese government's censorship policies."

If this all sounds a bit familiar, it is because Microsoft is following a path previously blazed by Google:

"Google operated a Chinese version of its engine, based in China, and went along with the government's censorship of results. But that approach never really sat well with a company dedicated to the idea of finding information and bringing it to web users.

Google eventually moved its Chinese search engine to Hong Kong, where the laws aren't as restrictive."

So Microsoft must have a better idea how to deal with these issues, right? Wrong:

"For its part, Microsoft says that it respects the laws of the countries where it does business and complies with them accordingly."

Rebecca MacKinnon from the New America Foundation is quoted in the report as saying:

"The Chinese government expects Internet companies to censor and police user content," she says. "So, with all of these companies, including Baidu, they're expected to exercise what the Chinese government calls 'self discipline' and they actually give out an award for this."

Meet the new Baidu, same as the old Baidu! Baidu-Bing!

### Supreme Court Protects Violence- In Video Games

The Supreme Court has struck down a California law that barred the sale of violent video games to minors as an unconstitutional infringement on free speech. Justice Scalia writing for the majority said:

"Like the protected books, plays and movies that preceded them, video games communicate ideas — and even social messages — through many familiar literary devices (such as characters, dialogue, plot and music) and through features distinctive to the medium (such as the player's interaction with the virtual world) . . . That suffices to confer First Amendment protection."

Grand Theft Auto was compared (and protected) under the same principles that shield the gory elements of stories like Hansel and Gretel in Grimm's Fairy Tales.

### Mini-Byte: Cyber-Afterlife?

Professor Gerry Beyer posted an interesting item this morning about a cyber-afterlife on his blog, Wills, Trusts & Estate Prof Blog. It involved a Twitter user who posted the following:

"If I die, I want you to use this password to get into my account and tweet "So this is what it's like being a ghost".

### On and Off the Cloud

On the heels of my last column about cloud computing, there is plenty of confirmation that the cloud is here and that some clouds may be dark and stormy.

### Platform Wars

A couple of days ago, Eric Schmidt, Executive Chairman of Google discussed the "Platform Wars" at D9, the annual All Things Digital conference. Schmidt referred to four dominant players who have used their distinctive platforms to dominant the web: Google, Apple, Facebook and Amazon. What about Microsoft? Forget about Microsoft, says Schmidt; isn't a player on this field.

### Store It In My Cloud

This comes close on the heels of Amazon's move to get us to upload our music and other files (with encouragement to buy more from Amazon) onto its "Cloud Drive". Apple responded with its own cloud storage initiative, named (who would have guessed) iCloud, which debuted on June 6 at the Apple's World-Wide Developers Conference. It is clear that the platform players are jockeying to get you on their cloud (and tied to content that they sell or make money through advertising). So the Cloud Wars are heating up too.

### It's Security, Stupid!

Now for the dark side. As discussed in my last column, the "cloud" is really using someone else's computer. Instead of computing or storing things on your desktop, or your laptop, or your Smartphone, you using computers and servers on the Internet and storing information, documents, financial records, music, videos and other data on someone else's computer. When you use Facebook, you are piling up personal comments, pictures and information on Facebook's servers. If you play on XBox Live or some other online gaming platform, you are leaving information with the servers for

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# MARYLAND CASELAW DEVELOPMENTS

By Charles S. Abell  
Furey, Doolan & Abell, LLP

## *Personal Representative's Right to Release*

In *Allen v. Ritter*, 196 Md. App 617, 10 A.3d 1183 (Md. Ct. Spec. App. 2010), *cert granted*, 419 Md. 646, 20 A.3d 15, the Court of Special Appeals held that a personal representative may require beneficiaries to execute a release prior to distribution of estate assets.

It will come as no surprise that the case arose out of a contentious estate, in which the initial personal representatives had been removed and replaced with an experienced estates and trusts practitioner. The beneficiaries continued to fight even after the new personal representative came on board. Therefore, after the Orphans' Court approved the Final Account, the personal representative requested that the beneficiaries sign a broad release of her liability prior to distribution of the estate. One beneficiary signed, but the other two refused. The personal representative petitioned the court for release, relying on §9-111 of the Estates & Trusts Article, which permits a personal representative to request a release.

Pursuant to that petition, the Orphans' Court ordered the other two beneficiaries to sign the release. They appealed, arguing first that the personal representative was not entitled to insist on a release, and second that the Orphans' Court lacked jurisdiction to order them to sign.

The Court of Special Appeals affirmed the Orphans' Court on both grounds. Finding no relevant legislative history to shed light on the meaning of §9-111, the Court held that the plain language of the statute ("a personal representative may...obtain a verified release from the heir or legatee") confers on a personal representative the right to obtain a release prior to distribution. The Court of Special Appeals found that this construction is in line with other jurisdictions, including the District of Columbia and Delaware.

The Court also held that the Orphans' Court has jurisdiction to order beneficiaries to sign a release. While the Orphans' Court has limited jurisdiction, the Court of Special Appeals noted that the jurisdiction extends at least to passing orders relating to administration and settlement of estates, and that ordering a release fell within the bounds of that jurisdiction.

