Document Drafting for the Elder Law Practitioner
Maryland State Bar Association
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Will Basics for the Maryland Lawyer (Including the Impact of Boilerplate and Other Standard Clauses)

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1. Formalities of Wills

1.1 Execution of Will

Basic Requirements. Maryland Estates and Trusts Article provides, with two exceptions, that every will shall be (i) in writing, (ii) signed by the testator (or some other person for him, in his presence and by his express direction), and (iii) attested and signed by two or more credible witnesses in the presence of the testator. Md. Code Ann., Est. & Trusts § 4-102 (2006).

Exceptions. The two exceptions are contained in § 4-103 (allowing holographic wills for certain individuals serving in the armed services to be upheld for a period of time) and § 4-104 (validating a will made outside of Maryland provided the will is in writing, signed by the testator and executed in conformance with the law of the domicile of the testator or the place where it was executed). See *Nugent v. Wright*, 277 Md. 614, 356 A.2d 548 (1976), for an example of a Maryland Court of Appeals case dealing with a holographic will from a state (here, Virginia) that recognizes holographic wills.

Witnesses. Although it may be best practice to gather the testator and the witnesses in one room together in accord with traditional practice, that is not strictly necessary in Maryland. Maryland law, for example, does not require that witnesses to the will observe each other executing the will. In *O'Neal v. Jennings*, 53 Md. App. 604, 455 A.2d 604 (1983), the court upheld a will despite an attestation clause stating that the witnesses signed in the presence of each other when, in fact, they did not. The law is clear, however, that the witnesses must have attested and subscribed to the will in the presence of the testator. *Tinnan v. Fitzpatrick*, 120 Md. 342, 87 A. 802 (1913). Although it may be desirable for the testator to identify that it is a will to which he wants the witnesses to subscribe, it is not strictly necessary for the testator to identify the document. *Casson v. Swogell*, 304 Md. 641, 500 A.2d 1031 (1985) (holding that there is no requirement of "publication"); see also *Slack v. Truitt*, 368 Md. 2, 14, 791 A.2d 129 (2001) ("[A] testator need not acknowledge a will or signature orally; acknowledgment can be accomplished by conduct alone."). The use of an attestation clause (stating that the witnesses signed within the presence of the testator) provides prima facie evidence of due execution. *VanMeter v. VanMeter*, 183 Md. 614, 39 A.2d 752 (1944); *West v. Fidelity-Baltimore Nat'l Bank*, 219 Md. 258, 147 A.2d 859 (1959). The attestation clause, however, does not prevent a witness from testifying to facts contrary to those set out in the clause. *Casson*, 304 Md. 641.

"In the Presence." Generally, there are two interpretations of the presence requirement: 1) the line-of-vision test; and 2) the conscious-presence test. Under the line-of-vision test the testator needs to be able to watch the witness sign (regardless of whether the testator actually witnessed the signature). Maryland has adopted the line-of-vision test. *Grant v.*

Sandsbury, 213 Md.App. 144, 73 A.3d 374 (2013). (Witnesses "within the unobstructed vision of the testator …"); *Brittingham v. Brittingham,* 147 Md. 153, 127 A. 737 (1925).

Under the conscious-presence test, the testator must be able to sense the presence or actions of another but need not actually be able to see the witness. The *Restatement (Third) of Property* adopts the conscious-presence test, recognizing that "a person can sense the presence or actions of another without seeing the other person." *Restatement (Third) of Prop.: Donative Transfers* § 3.1 cmt. p. The Uniform Probate Code provides that a will must be "signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will...or the testator's acknowledgment of that signature or acknowledgement of the will." Unif. Probate Code § 2-502(a)(3). Thus, the Uniform Probate Code no longer requires that the witnesses be in the presence of the testator; it requires only that the witness attests to the will "within a reasonable time" after the testator signed or acknowledged the signature.

Signed by Surrogate. In Maryland the testator may direct another person to sign for him "in his presence and by his express direction." Md. Code Ann., Est. & Trusts § 4-102. This provision raises the line-of-vision test versus conscious-presence test concern. In this situation, the *Restatement (Third) of Property* rejects the line-of-vision test in favor of the conscious-presence test. § 3.1 cmt. n. The Uniform Probate Code explicitly states that the surrogate sign "in the testator's *conscious* presence." § 2-502(a)(2) (emphasis added).

Attestation Clause. There is a strong presumption of due execution that attaches to a signed and witnessed will. *Slack v. Truitt*, 268 Md. 2, 298 A.2d 862 (2002). Merely asking the witnesses to attest to a will, without telling the witnesses that the document is a will, is sufficient.

Credible Witnesses. Under the common law, a credible witness was one competent to attest to the will at the time of the attestation. Certain individuals were not permitted to testify under the common law: those with an interest in the subject matter of the litigation, infants, insane persons, and those convicted of infamous crimes. See *McGarvey v. McGarvey*, 286 Md. 19, 25, 405 A.2d 250 (1979). Over time, the courts have loosened the requirements for the attesting witnesses to a will. In *Shaffer v. Corbett*, 3 H. & McH. 513 (1797) (discussed in *McGarvey*, 286 Md. at 22-23), the court sidestepped the prohibition against interested persons acting as witnesses. In that case the husband of a woman who was a devisee in the will signed as an attesting witness. The court made the distinction between whether the husband was competent to attest to the will at the time of the attestation as opposed to his competency at a trial in regards to proving the will. At the time of attestation, the wife had an unenforceable expectancy; therefore, there was no interest. At the time of the caveat proceeding, the husband and wife had disclaimed any interest in the will to permit the husband to testify. His

competency as an attesting witness was not voided by the fact that the wife's interest rose to an enforceable interest (before disclaimer) by reason of the testator's death. Similarly, *Leitch v. Leitch*, 114 Md. 336, 79 A 600 (1911), held that a beneficial devisee can also be an attesting witness to a will.

Maryland law generally allows testimony from those persons with an interest in the matter in question and those who have committed a crime. See Md. Code Ann., Cts. & Jud. Proc. § 9-101 (2006); but see Md. Code Ann., Cts. & Jud. Proc. § 9-104 (2006) (prohibiting a convicted perjurer from testifying). In *McGarvey*, the court decided whether a person convicted of subornation of perjury would be prohibited from being an attesting witness. The court held that the disability of an attesting witness by reason of conviction of an infamous crime was imposed by common law and not by statute. This holding left the court free to declare the state of the common law. Thereupon, the court held that a criminal conviction, including perjury, would not bar someone from being an attesting witness:

> "We see no reason why a criminal conviction, including perjury, should automatically bar anyone in this State from performing the largely formal ritual of attestation. We, therefore, hold that the common-law rule which disqualifies one convicted of an 'infamous' crime from attesting to wills, is no longer applicable in this State. Any other result would be a needless trap for the unwary testator who, by failing to discover an attesting witnesses' prior criminal record, risks having his will declared void."

McGarvey, 286 Md. at 27-28.

1.2 Formalities of Will Substitutes

General Rule. In Maryland no statute imposes formalities to the execution of revocable trusts similar to those formalities that govern wills.

Florida Variation. Conversely, Florida statute states that the State will not recognize the validity of testamentary distribution from a revocable trust that lacks the formalities of a Florida will. Fla. Stat. § 689.05 (2006); see also *Zuckerman v. Alter*, 615 So. 2d 661, 663 (1993) ("In Florida, formalities for the conveyance of real property are similar to will execution formalities."). Florida's law can cause a problem for a revocable trust executed in Maryland without testamentary formality if the client becomes a resident of Florida later in life or is a resident of Florida under the income tax rules but maintains dual residency. Arguably, the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, would require Florida to uphold a Maryland revocable trust executed without formalities provided it was valid under Maryland

law. However, lawyers are advised to adhere to those rules governing will executions when creating revocable trusts for clients who maintain property in Florida.

New York Variation. New York State also requires will formalities or a notarized instrument for a valid revocable trust. See N.Y. Est. Powers & Trusts § 7-1.17 (Consol. 2006). Maryland law does not require revocable trusts to be notarized. However, it is general practice that such instruments are notarized to permit recordation among state land records if real estate is concerned.

2.1 Capacity to Make a Will

General Rule. Maryland Estates and Trusts Article § 4-101 provides that: "Any person may make a will if he is 18 years of age or older, and legally competent to make a will." This definition does not specific what constitutes legal competency. Maryland, like most states, follows the common law rule to determine legal testamentary capacity:

> "Whether a testator had sufficient mental capacity is determined by a consideration of his external acts and appearances. It must appear that at the time of making the Will he had a full understanding of the nature of the business in which he was engaged; a recollection of the property of which he intended to dispose and the persons to whom he meant to give it, and the relative claims of the different persons who were or should have been the objects of his bounty."

Philip L. Sykes, *Contest of Wills in Maryland* § 61 (1941), quoted in *Sellers v. Qualls*, 206 Md. 58, 66, 110 A.2d 73 (1954).

Pre-Henderson Commission Rule. Prior to the revision of the testamentary laws in 1969, Maryland statutory law stated that a person had testamentary capacity if such person was "of sound and disposing mind, and capable of making a valid deed or contract." *How Wills Shall be Made and Their Effect*, Laws of Maryland, 288-89 (1796), available at www.mdacrchives.state.md.us. That language was changed by the Henderson Commission to the language now found in § 4-101 ("legally competent to make a will"). The Henderson Commission decided that Maryland had developed a substantial body of decisional law setting forth the elements of legal competency and placing the legal competency to make a contract and/or a gift is arguably a different standard than that to make a will. To restate the past language would have called into question that decisional language. This distinction is evident in various court decisions that have upheld wills when a deed and/or gift would have been set aside. See *Ritter v. Ritter,* 114 Md.App. 99, 689 A.2d 101 (1997). (Earlier finding that testator lacked capacity to execute a power of attorney not determinative on later issue of capacity to execute a will); *Lee v. Lee*, 337 So. 2d 713 (Miss. 1976); *In Re Estate of Sorenson*, 274 N.W.2d 694 (Wis.

1979).