Note that the Court of Appeals has granted certiorari in this case.

## *Spouse's Elective Share*

The Court of Special Appeals considered several issues

relating to calculation of an electing spouse's statutory share in *Nassif v. Green*, 198 Md. App. 719, 18 A.3d 1018 (Md. Ct. Spec. App. 2011), *cert granted*, 421 Md. 192, 25 A.3d 1025. The Court held that an electing spouse's share must be calculated as of the date of payment and is entitled to a share of income up to the date of payment. The Court also held that only claims that actually are allowed and paid may be considered for purposes of determining the "net estate" subject to the spouse's elective share.

The case involved the estate of Walter Green. Mr. Green's estate was valued at more than \$28 million at the time of his death in 1993. Helen Nassif, Mr. Green's widow, made a timely election to take her statutory share of one-third.

The estate assets comprised extensive real estate and business holdings, and the complicated nature of these assets (as well as the litigious nature of various parties) conspired to draw out administration over more than 13 years. In addition, the estate was subject to extensive claims in excess of more than \$13 million; however, most of these were guarantees of loans to other obligors, and those other obligors reimbursed the estate for all but about \$120,000 of these claims.

When the personal representatives finally were ready to make distribution of the residue of the estate in 2006, they and Ms. Nassif disagreed on the calculation of her share. The personal representatives contended that (1) the net estate should be calculated with a deduction for the total value of claims filed against the estate, even though most of those claims actually were not paid by the estate (because the estate was reimbursed by other obligors), (2) the non-cash assets of the estate should be valued as of the date of election, not the date of distribution, and (3) Ms. Nassif was not entitled to a share of the income earned during the period of administration.

The Court of Special Appeals held for Ms. Nassif on all three points. It held that the "enforceable claims" that reduce the "net estate" under §3-203(a) (and therefore that reduce the base off which the statutory share is calculated) did not include all claims that *could be* enforced (as the personal representatives argued), but only those claims that *actually are* required to be paid. Therefore, while the estate had more than \$13 million in claims that could have been enforced, it only had to pay about \$120,000 (after being reimbursed), and the Court held that only those \$120,000 could be considered

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## Maryland Caselaw Developments. . .

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for purposes of calculating the elective share.

The Court also found for Ms. Nassif on the other two major issues. In a more current estate, these questions would have been easier to answer, because the legislature has revised ET §§ 3-208 and 3-203. The Court of Special Appeals could not apply these revised statutes, however, and instead had to consider these questions in light of 1993 statutes. Even though the revised statutes did not apply, the Court of Special Appeals reached essentially the same conclusion that the new statutes would have provided, namely that Ms. Nassif's share of "in kind" assets should be calculated as of the date of distribution (*i.e.* including the post-death appreciation), and that her share was entitled to its *pro rata* share of income earned during administration.

The personal representatives also had argued that the Maryland Principal and Income Act should not apply, in part because the will stated that it should not apply. While this argument did not end up being critical to the outcome (because the Court already had determined that Ms. Nassif was entitled to a share of income), the Court rejected the argument anyway, reasoning that the provisions of a will could not negate default statutory rules that impact the calculation of a surviving spouse's statutory share.

Note that the Court of Appeals has granted certiorari in this case.

### *Construction of a Will*

The United States District Court for the District of Maryland undertook an extensive construction of the will of Charles Austrian in *Fisher v. PNC Bank, N.A.*, 769 F.Supp.2d 853 (D. Md. 2011). The case turned on the interpretation of the phrase "at such time," and determined whether a trust created under Mr. Austrian's will passed to charities that were beneficiaries under the will and revocable trust of Mr. Austrian's daughter, Janet Fisher, or whether it passed to the charities selected in Mr. Austrian's will (both his children died without descendants).

As we might expect, the Court's opinion is very fact specific (and the case involved a fairly unusual set of facts). After extensive parsing of the will and consideration of the facts, the Court found that Mr. Austrian had intended to provide use of the trust assets for his children during their lives, and then if they had no descendants (as was the case) to a group of charitable beneficiaries that he had selected. Space precludes a detailed recounting of the Court's analysis, but the opinion is worth reading to see how a court works through the language of a will to determine a testator's intent.

### *Trust Termination*

The federal district court considered a petition to terminate a charitable trust in *Convention of Protestant Episcopal Church v. PNC Bank*, \_\_\_ F. Supp.2d \_\_\_ (D. Md. June 7, 2011). The Protestant Episcopal Diocese of Washington was beneficiary of a trust created under the will of Ruth Soper, who died domiciled in Maryland in 1973. The trust was designed to benefit three individual beneficiaries, and then the Diocese. Shortly after Mrs. Soper's death, the trust was amended (with the consent of the Diocese and the other beneficiaries) to ensure that the trust could qualify for a charitable deduction. Among the amendments was the addition of a spendthrift clause.