Different evidentiary rules have developed under Maryland law with respect to challenges of gifts and wills based on undue influence. If the recipient of the gift has a confidential relationship with the donor, the lifetime transfer shifts the burden to the donee to show the fairness and reasonableness of the transaction. Indeed, the donee must establish by "clear and convincing evidence" that there was no abuse of the confidence. *Upman v. Clarke*, 359 Md. 32, 753 A.2d 4 (2000). The rule regarding an attack on a will is very different. The fact of a confidential relationship simply is one element of the proof of the exercise of undue influence and does not shift the burden of proof. *Id*. The policy basis for the two different rules reflects the necessity of protecting individuals from access to their assets while living. After death, of course, this policy consideration no longer exists. By requiring that the testator be "legally competent to make a will" rather than being "capable of making a valid deed or contract," the present Estates and Trusts Article accurately codifies decisional law of Maryland. Evidence of the testator's conduct and statements, declarations or conversations—before and after the execution of the will may be admissible to establish or dispute capacity if material and sufficiently near in time. *Grill v. O'Dell*, 113Md. 625, 77A. 984(1910); *Dudderar v. Dudderar*, 116 Md. 605, 82 A. 453 (1911); *Collins v. Ecksteine*, 164 Md. 696, 163 A. 698 (1933).

External Indicia of Capacity. As noted, whether a testator has the requisite capacity must be determined by consideration of external acts. One case illustrating the bias against finding a lack of capacity is *Sellers v. Qualls*, 206 Md. 58, 66 (1954). In that case, the court stressed that there is no extraordinary mental capacity for making a will required by the law. Mere eccentricity is not enough to void a will and the eccentricities evident in the *Sellers* case did not rise to a level of incapacity. These eccentricities were described by the court in detail:

> "...the effects of diseases (diabetes) from which she suffered; her rather frequent falls both indoors and outside, her rummaging through a garbage dump, which she permitted to be established on her place (and on which she sometimes fell), and eating moldy bread and other food which she retrieved from it; once eating food which she had vomited; eating food given her by hucksters for her chickens; eating large quantities of cheese, liverwurst, braunschweiger or bacon, regardless of dietary restrictions; licking her plate; making unfounded accusations of theft against a tenant, against her sister, Mrs. Sellers, and against others; hitting Mrs. Sellers with a saucer at some unspecified date in 1950; making unfounded allegations of attempts to poison her; hiding money in odd places; laughing, crying or talking to herself and seeming nervous or upset; and on one occasion wanting to put roomers out of her house and then letting them return almost immediately."

Sellers, 206 Md. at 64. The court concluded that her eating habits were "an odd and extreme form of miserliness; but miserliness is not necessarily the hallmark of insanity, and is more likely to indicate the reverse." *Id.* at 65-66. The *Sellers* case and others show that it is difficult to attack capacity without expert testimony and it is likely that such expert testimony must be provided by someone who examined the testator. *Sellers* illustrates the presumption under the law that every person is sane and has the capacity to make a valid will. The burden is on the caveators to show lack of such capacity. See *Ingalls v. Mount Oak Methodist Church Cemetery*, 244 Md. 243, 260, 223 A.2d 778 (1966).

Undue Influence. Setting aside a will because it was a product of undue influence on the testator rests on the premise that the undue influence is to such a degree that the testator is robbed of his or her free agency:

> "Undue influence has also been a much litigated question. To warrant a finding that it invalidates a will, it must be shown that there existed 'that degree of importunity which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act'."

Sellers, 206 Md. at 70 (citation omitted). There is no bright line test to determine existence of undue influence. Certain factors, however, have been found by the Maryland Court of Appeals as "characteristics" of undue influence:

1. "The benefactor and the beneficiary are involved in a relationship of confidence and trust;
2. The will contains substantial benefit to the beneficiary;
3. The beneficiary caused or assisted in effecting execution of the will;
4. There was an opportunity to exercise influence;
5. The will contains an unnatural disposition;
6. The bequests constitute a change from a former will; and
7. The testator was highly susceptible to the undue influence."

Moore v. Smith, 321 Md. 347, 353, 582 A.2d 1237 (1990); See *Anderson v. Meadowroft,* 339 Md. 218, 661 A.2d 726 (1995).

As mentioned, the "relationship of confidence and trust" is one piece of evidence to establish undue influence in a will contest. The rule for an inter vivos gift, on the other hand, is that the existence of a confidential relationship shifts the burden of proof to the donee of the gift: "In some relationships, such as attorney-client or trustee-beneficiary, a confidential relationship is, indeed, presumed as a matter of law. Otherwise, and particularly in family

relationships, such as parent-child and husband-wife, the existence of a confidential relationship is an issue of fact and not to be presumed as a matter of law." *Upman*, 359 Md. at 42. *Upman v. Clarke* involved a revocable trust which had the decedent as initial trustee and the Clarkes as successor trustees and remaindermen. The issue was whether the creation of the revocable trust was inter vivos or testamentary. The court held that, when resolving issues of undue influence and the revocable trust, one should follow the testamentary rules rather than inter vivos rules where the donees had not disposed of any of the assets of the trust to themselves or exercised substantial control over those assets to the detriment to the grantor of the trust: "Whether an instrument of this kind [where assets were used for the benefit of someone other than the grantor] is to be regarded as testamentary or inter vivos may depend on how it is, in fact, implemented." *Id*. at 48.

In *Figgins v. Cochrane*, 403 Md. 392, 942 A.2d 736 (2008), the Court held that a gratuitous transfer to the agent under a durable power of attorney was the result of undue influence. In that case, the agent failed to rebut the presumption of undue influence that arose because of the confidential relationship.

Bequest to Lawyers. The attorney-client relationship is one example of a well-recognized confidential relationship. Under some circumstances such relationship would be fatal to an instrument leaving the attorney a bequest. Maryland Lawyer's Rules of Professional Conduct Rule 1.8(c) instructs that: "[a] lawyer shall not solicit… a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client…" Even when the lawyer is related to the testator it may be bad practice to prepare the instrument if the lawyer or the lawyer's branch of the family is being favored as against other members of the family or branches of the family. See e.g., *Lipper v. Weslow*, 369 S.W.2d 698 (Tex. App. 1963) (indicating that the issue of undue influence would have been moot had the testatrix used an independent attorney to prepare her will).

The American College of Trust and Estate Counsel's commentary to MRPC Rule 1.8(c) pointedly states that: "the lawyer should exercise special care if a relative of either the lawyer or the lawyer's spouse proposes to make a gift that is disproportionally large in relation to gifts that the relative proposes to make to others who are equally related." ACTEC *Commentaries on the Model Rules of Professional Conduct* MRPC 1.8 (2nd ed. 1999).

Rule 1.8(c) dictates an absolute prohibition on the lawyer preparing an instrument favoring the lawyer outside of the family setting. The ACTEC commentary makes a sensible extension of that prohibition: "[n]either the lawyer nor anyone associated with the lawyer should assist a client who is not closely related to the lawyer or to the lawyer's spouse to make a substantial gift to the lawyer or to the lawyer's spouse, children, parents or siblings." ACTEC

Commentaries, supra. Presumably, a lawyer would need to refrain from not only preparing the instrument but also assisting the client in arriving at the decision.

Numerous cases have supported disbarment or indefinite supervision of a lawyer drafting a will of a non-relative that names the lawyer or the lawyer's family member as a legatee. *Atty. Griev. v. Brooke*, 374 Md. 155, 821 A.2d 414 (2003); *Atty. Griev. v. Stein*, 373 Md. 531, 819 A.2d 372 (2003). See also *Atty. Griev. v. Saridakas*, 402 Md. 413, 936 A.2d 886 (2007), where having the will passed by the lawyer's office space sharer did not save sanctions from being imposed. A dissent by Wilner and Greene questioned why someone merely sharing space is not an independent attorney.

At least one court has extended the ethical rule to cover non-lawyers acting in the role of a lawyer. *In Re Estate of Marks*, 91 Wash. App. 325, 957 P.2nd 235 (1998), was an appeal on an undue influence case where no undue influence was found by the trial court. In that case, the testatrix had been hospitalized and was assisted by a friend who was closely involved with a church. The testatrix was scheduled for surgery and, reportedly, stated that she wanted to make sure that she had her affairs in order beforehand. A friend secured a will kit at Office Depot, read the instructions to the testatrix, and helped her complete the will. The will at issue left part of the estate to the friend and a large amount to the friend's church. Although in *Marks* it was held that undue influence could not be shown[1], the court found that the will was the product of the unauthorized practice of law and therefore those provisions benefiting the friend were set aside. Ultimately the court decided that "the rules regulating the conduct of lawyers are applicable to lay people who engage in the practice of law." *Id*. at 241.

Fraud. As with other documents, a will may be the product of fraud if the testator is deceived into signing the will without understanding that the document is meant to be a will or if there is a provision in the will which is unknown to the testator. Dukeminier points to *In re Estate of Carson*, 184 Cal. 437, 194 P. 5 (1920), as a "dramatic illustration" of part of the difficulty in determining what constitutes fraud and inducement of gaining a bequest in a will. Dukeminier, *supra*. In *Carson*, a man induced the testatrix to go through a "marriage ceremony" while knowingly married to another women. Thus, the ceremony was fraudulent. After living together for a year the testrix died and left the majority of her estate to her "husband". The issue to be decided was whether the bequest was a product of the fraud or a product of the intimate relationship that was valid regardless of the issue of the fraudulent marriage. The court in *Carson* pointed out the difficulties in determining the issue at hand. An easy case would be if the parties lived together in excess of twenty years, then it would be fairly likely that the bequest did not hinge on the supposed legal relationship with the "husband". Similarly, if it was a deathbed

[1] After the testatrix survived surgery the friend retyped the language from the will kit on her home computer and gave the testatrix a draft. The testatrix reviewed the draft and made only small, typographical changes in the will over a period of several days. Later, the testatrix discussed the contents of this will with her sister.

marriage followed by the will the fraud would be almost certainly related to the bequest. "Between these two extreme cases come those wherein it cannot be said that either one conclusion or the other is wholly unreasonable, and in those cases the determination of the fact is for the jury." *Id*. at 442.

3. Appointment of Personal Representative

3.1 The Statute:

"§ 5-104. Order of rights to letters

In granting letters in administrative or judicial probate, or in appointing a successor personal representative, or a special administrator as provided in Title 6, Subtitle 4 of this article, the court and register shall observe the following order of priority, with any person in any one of the following paragraphs considered as a class:

(1) The personal representatives named in a will admitted to probate;

(2) The personal representatives nominated in accordance with a power conferred in a will admitted to probate;

(3) The surviving spouse and children of an intestate decedent, or the surviving spouse of a testate decedent;

(4) The residuary legatees;

(5) The children of a testate decedent who are entitled to share in the estate;

(6) The grandchildren of the decedent who are entitled to share in the estate;

(7) Subject to §§ 3-111 and 3-112 of this article, the parents of the decedent who are entitled to share in the estate;

(8) The brothers and sisters of the decedent who are entitled to share in the estate;

(9) Other relations of the decedent who apply for administration;

(10) The largest creditor of the decedent who applies for administration;

(11) Any other person having a pecuniary interest in the proper administration of the estate of the decedent who applies for administration; or

(12) Any other person."

"§ 5-105. Restrictions on right to letters

(a) "Serious crime" defined. –

(1) In this section, "serious crime" means a crime that reflects adversely on an individual's honesty, trustworthiness, or fitness to perform the duties of a

personal representative.

(2) "Serious crime" includes fraud, extortion, embezzlement, forgery, perjury, and theft.

(b) In general. -- Subject to § 5-104 of this subtitle, the register or court may grant letters to:

(1) A trust company;

(2) Any other corporation authorized by law to be a personal representative; or

(3) Subject to subsection (c) of this section, any individual.

(c) Persons excluded. -- Letters may not be granted to a person who, at the time a determination of priority is made, has filed with the register a declaration in writing that the person renounces the right to administer or is:

(1) Under the age of 18 years;

(2) Mentally incompetent;

(3) Convicted of a serious crime, unless the person shows good cause for the granting of letters;

(4) Not a citizen of the United States unless the person is a permanent resident of the United States and is:

(i) The spouse of the decedent;

(ii) An ancestor of the decedent;

(iii) A descendant of the decedent; or

(iv) A sibling of the decedent;

(5) A full-time judge of a court established under the laws of Maryland or the United States including, a judge of an orphans' or probate court, or a clerk of court, or a register, unless the person is the surviving spouse or is related to the decedent within the third degree; or

(6) A nonresident of the State, unless there shall be on file with the register an irrevocable designation by the nonresident of an appropriate person who resides in the State on whom service of process may be made in the same manner and with the effect as if it were served personally in the State on the nonresident."

3.2 Select Issues Concerning Appointment

The statutory order to the right to letters is stated in mandatory terms ("… the court and register shall …"). From time to time, the Section Council of the Maryland State Bar Association has recommended changing this to non-mandatory. (The so-called "Grace Connelly Bill" after the Register of Wills/Orphans' Court Judge in Baltimore County). Such a change would permit the Orphans' Court to appoint out of order when it appears that a strict application of the statutory order would be imprudent. This proposed legislation has never been enacted. See, however, *Preston Phillips v. Lynn Krause*, personal representative (Md. Ct. Spc. Appeals,

May 20, 2002) (unreported) (If the Court has reason to remove a person as personal representative it cannot appoint the person in the first place.")

Section 5-104 characterizes each person in each category of priority as a "class." The Court of Appeals has held that the Orphans' Court, within its sound discretion, may appoint one member of an equally entitled class to the exclusion of others in the same class. *Kuenne v. Loffler*, 266 Md. 468, 295 A.2d 219 (1972) (one sister appointed with a second sister petitioning to become a joint personal representative. The second sister's petition was denied.) Est. & Trusts § 5-106, however, states that all personal representatives named in the will are entitled to probate.

Est. & Trusts § 5-104(2) effectively elevates a personal representative named "in accordance with a power conferred in a will" to be treated as named by the testator. An example of this would be when a personal representative has the authority in the will to name his or her successor. Such a nominated personal representative is treated as if named in the will for § 5-106 purposes.

A guardian of a person entitled to serve as personal representative cannot serve in their stead. *Courtney v. Lawson*, 97 Md. App. 471, 631 A.2d 102 (1993) (mother of minor child of decedent not entitled to letters).
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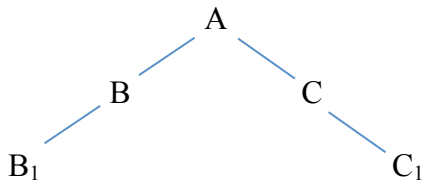
Est. & Trusts § 5-105 lists persons not qualified to be appointed personal representative. This includes persons convicted of a "serious crime." Serious crime is a defined term meaning a crime that "reflects adversely" on that person's trustworthiness. Non-citizens of the United States are not qualified unless such a person is "a permanent resident" and related to the decedent. Judges are disqualified except for estates of spouses or of persons related with in the third degree:



"C" is related in the third degree to "B1". Non-residents may serve as personal representatives only if a resident agent is on file.

4. Personal Representative: Duties Generally

4.1 The Statute:

"§ 7-101. Duties of personal representative generally

(a) Fiduciary responsibility. -- A personal representative is a fiduciary. He is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and the estates of decedents law as expeditiously and with as little sacrifice of value as is reasonable under the circumstances. He shall use the authority conferred upon him by the estates of decedents law, by the terms of the will, by orders in proceedings to which he is party, and by the equitable principles generally applicable to fiduciaries, fairly considering the interests of all interested persons and creditors.

(b) Time for distribution. -- Unless the time of distribution is extended by order of court for good cause shown, the personal representative shall distribute all the assets of the estate of which he has taken possession or control within the time provided in § 7-305 of this title for rendering his first account.

(c) Exoneration for certain payments. -- The personal representative does not incur any personal liability by his payment of claims or distribution of assets even if he does not consider claims for injuries to the person prosecuted under the provisions of § 8-103(e) or § 8-104 of this article, if at the time of payment or distribution:

(1) He had no actual knowledge of the claim; and

(2) The plaintiff had not filed on time his claim with the register."

"§ 7-102. Possession and control of estate

A personal representative has a right to and shall take possession or control of the estate of the decedent, except that property in the possession of the person presumptively entitled to it as heir or legatee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of property possessed by the heir or legatee is conclusive evidence, in an action against the heir or legatee for possession, that the possession of the property by the personal representative is reasonably necessary for purposes of administration. The personal representative may maintain an action to recover possession of property or to determine its title."

4.2 Introduction – Duties of Personal Representatives

The Personal Representative of an estate has certain responsibilities and obligations that are set by statute and case law. According to the Annotated Code of Maryland, Est. & Trusts Article, § 7-101, a Personal Representative is a "fiduciary." "He is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will

and the estates of decedents' law as expeditiously and with as little sacrifice of value as is reasonable under the circumstances."

Each estate is quite unique and consequently requires individualized attention. Nevertheless, the administration of an estate follows a logical progression of gathering assets, paying debts, and following the dictates of the will (or, in the absence of a will, the dictates of the intestacy statute).

The purpose of this discussion, however, it not to set forth the specific tasks of a personal representative. Instead, this discussion will focus on the nature of the fiduciary obligation of the personal representative.

In general, the Personal Representative has a duty to settle and distribute the estate in accordance with the terms of the will or in accordance with the laws of descendants as expeditiously and with as little sacrifice of the value as is reasonable under the circumstances. In order to accomplish this task, the Personal Representative takes possession and control of the estate. The Personal Representative has a duty to notify the heirs and legatees and to prepare and file an inventory of the estate. The Personal Representative must arrange for appraisals of all of the property of the estate in order to pay the inheritance tax to the state and any estate tax due the federal government. The Personal Representative has a duty to account for the management of the estate to the Orphans' Court and to the heirs. The Personal Representative may be held liable by the creditors of the estate, the heirs of the estate, or by any other taxing authorities if the Personal Representative fails to properly execute the duties of his or her office.

4.3 The Duty of Loyalty

One fundamental duty of a Personal Representative is that of loyalty. According to Est. & Trusts Article § 7-101, this duty is to "all interested persons and creditors" of the estate. Every action that a Personal Representative takes must take into account the impact that class of beneficiaries and/or creditors.

A Personal Representative should never place him/herself in a position that may favor the Personal Representative's interest over the interest of the beneficiaries and/or creditors. The Personal Representative must consistently avoid conflicts of interests. Aside from a reasonable fee for services, a Personal Representative must not derive any personal advantage from, or realize a profit in, dealing with the estate.

4.4 The Duty of Prudence

The Personal Representative has a duty to exercise care, diligence, and prudence

in dealing with the estate's property. The Personal Representative's conduct will be considered reasonable if he or she acts as a "prudent person" would act. The "prudent person" theory means that the Personal Representative must act with the care and skill that a prudent person would exercise in his or her own affairs.

4.5 Preserving the Assets

The Personal Representative is under a duty to preserve and protect the assets of the estate. This includes such assets as real estate held by the estate, household furniture, furnishings, and collectibles. The Personal Representative is under a duty to provide adequate security and protection for these and other items. It is important that the decedent's insurance agent be contacted and that the Personal Representative review all of the insurance coverage for assets belonging to the estate.

4.6 Conduct in Investing

With regard to investing, the Personal Representative's first duty is to protect capital and avoid undo risk. The Personal Representative is also under a duty to use reasonable care and skill to make property productive, within the guidelines of the will and of state law restrictions. If the Personal Representative invests estate assets in speculative ventures, he or she is risking personal liability in the event that a loss is sustained, unless that investment is authorized specifically by the terms of the will. The bottom line is that a Personal Representative must exercise prudence, discretion, and intelligence to safeguard the estate's principal, but at the same time generate as much income as is reasonably possible.

Fortunately, it is the conduct of the Personal Representative, rather than the investment performance, that is judged by the courts. The Personal Representative will be personally liable only when losses result from his or her imprudent conduct, rather than because investment performance has not been as good as possible. The Personal Representative may retain non-income-producing-assets, but only if the will specifically authorizes him or her to hold those assets (or if there is some overriding reason for keeping them).

Maryland law (Est. & Trusts Article § 15-106) provides a list of "lawful investments." This is a list in the statute of various investments, generally an investment guaranteed by the federal or state government or an agency of the federal or state government. The statute establishes guidelines but does not insure protection for the Personal Representative. Reasonable care must still be exercised in selecting securities by the Personal Representative. The fact that there is a statute providing certain "lawful investments" does not mean that any other investment is unlawful in any sense. The duty to use reasonable care and skill in selecting investments is the fundamental test in reviewing a Personal Representative's activity.