The Diocese came to differ with PNC Bank, the trustee, over a number of matters, including PNC's fees. The Diocese petitioned for the termination of the trust. The Diocese alleged that it was the sole beneficiary (and therefore that no other consents were required) and that termination would not be inconsistent with the trust's charitable purposes. PNC moved to dismiss, on the grounds that the consent of the Attorney General for Maryland was needed, that other charitable beneficiaries possibly could receive trust assets (if, for example, the Diocese ceased to exist), and that the spendthrift clause precluded termination.

The Court denied the motion to dismiss. Citing the Restatement (Third) of Trusts, it held that an irrevocable trust can be terminated with the consent of all its beneficiaries, unless termination would violate a material purpose of the trust. The Court found that the Diocese was the only beneficiary whose consent was needed. In addition, the Attorney General had declared his unwillingness to participate, so the Court did not need to determine whether he was a necessary party.

The Court noted that while a spendthrift clause can be a material purpose of a trust, it would not be one where it is merely an "incidental or routine" provision. The Court found that the spendthrift clause was not material to this trust, in part because the clause was not included by the testator, but was added after her death. Therefore, the Court denied the motion to dismiss and ordered the Diocese to file a motion for summary judgment.

### *Creditor Claims*

In *Boer v. University Specialty Hospital*, 421 Md. 529, 27 A.3d 175 (Md. 2011), the Court of Appeals considered the meaning of § 8-104(c) of the Estates & Trusts Article,

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## Maryland Caselaw Developments. . .

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which allows a creditor to file a claim in a county in which a decedent resided at the time of death. The case involved the estate of Dorothy Faya, who lived most of her life in Baltimore County, but who spent most of her final months in hospitals in Baltimore City.

Ms. Faya died in University Specialty Hospital (“USH”) in Baltimore City. USH filed a timely claim against Ms. Faya’s estate with the Register of Wills in Baltimore City. While it also filed later in Baltimore County, that claim was not timely. Thus, USH had not filed a claim in the county of Ms. Faya’s domicile. However, USH argued that its first claim was properly filed under § 8-104(c), because Ms. Faya “resided” in Baltimore City at the time of her death.

The Orphans’ Court for Baltimore County found that Ms. Faya’s presence in city medical facilities was not sufficient to make her resident in Baltimore City for purposes of § 8-104(c). The Circuit Court affirmed that decision, but the Court of Special Appeals reversed.

The Court of Appeals first noted that mere presence at the time of death is not sufficient to constitute residence for purposes of this statute. It also noted that while a person’s domicile is based on part on her subjective intent, residence must be more objective. Among other things, a creditor seeking to file a claim under § 8-104 must be reasonably able to determine where to file.

The Court rejected an argument that patients in hospitals could never be considered residents of that county and also rejected an argument that the type of facility (e.g., “nursing care facility” vs. “chronic care hospital”) was dispositive. Having said that, the Court did not establish a very clear standard for determining residence. In the end, the Court was persuaded by the length of Ms. Faya’s residence in the hospital (eleven months) and the extent of her condition, which it suggested rendered her permanently unable to return to her home in Catonsville.

Three judges dissented from the majority opinion. They argued first that the record did not support the majority’s factual determination that Ms. Faya’s condition rendered her permanently unable to return home. It also faulted the majority for failing to give a clear standard for determining residence, arguing that the majority’s opinion would leave prospective creditors more confused as to where to file, not less. Finally, the dissent noted that USH should not have been confused as to the proper place to file, as its own records noted Ms. Faya’s permanent address. Given that USH does seem to have had plenty of notice of Ms Faya’s permanent home, one does wonder why it did not do a better job of protecting its claim by filing earlier in Baltimore County, or at least watching to see whether an estate was opened there. Had it done so, this entire litigation could have been avoided.

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## Reality Bytes. . .

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those gaming platforms, whether it is gaming preferences and history or financial information to pay for the service. Think about the computing that you do on the “cloud” and what you leave behind. Think about it again when you are prompted by an app on Facebook that requests permission to access your Facebook personal information, friends and other data that you have left behind. What do you think those apps are doing with that information? Building you a better cow in Farmville?

It turns out that other people’s servers may be no more secure than your own. Servers for major platforms on the Internet may be even bigger targets than your computer for security breaches. As the story goes, when Willie Sutton was asked why he robbed banks, he said because “that’s where the money is.” In the cloud computing, big computer servers

are where the information is.

Recently we have seen hackers breach Nintendo’s servers. Now comes a more frightening wave. [Computers at major defense contractors have been breached.](#) Big time defense contractors: Northrop Grumman, Lockheed Martin and L3 Communications. The report just linked is even grimmer in that it says that prevention of such breaches by serious hackers (who may include foreign governments) is very difficult, if not impossible, to achieve. One weakness: People. Servers are attached to networks and networks connect people, and people are the weakest link. People can be convinced to “leave the door unlocked” and let the bad guys in.

So, cloud computing is here to stay, but be careful, because you may be the weakest link.