The Personal Representative must be more concerned with the safety of the principal than with enormous profits. Diversification is the key to safety in this area. Even with special language in the will relieving the Personal Representative of the obligation of diversifying assets, we suggest that the Personal Representative maintain records showing why he or she did not diversify. Again, the key in this area is the use of reasonable care in managing investments.

Est. & Trusts Article § 15-114 establishes guidelines and standards for the investment of assets. This provision, by its terms, only applies to trust companies or persons who made an election to be governed by this Section. Generally, § 15-114 permits the portfolio as a whole to be reviewed rather than focusing on an examination on an asset by asset basis. Additionally, the guidelines set forth considerations the fiduciary may take into account when making an investment decision, including: the general economic conditions, the possible effect of inflation, the expected tax consequences of a decision, the role each investment plays in the portfolio as a whole, the expected total return of the investments, the reasonableness of any costs associated with an investment, and the status of the related assets of beneficiaries. Although arguably Maryland law already dictates a "whole portfolio" approach to fiduciary investments, we recommend following these guidelines.

4.7 Maintaining Accurate Records

Maintaining accurate records is another important duty. The Personal Representative must account periodically to the beneficiaries. Keeping beneficiaries informed is an extremely good way to avoid litigation and maintaining accurate records greatly reduces the possibility of having a successful suit against a Personal Representative. In addition, accurate records ease the task of rendering the formal account to the Orphans' Court and/or Register of Wills. If accurate records are not maintained, the preparation of various accounting can become a nightmare.

4.8 Duty Not to Delegate

Personal Representatives may not delegate his or her fiduciary responsibility. This duty "not to delegate" is derived from the nature of the position as Personal Representative. Obviously, a Personal Representative is entitled to employ counsel, accountants, and others to help in the tasks. The Personal Representative, however, has a duty to careful monitor all work and, of course, "signs off" on every task.

In the case of several Personal Representatives, each Personal Representative is under a duty to the beneficiaries to participate in the administration of the estate and to use

reasonable care to prevent other Personal Representatives from breaching the fiduciary responsibilities.

4.9 Timeliness

If you are going to make any investment changes, timeliness is the key. This means that the Personal Representative must implement his or her plan as quickly as possible after prudent decisions have been made.

An astonishing number of lawsuits involve a Personal Representative's failure to file tax returns in a timely manner. Unless the Personal Representative has reasonable cause for not complying with the time requirement, he or she will be held personally liable for interest and possibly penalty charges resulting from taxes paid late or not paid.

4.10 Powers of a Personal Representative

In order to properly administer an estate, the Personal Representative must be given the power to perform his or her duties. In many instances the will enumerates a broad range of powers given to the Personal Representative. In the absence of certain powers delegated by the will, State law enumerates a long list of powers that the Personal Representative may exercise in carrying out his or her duties. (The statutory powers may also be in addition to any power authorized by a will, unless such powers are limited by the will). The statutory powers include the power to hold assets, receive assets from other sources, deposit funds in estate accounts, pay or settle any claims with a creditor of the estate, pay the funeral expenses, pay taxes, insure property, pay off debt, continue to operate an unincorporated business venture that the decedent was engaged in at the time of his or her death, perform the contracts of the decedent, exercise options on life insurance policies, employ attorneys and other specialists, prosecute or defend litigation, and make partial and final distributions.

5. Special Administrator

5.1 The Statute:

"§ 6-401. Appointment; qualifications

(a) When appointed. -- Upon the filing of a petition by an interested party, a creditor, or the register, or upon the motion of the court, a special administrator may be appointed by the court whenever it is necessary to protect property prior to the appointment and

qualification of a personal representative or upon the termination of appointment of a personal representative and prior to the appointment of a successor personal representative.

(b) Qualifications. -- A suitable person may be appointed as a special administrator, but special consideration shall be given to persons who will or may be ultimately entitled to letters as personal representatives and are immediately available for appointment."

"§ 6-403. Powers and duties

A special administrator shall collect, manage, and preserve property and account to the personal representative upon his appointment. A special administrator shall assume all duties unperformed by a personal representative imposed under Title 7, Subtitles 2, 3, and 5 of this article, and has all powers necessary to collect, manage, and preserve property. In addition, a special administrator has the other powers designated from time to time by court order."

5.2 Special Administrator – In General

Basically, a special administrator is used "to protect the property" until other issues can be resolved. Thus, the special administrator's powers do not include distributions unless specifically authorized by a court order.

6. Fees and Commissions

6.1 The Statute:

"§ 7-601. Compensation of personal representative and special administrator

(a) Right to compensation. -- A personal representative or special administrator is entitled to reasonable compensation for services. If a will provides a stated compensation for the personal representative, additional compensation shall be allowed if the provision is insufficient in the judgment of the court. The personal representative or special administrator may renounce at any time all or a part of the right to compensation.

(b) Computation of compensation. -- Unless the will provides a larger measure of compensation, upon petition filed in reasonable detail by the personal representative or special administrator the court may allow the commissions it considers appropriate. The commissions may not exceed those computed in accordance with the table in this subsection.

If the property subject to	The commission may

administration is:	not exceed:
Not over $ 20,000	9%
Over $ 20,000	$ 1,800 plus 3.6% of the excess over $ 20,000

(c) Appeal. -- Within 30 days a personal representative, special administrator, or unsuccessful exceptant may appeal the allowance to the circuit court, which shall determine the adequacy of the commissions and increase, but not in excess of the above schedule, or decrease them.

(d) Commission on sale of real property. -- If the personal representative retains the services of a licensed real estate broker to aid in the sale of real property, the commissions paid to the real estate broker are an expense of administration and may not be deducted from the commissions allowed by the court to the personal representative in accordance with subsection (a) of this section."

"§ 7-602. Compensation for services of an attorney

(a) In general. -- An attorney is entitled to reasonable compensation for legal services rendered by him to the estate and/or the personal representative.

(b) Petition. -- Upon the filing of a petition in reasonable detail by the personal representative or the attorney, the court may allow a counsel fee to an attorney employed by the personal representative for legal services. The compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney.

(c) Considered with commissions. -- If the court shall allow a counsel fee to one or more attorneys, it shall take into consideration in making its determination, what would be a fair and reasonable total charge for the cost of administering the estate under this article, and it shall not allow aggregate compensation in excess of that figure."

"§ 7-603. Expense of estate litigation

When a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith and with just cause, he shall be entitled to receive his necessary expenses and disbursements from the estate regardless of the outcome of the proceeding."

6.2 Personal Representative's Commissions

Est. & Trusts § 7-601 sets out certain rules governing personal representative's

commissions: (1) commissions set out in a will shall govern unless too low, (2) a personal representative is entitled to "reasonable compensation for services", (3) upon a petition "in reasonable detail" the court may allow commission it considers appropriate but not to exceed certain statutory limit (the "9 + 3.6" provision).

These commissions are to be divided among joint personal representatives and/or successive personal representatives and special administrators. *St. Mary's Female Orphan Asylum of Baltimore v. Hankey*, 137 Md. 569 (1921). This division of commissions, at least as between co-personal representatives, seems to be held equal regardless of the allocation of work. *Hohman v. Orem*, 169 Md. 634 (1936); *Crothers v. Crothers*, 123 Md. 603 (1914); *Richardson's Adm'x v. Stansbury*, 4 H.&J. 275 (1817). See, also, *Cearfoss v. Snyder*, 182 Md. 565 (1943) (equal shares even when one joint personal representative did all of the work). These are old cases, however, and the statutory authority to allow commissions as the court "considered appropriate" may give it latitude in apportionment.

6.3 Relationship of Attorney's Fees to Commissions

There is a direct relationship between attorney's fees and personal representative's commission for those fees an attorney charges for normal administrative tasks. Est. & Trusts § 7-602 provides that an attorney is entitled to reasonable compensation but such fees along with the commissions should not exceed the aggregate compensation under Est. & Trusts § 7-601.

There are important limitations on the interplay of these two sections. Attorney fees that represent charges for necessary services not encompassed in the normal administrative tasks are not included in the calculation. Thus, attorney compensation for tax filings (final 1040, fiduciary income tax returns and estate tax returns) are seen as additional services if stated separately. *Riddleberger v. Goellen*, 263 Md. 44 (1971) (distinguishing between "routine" matters and "extraordinary" matters such as the work required associated with tax filings). *Riddleberger* makes clear that the Orphans' Court is not determining whether a lawyer's fee is appropriate just how much can be a charge against the estate: "The laborer is worthy of his hire. By this opinion we are not to be understood as in any way setting the total compensation to which the attorney may be entitled."

Aside from the "routine ministerial" vs. "extraordinary" distinction, Est. & Trusts § 7-603 entitles the personal representative to receive his or her attorney fees from the estate whenever he or she defends or prosecutes a proceeding "in good faith." The good faith test is not whether he or she wins the suit. See *Piper Rudnick LLP v. Hartz*, 386 Md. 201 (2008) (the personal representative was entitled to attorney fees and costs to defend his removal, including an appeal to the circuit court).

6.4 Payment of Attorney's Fees

Generally, attorney's fees should not be paid from the estate without prior court approval. *Beyers v. Morgan State University*, 139 Md. App. 609 (2001), off'd, 369 Md. 335 (2002); *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334 (1991).

6.5 Consent to Compensation to Personal Representative or Attorney

Court approval may be avoided if all interested persons consent and the combined commissions and fees do not exceed the limits in Est. & Trusts § 7-601. Est. & Trusts § 7-604. Once a consent is entered, the amount is listed as the payment of an expense.

Consents do not govern amounts in excess of Est. & Trusts § 7-601 (to pay an attorney for extraordinary services, for example) or for litigation expenses.

7. Tax Clauses

7.1 The Tax Clause as a Bequest

In certain circumstances, the tax clause can be the functional equivalence of a bequest. In *Fauntleroy v. Blizzard*[2], for example, Ms. Jackson's Will contained the "standard" tax clause which directed that the taxes be paid from the residuary estate. The Will provided a specific bequest of her husband's family stock back to his family (to the children of the deceased husband's brother) and the residue to the Fauntleroy heirs who were her family members. The stock was valued at $1.4 Million with her estate apparently consisting of this stock and her farm. The total estate and inheritance taxes tax that was shifted to the residue was $910,000. Probably at least 75% of this amount was attributable to the specific bequest to the collateral family members. *In Estate of Boyd*[3], the "standard" tax clause wiped out the marital bequest because of a large insurance policy going to the decedent's son, the spouse's stepson. In that case, the son/stepson disclaimed his interest in the probate estate and to the benefit of the tax clause.

7.2 The Federal Law Regarding the Tax Burden

Generally, the federal law looks to state law to determine tax apportionment. *Riggs v. Del Drago*: "Congress from 1916 onward has understood local law as governing the

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[2] Reported as *Noble v. Bruce*, 349 Md. 730 (1998) where the Court of Appeals dismissed two malpractice cases due to the heirs lacking standing to sue based on a strict privity theory.

[3] *Estate of Boyd*, 819 F. 2d 170 (7th Cir. 1987), rev'g 85 T.C. 1056 (1985) held that one may disclaim the benefits of the tax clause which, in that case, resurrected the marital deduction. Presumably, not every family dynamic would permit the use of a disclaimer to fix the result in similar circumstances.

distribution of the estate tax after payment of the tax." Also "Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, and that Congress intended that state law should determine the ultimate thrust of the tax."[4] Also: "If the issue is how to apportion the estate taxes, *Riggs v. Del Drago* instructs us to look to state law." *Estate of Reno v. Comm.*[5]

This does not mean that the IRS is restricted in its collection efforts to follow the tax apportionment scheme. Under IRC § 6324, for example, a "secret" estate tax lien attaches to all of a decedent's probate property and the IRS is able to chase that property into the hands of as bone fide purchaser.[6]

Although the general federal law refers to state law, certain provisions of federal law contain special apportionment provisions. IRC § 2603 (b) provides that "Unless otherwise directed pursuant to the governing instrument by specific reference to the tax imposed by this chapter, the tax imposed by this chapter on a generation-skipping transfer shall be charged to the property constituting such transfer." Also, IRC § 2207 provides that unless the decedent provides otherwise, the property subject to a general power of appointment shall bear its share of the estate tax and, similarly, IRC § 2207A provides that QTIP property likewise bears its portion of the tax.

7.3 Maryland Common Law

"Historically, estate taxes were viewed, like other transfer tax or administrative expense, as being part of the cost of administration, and, absent an expression of intent in the will to the contrary, payable from the residuary portion of the estate." *Johnson v. Hall*, 283 Md. 644, 647 (1978).

"The inequity which frequently resulted from the application of this 'common law' rule, especially when the residue was left to sustain a widow or minor children, spurred many state legislatures to revise that rule through statutory enactment." Id.

7.4. The "Maryland Uniform Estate Tax Apportionment Act"[7]

The Act generally provides that federal (and Maryland) <u>estate</u> tax should be apportioned among all those interested in the estate in the proportion that each person's interest bears to the total estate value.

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[4] *Riggs v. Del Drago,* 317 U.S. 95, at 99 and 98 (1944).
[5] *Estate of Reno v. Comm*., 945 F. 2d 733, 733 (4th Cir. 1991)(citation omitted).
[6] *Detroit Bank v. U.S.*, 317 U.S. 329 (1943); *U.S. v. Vohland*, 675 F2d 1071 (1982 CA9).
[7] § 7-308 of the Tax-General Article, Annotated Code of Maryland.

"Person interested in the estate" includes non-probate legatees and recipients of *inter vivos* gifts where the gift may generate the federal estate tax: "[A]ny person who is entitled to receive or has received, from a decedent while alive or by reason of the death of a decedent, any property or interest in property included in the taxable estate of the decedent." In *Shepter v. Johns Hopkins University*, 334 Md. 82 (1994), the Court held that this included adjustable taxable gifts that had (or should have) reduced the available credit. In 1995, the General Assembly reenacted § 7-308 to legislatively reverse the result of *Shepter*. Thus, the apportionment does "not include any interest of the decedent that is not included in the value of the decedent's taxable estate determined under §§ 2001(b)(1)(A) and 2051 of the Internal Revenue Code of 1986." Section 2. ch. 555, Acts 1995.

The statutory apportionment does not apply if a contrary instruction is in the Will. § 7-308(k).

In *Johnson v. Hall*, 283 Md. 644 (1978), the Court of Appeals held that a general direction to pay taxes <u>is not</u> a direction to pay such taxes from the residuary estate. In *Johnson*, the Will directed that "I direct that … all estate and inheritance taxes, be paid as soon after my death as can lawfully and conveniently be done." The court held that "No magical or mystical word or phrase is required to shift the burden of estate taxes from the legatees and devisees to the residue; however, for us to recognize the testatrix's 'boiler plate' reference to the payment of debts, expenses, and taxes in the first clause of her will states an intent not to apportion would require that we be clairvoyant." (at 655). The purported deficiency in the language was that the personal representative was not directed from where the money was to come. The tax clause should have a direction that the taxes be paid "from my residuary estate."

In *Pfeufer v. Cyphers*, 397 Md. 643 (2007), the will left the entire residuary estate to four people, three of whom were exempt from inheritance tax but one of whom was liable for the inheritance tax. The issue was whether a directive to pay all taxes from the residue meant that the residue was liable for the inheritance tax thereby, in effect, having that tax shifted to the tax-exempt heirs. The tax clause in *Pfeufer* stated: "I direct that all estate, inheritance, transfer, legacy, or succession taxes … which may be assessed or imposed with respect to my estate … shall be paid out of the principal of my residuary estate … without apportionment." The Court upheld the clause and held that the inheritance tax was to be paid from the residuary estate. *Pfeufer* has a detailed discussion of *Johnson v. Hall* and tax clauses in general. The inheritance tax is a tax on the "privilege of receiving property that passes from a decedent." § 7-202 of the Tax-General Article of the Annotated Code of Maryland. The tax is payable by the person to whom property passes and not on the estate of the person from whom it passed. *Mercantile-Safe Deposit & Trust Co. v. Register of Wills*, 252 Md. 311 (1969). Nevertheless, *Pfeufer* held that a tax clause can shift the tax to the estate.

8. Investment Powers

8.1 Common Law Rule

"Maryland follows a 'prudent person' standard for investment by fiduciaries." *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334, 350 n. 7 (1991). This means that "in all management of the trust a trustee is required to manifest 'the care, skill, prudence, and diligence of an ordinarily prudent [person] engaged in similar business affairs and with objectives similar to those of the trust in question.' This duty 'is not necessarily to maximize the return on investments but rather to secure a "just" or "reasonable" return while avoiding undue risk.'" *Maryland Nat'l Bank v. Cummins*, 322 Md. 570, 580 (1991) (citations omitted). In *Board of Trustees v. City of Baltimore*, 317 Md. 72 (1989), the Court clarified that the prudent investment rule looks to the whole portfolio, not on examination of each investment. This was a challenge by the city pension trustees to ordinances requiring divestiture of its holdings in companies doing business in South Africa. The pension trustees claimed that the ordinances conflicted with the trustees' common law duties of investment prudence and loyalty. The trustees' claimed that prudence of investment was effected "by radically reducing the universe of eligible investments." They claimed to be barred from almost 1/2 of the market capitalization of the S & P 500. (at 103). The Court rejected this argument and held that the "prudent person" rule dictates a "whole portfolio" approach rather than an examination of each investment. (at 104). The "whole portfolio" approach to prudence is particularly useful in defending the performance of one holding by a showing of portfolio balance. In addition to its contention that the ordinances violated rules of prudence, the trustees argued that the ordinances violated the duty of loyalty because they were forced to consider the interests of persons other than the pension beneficiaries. The Court rejected that argument, stating that the cost of considering the social aspects of investments are *de minimis.*

8.2 The Prudent Investor Act

E&T § 15-114 sets out standards for investments. By its terms, the Act covers trust companies and persons who elect into the coverage. It generally covers trustees, guardians, custodian, under the UTMA but not personal representatives.[8] Nevertheless, it is a statutory map as to how any fiduciary should invest and it establishes standards offering more direction and guidance than the Common Law prudent person standard cases.

[8] E&T § 15-114 contains its own definition of "fiduciary" and "fiduciary assets" that exclude personal representatives. The rest of Title 15, however, includes personal representatives in the definition of fiduciary. E&T § 15-101(g).

8.3 The "Legal List" of Investments

E&T § 15-106 sets out "lawful investments" in which a fiduciary may invest. It is not exclusive: "This section shall not be construed to make unlawful any investment not listed in this section." E&T § 15-106(g). Also, investing on the list is not a defense to imprudence. The Henderson Commission recommended abolishing the legal list of fiduciary investments. Notwithstanding this recommendation, the "legal list" remains in the Code but offers no protection to the fiduciary: "The Maryland legislature has interposed what can be characterized as a permissive legal list for most fiduciaries; it has acknowledged, however, that the prudent man rule underlies all fiduciary investment decisions. One is then left to wonder why Maryland's legal lists are necessary ... In essence, Maryland's statutory provisions on investments by fiduciaries generate much heat but little light. The fiduciary is on his own in making decisions, frequently operating under the belief that the law protects him when, in fact, it only creates a presumption in favor of his decisions if he complies with the statutory recommendations." Tralins, *Contemporary Fiduciary Investments: Why Maryland Needs the Prudent Man Rule*, 12 U. Balt. L. Rev. 207, 230-231 (1982).

8.4 Statutory Powers in General

E&T Art. § 7-401 establishes the investment authority for personal representatives. These powers cover personal representatives but no other fiduciaries. Subsection (a) states that the statute enumerates powers that are "in addition to the power or authority contained in the will and other common-law or statutory powers …." Investment authority largely remains an issue dependent on the "prudent person" rule. Even court approval of an investment does not insulate the fiduciary from liability. See, *Goldsborough v. DeWitt*, 171 Md. 225 (1937).

8.5 The Statutory Enumeration of Powers

Subsection (b) permits the personal representative to "retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or which are otherwise improper for trust investment." The ability to retain investments even when the personal representative is also "personally interested" in the investment parallels, in part, the "implied exemption" to fiduciary conflicts. In *Goldman v. Rubin*, 292 Md. 693 (1982), the testator was the founder of a clothing business which he ran as a family affair with one son as president, a son-in-law as vice-president, and another son-in-law as secretary and counsel of the business. One daughter, Mrs. Goldman, the Plaintiff, was not involved in the business. The testator named as personal representatives, those family members who were also part owners of the business and who served on its board of directors. The will provided that the taxes, funeral and administrative expenses be paid out of a trust which held all

of the testator's stock. The trust was for the benefit of his son who was president and his daughter whose husband was vice-president. The trustees were identical to the board of directors. This arrangement was structured to enable the stock to be redeemed under IRC § 303 to the extent of these expenses, which redemption would get capital gains treatment. Other than the § 303 expenses out of the trust, all remaining expenses were to be paid out of the residuary and the net residuary was to be distributed to all of the children -- including Mrs. Goldman, who was to receive 2/9th. Mrs. Goldman did not have any relationship with the company and was not a trust beneficiary. The Trustees/Directors effectuated the redemption in exchange for a note (the company being apparently short of cash). The note paid 6% interest currently, with principal payments deferred for 10 years. A 2/9th interest in this note was then distributed to Mrs. Goldman. Mrs. Goldman sued charging that the personal representatives had a conflict of interest. The trial court agreed. The Court of Appeals held that because the testator created the conflict of interest, this divided loyalty does not constitute a per se breach of duty. This holding (the so-called "implied exemption" rule) means that the conflict, in itself, is not prohibited. Thus, the trial court should have examined the conduct of the personal representatives to see if they acted prudently in issuing the note. Because the trial court decided the case on a per se basis, it was sent down for a hearing to determine whether the note was a proper exercise of the personal representative's discretion based on a balancing of their duty to the legatees and on the testator's intention (found in the will) to keep his company intact for those of the family who worked in the business.

Subsection (e) permits the personal representative to deposit funds for the account of the estate in checking accounts, in insured interest-bearing accounts, or in short-term loan arrangements. The Court of Appeals has held: "It is the obligation of an attorney upon receiving funds representing the assets of an estate to deposit those funds in a separate estate account clearly identified by the name of the decedent. Such funds should not be commingled in an escrow account, general or otherwise." *Attorney Grievance Comm'n v. Kenneth L. Boehm*, 293 Md. 476, 479 (1982).

Subsection (n) states that the personal representative "may invest in, sell, mortgage, pledge, exchange, or lease property."

Subsection (s) permits the personal representative to continue an <u>unincorporated</u> business of the decedent for a period of 4 months "where continuation is a reasonable means of preserving the value of the business including goodwill." With Court approval, the unincorporated business may be continued for a longer period. This procedure permits interested persons to object. If the business becomes incorporated after the death by the personal representative, then the business may be continued throughout the period of administration. Subsections (t) and (u) permit the personal representative to incorporate or create an LLC for the sole proprietorship.

8.6 Powers in the Instrument

Generally, the governing instrument may alter restrictions contained in statute or in the Common Law. See, for example E&T Art. § 7-401(a): "[A] personal representative may exercise all the power or authority conferred upon him by statute or in the will, without application to, the approval of, or ratification by the court. Except as validly limited by the will ... a personal representative may" also exercise certain enumerated powers as set forth in the statute. Generally when powers are added in a will they are drafted to apply to both personal representatives (generally a relatively short term or transitional position) and the trustee (generally a longer term position).

One typical provision authorizes a fiduciary to invest in securities that may be too risky to qualify under the "prudent person" rule. If it is anticipated that a major portion of a trust (or estate) is stock or some other ownership interest in one business -- perhaps the testator(rix)'s business -- a provision negating normal diversification rules should be included. Generally, it is a good practice to name the business interest that may comprise a large part of the trust and give authority to continue and perhaps expand such investment.

Another provision may be to permit the fiduciary to invest in non-income producing property -- for example if part of the family home or farm is put into trust. In this situation, additional powers to permit the income beneficiary to reside in the property is advisable. If the trust is a QTIP trust, any power to retain non-income producing property should be contingent on the surviving spouse's explicit permission.

Generally, if a closely held business is part of the assets, it is a good idea to give powers to operate such a business to the fiduciary. Although limited powers are contained in E&T Art. § 7-401(s), these are too limited in purpose (solely to preserve the value of an unincorporated business), time (4 months without a court order), and specifics (continue an unincorporated business) to do the job. In addition, creating a power-to-operate-a-business clause that is tailored to the actual circumstances of the client is a useful way to focus such planning. Some of the areas to discuss include: whether other estate or trust funds may be applied to the running of the business, whether the fiduciary will be paid extra amounts for running the business, power to borrow, power to hire and fire, power to delegate management tasks, etc.

The tension between instructions concerning the retention of particular investments and unforeseen circumstances has produced litigation. One dramatic instance of this tension was *Matter of Dumont*,26 A.D.3d 824, 809 N.Y.S.2d 360 (N.Y.App. Div. 2006). Mr. Dumont wanted to preserve his Eastman Kodak stock for the remaindermen of his trust and so he provided in his will: "It is my desire and hope that [the Kodak stock] will be held by my said

Executors and by my said trustee to be distributed to the ultimate beneficiaries under this Will, and neither my Executors nor my said trustee shall dispose of such stock for the purpose of diversification of investment and neither they or it shall be held liable for any diminution in the value of such stock." The Will also provided: "The foregoing provisions shall not prevent my said Executors or my said Trustee from disposing of all or part of the stock in Eastman Kodak Company in case there shall be some compelling reason other than diversification of investment for doing so." The Surrogate surcharged the trustee, J.P. Morgan/Chase, over $24 Million because it failed to timely sell the Eastman Kodak stock. The intermediate appellate court reversed on narrow grounds (the Surrogate based its surcharge on the assumption that the stock should have been sold on a particular date not alleged by the remaindermen). Nevertheless, this case illustrates that care must be used in drafting and implementation of these sort of clauses. See Jeffrey A. Cooper, "Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments, 33 Ohio N.U.L.Rev. 903 (2007).

8.7 Deductibility of Investment Advice

In *Knight v. Commissioner*, 552U.S. 181(January 16, 2008), the Supreme Court decided that the deduction that a trust takes for investment advice is subject to the 2% floor of adjusted gross income. Before this ruling, many trustees deducted the full amount of such expenses on the basis that such advice was a necessary cost arising from its fiduciary duties. The Supreme Court, however, held that because such fees could be incurred if the property was held individually, IRC § 67(e)(1) would not exempt the fee from the 2% floor treatment.

9. Spendthrift Provisions

9.1 In General

A spendthrift trust may be created when the creator of a trust manifests the intention (expressly or by implication) that the beneficiaries receive an equitable interest in the trust free of the claims of their creditors. *Cherbonnier v. Bussey*, 92 Md. 413 (1901). No specific language is needed to create a spendthrift trust. The earliest Maryland case, for example, determined that the direction that the trustee make payments "into his (the beneficiary's) hands, and not into another, whether claiming by his authority or otherwise" was an expressed manifestation of such an intent. *Smith v. Towers*, 69 Md. 77, __ (1888). Other manifestations of an intention to create a spendthrift trust are more elaborate:

> "No interest of any beneficiary of this Will or any rust [sic] created thereby shall be assignable in anticipation of payment thereof in whole or in party by the voluntary or involuntary acts of any such beneficiary or by operation of law.

> Neither the corpus of any trust created hereby, nor the income resulting therefrom, while in the hands of my fiduciaries, shall be subject to any conveyance, transfer, or assignment, or be pledged as security for any debt or obligation of any beneficiary thereof, and the same shall not be subject to any claim of any creditor of any such beneficiary through legal process or otherwise. Any such attempted sale, anticipation, or pledge of any of the funds or property held in any such trust or will, or the income therefrom, by any beneficiary shall be null and void, and shall not be recognized by my fiduciaries."

Duvall v. McGee, 375 Md. 476 (2003), footnote 5.

9.2 Theoretical Underpinning

A spendthrift trust has been defined as "a trust that restrains voluntary and involuntary alienation of all or any of the beneficiaries' interests." Restatement of Trusts 3d § 58. "The Validity of Spendthrift Trusts," 34 A.L.R. 2d 1335: "[T]his particular type of trust, created with the view of providing a fund for the maintenance or use of another, and at the same time securing it against his improvidence, incapacity, misfortune, by means of such a restrictive provision, to which the term spendthrift trust was originally and is now generally applied…" Spendthrift trusts are upheld because the donor of the trust has the right to dispose of his or her property:

> "Now common honesty requires, of course, that every one should pay his debts, and the policy of the law for centuries has been to subject the property of a debtor of every kind which he holds in his own right, to the payment of his debts. He has as owner of such property the right to dispose of it as he pleases, and his interest is, therefore, liable for the payment of his debts. But a cestui que trust does not hold the estate or interest in his own right; he has but an equitable and qualified right to the property or to its income, to be held and enjoyed by the beneficiary on certain terms and conditions prescribed by the founder of the trust. The legal title is in the trustee, and the cestui que trust derives his title to the income through the instrument by which the trust is created. The donor or devisor, as the absolute owner of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. And it is no answer to say that the gift of an equitable right to income to the exclusion of creditors is against the policy of the law. This is begging the question. Why is it against the policy of the law? What sound principle does it violate? The creditors of the beneficiary have no right to complain, because the founder of the trust did not give his bounty to them. And if so, what grounds have they to complain because he has seen proper to give it in trust to be received by the trustee and to be paid to

> another, and not to be liable while in the hands of the trustee to the creditors of the cestui que trust. All deeds and wills and other instruments by which such trusts are created, are required by law to be recorded in the public offices, and creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property. They know that the founder of the trust has declared that this income shall be paid to the object of his bounty to the exclusion of creditors, and if under such circumstances they see proper to give credit to one who has but an equitable and qualified right to the enjoyment of property, they do so with their eyes open. It cannot be said that credit was given upon such a qualified right to the enjoyment of the income of property, or that creditors have been deceived or mislead; and if the beneficiary is dishonest enough not to apply the income when received by him to the payment of his debts, creditors have no right to complain because they cannot subject it in the hands of the trustee to the payment of their claims, against the express terms of the trust."

Smith v. Towers, 69 Md. 77, 88 (1888) (as quoted in *DuVall v. McGee*, 375 Md. 476 (2003)).

9.3 Special Status Creditors

Despite the general respect afforded a spendthrift trust, it is not inviolate against certain claims: alimony arrearages, *Safe Deposit & Trust Co. v. Robertson*, 192 Md. 653 (1949); child support, *Zouck v. Zouck*, 204 Md. 285 (1954), and federal income taxes, *Mercantile Trust Co. v. Hofferbert*, 58 F. Supp. 701 (D. Md. 1944). In the case of alimony and child support, the Court has made the distinction that such claims are not for debts of a beneficiary but are rather duties of the beneficiary: "We think the view expressed in the Restatement is sound. The reason for the rejection of the common law rule (prohibiting spendthrift provisions), that a condition restraining alienation by the beneficiary is repugnant to the nature of the estate granted, was simply that persons extending credit to the beneficiary on a voluntary basis are chargeable with notice of the conditions set forth in the instrument…. This reasoning is inapplicable to a claim for alimony which in Maryland at least, is 'an award made by the court for food, clothing, habitation and other necessities for the maintenance of the wife…'. The obligation continues during the joint lives of the parties, and is a duty, not a debt." *Robertson*, at 662. See also, *Prince George's County Police Pension Plan v. Burke*, 321 Md. 699 (1991) upholding, as part of a marital property award, a transfer of a partial interest in a county pension plan despite spendthrift protections because the spouse is entitled to her the equitable distribution of her "rightful portion" of the retirement fund. When discussing these cases, the Court of Appeals noted that "none of these cases was premised on there having been a lack of notice given to the claimants as to the trust beneficiary's limited interest in the trust. Rather, the courts recognize a fundamental difference between these obligations and those of ordinary creditors." *DuVall* at 499-500. This distinction in *DuVall* is important, of course, as *DuVall* involved a tort creditor

who certainly lacked notice of the debtor/tortfeasor's limited interest in the trust. One could argue that a prospective spouse may have notice when he or she marries a person primarily supported by a trust fund that a subsequent spousal award may be difficult to collect.

Every edition of the Restatement of Trusts has recognized that a spendthrift trust can be reached to satisfy claims "for necessary services rendered to the beneficiary or necessary supplies furnished to him," Restatement § 157 or based on "services or supplies provided for necessities or for the protection of the beneficiary's interest in the trust." Restatement 3d § 59. The Comment to Restatement 3d states: "Failure to give enforcement to appropriate claims of this type (based on supplying necessities) would tend to undermine the beneficiary's ability to obtain necessary goods and assistance; and a refusal to enforce such claims is not essential to a settlor's purpose of protecting the beneficiary." These rules suggest that the trust in question is either explicitly or implicitly a "support trust." To the extent that the trust is wholly or partially discretionary, of course, no creditor will be able to enforce a judgment for providing necessities. See *First Nat. Bank of Maryland v. Dept. Health and Mental Hygiene*, 284 Md. 720 (1079): "A support trust, it is generally recognized, is one that provides that 'the trustee shall pay or apply only so much of the income and principal or either as necessary for the education or support of the beneficiary,' thereby barring the beneficiary from transferring his interest and precluding his creditors from reaching it." Id. At 725. The beneficiary of a support trust has enforceable rights to compel the trustee to make appropriate distributions. *Offutt v. Offutt*, 204 Md. 101 (1954). The *First Nat. Bank of Maryland* court cited *Robertson* for the proposition that a creditor of the beneficiary likewise may compel the support distributions. *Robertson*, 192 Md. 653 (1949). The creditor in *Robertson*, of course, was a spouse who is afforded super-creditor status.

9.4 Tortfeaser Access

The Court of Appeals refused to extend the class of claims that may breach a spendthrift trust to include claims by tortfeasors. The facts underlying *Duvall v. McGee* are egregious. The beneficiary of a spendthrift trust was convicted of felony murder. The estate of the victim brought suit to enforce its judgment against the trust. The Court distinguished "a mere judgment creditor" from a spouse or child to whom a beneficiary owes a "duty" of support: "Indeed, to permit the invasion of the Trust to pay the tort judgments of the beneficiary, in addition to thwarting the trust donor's intent by, in effect, imposing liability on the Trust for the wrongful acts of the trust beneficiary, is, as the appellees argue, to create an exception for "tort victims" or "victims of crimes." Comment a. to Restatement 3d (2003) § 59 takes a different position: "The nature or pattern of tortious conduct by a beneficiary, for example, may on policy grounds justify a court's refusal to allow spendthrift immunity to protect the trust interest and lifestyle of that beneficiary, especially one whose willful or fraudulent conduct or persistently reckless behavior causes serious harm to others." See also, *Sligh v. First Nat. Bank of Holmes County*, 704 So. 2d 1020 (Miss. 1997) which, as noted in a footnote in *DuVall*, prompted a

legislative reversal so to reinstate immunity from tort claims in 1998. The Commissioners of the Uniform Trust Code (2005) "declined to create an exception for tort claimants" to its exceptions to spendthrift provisions (Section 503).

9.5 Spendthrift Clauses and Trust Termination

Before enactment of the Maryland Trust Act, Maryland followed the general American rule that a trust may be terminated when all beneficiaries consent to the termination and when termination is not contrary to the settlor's intention. *Probasco v. Clark*, 58 Md. App. 683 (1984). When a trust contains a spendthrift provision, however, one of the material purposes of the trust is the protection afforded a beneficiary by that clause. Consequently, a trust containing a spendthrift provision may not be modified by a Maryland Court regardless of whether all beneficiaries consent:

> "These cases and many others in Maryland have upheld the immunity of spendthrift trusts from attempted invasion by creditors of the beneficiaries. A necessary corollary of such a policy is that spendthrift trusts must be immune from attempts by the beneficiaries themselves to reach the corpus. As Dean Griswold has pointed out, to permit premature termination by the beneficiaries, either in whole or in *pro tanto*, would amount to an assignment of the corpus, the very thing that a restraint on alienation, such as we have in the case at bar, forbids. Griswold, *'Spendthrift Trusts,'* (2 Ed.) § 517, 517.1. If a beneficiary be forbidden to assign her interest in the trust, should she be allowed to accomplish the same result by termination? We think the answer is apparent. The purpose of the restraint on alienation such as the one in this trust is not only to protect the beneficiaries from the claims of creditors, but also to assure the maximum annual income."

Kirkland v. Mercantile Safe Deposit & Trust Co., 218 Md. 17, 23 (1958). See also *Mahan v. Mahan*, 320 Md. 262 (1989) ("[W]e hold that paragraph six of Frances's deed of trust created a spendthrift trust, and that a spendthrift trust cannot be terminated by the consent of the beneficiaries, even though all are sui juris and all join in seeking termination.")

The *Kirkland* case is instructive as to the type of circumstances where a spendthrift clause may, in fact, injure the beneficiary that the trust was presumably established to protect. In *Kirkland*, a mother established a trust to protect her three daughters. The trust directed 'all income' to go to the daughters but no distributions of corpus. Almost forty years after the mother's death, one of the two remaining daughters suffered a stroke and 'was left in such a condition that she was unable to care for herself, which involved expenses in excess of the income from the trust.' *Kirkland* at 21. The remaining daughter – who was guardian for the

sister – sought a termination of the trust so that principal could be used for her sister. It was under those circumstances that the Court held that the trust could not be terminated. With the addition of § 104 of the new Uniform Principal and Income Act, Maryland law provides a trustee With a partial potential remedy to this sort of situation. E&T Art. §§ 15-502.1-15-502.3.

The Maryland Trust Act follows the Uniform Trust Code by providing that the mere existence of a spendthrift clause does not prevent a termination of a trust. Est. & Trusts § 14.5-410 (Modification or termination of trusts.) That section, however, only permits termination or modification "if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." Given the Maryland cases holding that the existence of a spendthrift clause constitutes one of the material purposes of a trust, one must question whether courts will permit termination of trusts with such clauses. Modification, however, has been liberalized.

10. Powers of Appointment

10.1 The Maryland "General" Power

Maryland has a unique rule that holds that a "general" power of appointment is not really a general power of appointment unless it specifically provides that the donee of the power may appoint to his or her self, creditors, or the creditors of his or her estate. Merely stating that one is granting a "general power of appointment" is insufficient. *Bryan v. U.S.*, 286 Md. 176 (1979) (a power designated "a general power of testamentary disposition" was held not to be a power to appoint to self, creditors, estate or creditors of estate and therefore did not qualify as a general power of appointment marital trust); *Pierport v. Comm'n*, 336 F. 2d 277 (1964) (no marital deduction under IRC § 2056); but see *Guiney v. U.S.*, 425 F. 2d 145 (1970) (holding that a "general power of appointment" qualified for § 2056 treatment where the Will specifically stated it was a "general power" in order to qualify for the federal marital deduction).

Therefore, in order to create a general power of appointment in Maryland, the donor of the power must specify that the donee may appoint to his or her self, estate, creditors or creditors of his or her estate.

10.2 Creditors and Limited Powers of Appointment

As a general rule, creditors of the donee of a limited or special power of appointment cannot reach the property. In *Mercantile Trust Co. v. Bergdorf & Goodman Co.*, 167 Md. 158 (1934), a woman created a self-settled trust and retained an income interest for life and retained a testamentary power of appointment to heirs. In the absence of a showing of fraud

in the inception of the trust, creditors had no recourse against the principal of the trust. In *U.S. v. Baldwin*, 283 Md. 586 (1978), a settlor retained income for life, could name himself as trustee, and retained a broad (but not general) testamentary power of appointment. The Court held that the principal was beyond the reach of creditors (including the U.S. as creditor based on income tax liability.)

10.3 Creditors and General Powers of Appointment

The Maryland rule as to *inter vivos* general powers of appointment seems to be that a creditor may force exercise. In *Brent v. State Cent. Collection Unit*, 311 Md. 626 (1988), a beneficiary was given the power to withdraw from her father's spendthrift trust certain percentage amounts of the trust at certain ages (1/2 at age 35, the remainder at age 40). Before reaching these ages, the beneficiary became permanently disabled and unable to direct the trustee to make the distributions. The Court held that regardless of her ability to withdraw funds, the power to withdraw took those funds out of the spendthrift protection and exposed the funds to creditor attachment.[9]

The Maryland Trust Act continues this treatment. Est. & Trusts § 14.5-103(p) generally defines a currently exercisable power of appointment for the benefit of the power holder to be a "power of withdrawal." [The exceptions include a 5&5 power.] Est. & Trusts § 14.5-508(b) holds that during the period a power of withdrawal can be exercised, the holder's creditors may attach the property to the extent of the power. In other words, the Maryland Tax Act mirrors the *Brent* decision.

The rule regarding testamentary powers of appointment seems to be very different. In *U.S. v. Field*, 255 U.S. 257 (1921), the Court held that the existence of the power does not shift the subject property to the donee. If the donee exercises the power, however, then the exercise to someone other than the creditor is deemed a fraudulent conveyance:

> "Where the donee dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal, assets of his estate; *Clapp v. Ingrahm, 126 Massachusetts, 200, 203; Patterson & Co. v. Lawrence, 83 Georgia, 703, 707;* and (in the absence of statute), if it passes to the executor at all, it does so not by virtue of his office but as a matter of convenience

[9] Interestingly, the Court held that the beneficiary's competence could have been made a condition precedent of her withdrawal right: "As the Court of Special Appeals indicated, the settlor in the case *sub judice* used no words which even intimated that the distribution of the principal upon demand be deferred for any reason. He showed no interest whatsoever in the preservation of the corpus intact upon demand to distribute it. He did not see fit to direct postponement of the distribution of the principal in the unhappy event of the legal disability of the beneficiary. *See La Salle Nat. Bank v. MacDonald*, 2 Ill.2d 581, 119 N.E.2d 266. Had the settlor intended to these ends, he could have easily so provided in the agreement." Brent, *supra*. at 640-641.

> and because he represents the rights of creditors. *O'Grady v. Wilmot* [1916] 2 A.C. 231, 248-257; *Smith v. Garey, 2 Dev. & Bat. Eq. (N.C.) 42, 49; Olney v. Balch, 154 Massachusetts, 318, 322; Emmons v. Shaw, 171 Massachusetts, 410, 411; Hill v. Treasurer, 229 Massachusetts, 474, 477.*
>
> Where the power is executed, creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands. *Patterson & Co. v. Lawrence, 83 Georgia, 703, 708; Walker v. Treasurer, 221, Massachusetts, 600, 602-603; Shattuck v. Burrage, 229 Massachusetts, 448, 452.*
>
> It is settled that (in the absence of statute) creditors have no redress in case of a failure to execute the power."

The rule has been repeated (and, perhaps expanded, albeit in dicta) in various Maryland decisions. See, for example, *Frank v. Frank*, 253 Md. 413 (1969):

> "In *Connor v. O'Hara, 188 Md. 527*, in holding that for purposes of the Maryland inheritance tax laws, property passing by exercise of a testamentary power of appointment is regarded as passing not from the donee of the power but from the donor, Judge Markell, for the Court, said that this theory of passage not only is as fully applicable in Maryland as elsewhere but has been carried further here than in many other jurisdictions, and continued:
>
> "In England, and generally but not universally in this country, this rule is qualified by a rule that when a general power of appointment is exercised, equity will regard the property appointed as part of the donee's assets for the payment of his creditors in preference to the claims of his voluntary appointees. In such cases the appointed property is treated as equitable, not legal, assets of the donee's estate, and may pass to the executor, not by virtue of his office but as a matter of convenience and because he represents the rights of creditors. *United States v. Field, 1921, 255 U.S. 257, 262, 263, 41 S. Ct. 256, 65 L. Ed. 617, 18 A.L.R. 1461.* In Maryland this English rule has been rejected. Decisions of dicta of this court indicate that a donee has no power (unless expressly conferred) to appoint for payment of his own debts. *Balls v. Dampman, 69 Md. 390, 16 A. 16, 1 L.R.A. 545; Price v. Cherbonnier, 103 Md. 107, 110, 111, 63 A. 209; cf. Wyeth v. Safe Deposit & Trust Co., 176 Md. 369, 376, 4 A. 2d 753;* appointed property is not part of the donee's estate, not subject to the jurisdiction of the Orphans' Court, and not subject to payment of the donee's debts. *Prince de Bearn v. Winans, 111 Md. 434, 472, 74 A. 626." [188 Md. At 530-531]*"

Indeed, the *Conner* decision continued to reference *O'Hare v. O'Hare*, 185 Md. 321 for the proposition that a donee of a testamentary power could not during his life bind himself by contract as to the exercise of the power and that the subject matter of the power was not the donee's property but that of the donor. *Connor* did not involve a creditor claiming against the donee of a power so its pronouncements are dicta. It is not fully clear which English rule has been rejected by Maryland but the passage strongly suggests that it is the rule pertaining to exercised powers. It may, however, merely be a reference to the restrictive nature of a Maryland general power of appointment without explicit authority to appoint to creditors, etc. See Rolling-Tarbox, "Powers of Appointment Under the Bankruptcy Code: A Focus on General Testamentary Powers," 72 Iowa L. Rev. 1041 (1987) (a discussion of the potential inclusion of a general power in the bankruptcy estate. Even if included, the court should not have the authority to trigger exercise absent a specific statute under state law authorizing same).

The Maryland Trust Act likewise holds that the donee of a testamentary power of appointment does not have a property interest in the donor's property and therefore attachment of such interest is prohibited. Est. & Trusts § 14.5-507(a).

11. Exculpatory Clauses

11.1 Validity in General

The Court of Appeals "has held that exculpatory clauses are valid, and will be enforced according to their tenor, with certain limitations." *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334, 350 (1991) (Citing *Sullivan v. Mosner*, 266 Md. 479 (1972)).

In *Helman v. Mendelson*, 138 Md. App. 29, 37 (2001), the Court recognized that an exculpatory clause is a restriction on the rights of beneficiaries in favor of the trustee: "Although Alfred did not specifically authorize loans to trustees who were also beneficiaries of the trust, he explicitly elevated the beneficiaries' interests over the rules governing trust investment by the exculpatory provision of the trust. This form of exculpatory clause is designed to protect the trustees who act in the interests of the beneficiaries when that act may be contrary to the law of trust governing certain types of investment. In Maryland, exculpatory clauses are generally deemed to be valid and enforceable."

An exculpatory clause limits a fiduciaries personal liability: "Exculpatory clauses are different from provisions in a will that enlarge upon the general powers of a personal representative … For example, a testator may wish to authorize a personal representative or a testamentary trustee to invest in securities that might be too risky to qualify under the "prudent person" rule … Such a clause would enlarge the powers of the personal representative beyond

those specified by statute and thereby prevent the exercise of such powers from resulting in a breach of fiduciary duty. In contrast, an exculpatory clause relieves a personal representative from breaches of duty, however narrowly or broadly defined." *Godette v. Estate of Cox*, 592 A.2d 1028, 1033 in Note 11 (D.C. App. 1991).

11.2 Limits to Exculpatory Clauses

There are limits on exculpatory clauses: "There are circumstances, however, under which the public interest will not permit an exculpatory clause in a contract; these have often been grouped into three general exceptions to the rule. First, a party will not be permitted to excuse its liability for intentional harms or for the more extreme forms of negligence, i.e., reckless, wanton, or gross. *Winterstein*, 16 Md. App. At 136, 293 A.2d at 824; Restatement, Second, Contracts § 195(1); Keeton, *supra*. Second, the contract cannot be the product of grossly unequal bargaining power. 'When one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence, the agreement is void as against public policy.' *Winterstein*, 16 Md. App. At 135-36, 293 A.2d at 824; Keeton, *supra*. Third, public policy will not permit exculpatory agreements in transactions affecting the public interest. *Winterstein*, 16 Md. App. 136, 293 A.2d at 824. The last category includes the performance of a public service obligation, e.g., public utilities, common carriers, innkeepers, and public warehousemen. It also includes these transactions, not readily susceptible to definition or broad categorization, that are so important to the public good that an exculpatory clause would be 'patently offensive,' such that 'the common sense of the entire community would … pronounce it' invalid." *Md. Nat'l Cap. P. & P. v. Wash. Nat'l Arena*, 282 Md. 588, 606, 386 A.2d 1216, 1228 (1978), quoting *Estate of Woods, Weeks & Co.,* 52 Md. 520, 536 (1879). This standard is a strict one, in keeping with our general reluctance to invoke the nebulous public interest to disturb private contracts." *Wolf v. Ford*, 335 Md. 525, 531-532 (1994).

Whether an exculpatory clause will protect the scrivener/attorney/fiduciary is highly problematic: "The legal profession, with its ability to influence all aspects of citizens' lives, public and private, cannot be separated from the concept of ordered liberty. Thus, the attorney-client relationship is one that is so affected with public interest that generally an attorney cannot require a client to release him or her from liability for future negligence. *See* Rule 1.8(h) of the Rules of Professional Conduct." *Wolf*, *supra*. at footnote 6.

The Maryland Trust Act states that exculpatory clauses are generally unenforceable to the extent it purports to relieve a trustee from bad faith or reckless conduct or is inserted in the trust instrument as a result of an abuse by the trustee of its fiduciary relationship. Est. & Trusts § 14.5-906. These provisions are essentially a codification of the common law rules.

11.3 In Terrorem Clauses

Maryland Estates and Trusts Article § 4-413 contains a statutory restriction on the use of in terrorem clauses: "If probable cause exists for instituting proceedings, a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings related to the estate is void." From a practical standpoint, an in terrorem clause is only an effective deterrent if the potential challenger is left a substantial bequest. If the potential challenger is left, for example, $10.00 then he or she would only default $10.00 for bringing suit. Therefore, if one is relying on the in terrorem clause to discourage lawsuits it is usually (and ironically) better to leave a substantial bequest to be forfeited.

12. The Elective Share: A Limitation on Testamentary Freedom

Prior to 2015 Maryland provided by statute that a surviving spouse may elect to receive a percentage of the net estate of the deceased spouse instead of what is provided by Will:

> § 3-203. Right to elective share.
>
> (a) *Net estate defined.* In this section, "net estate" means the property of the decedent passing by testate succession, without a deduction for State or federal estate or inheritance taxes, and reduced by:
>
> (1) Funeral and administration expenses;
> (2) Family allowances; and
> (3) Enforceable claims and debts against the estate.
>
> (b) *General.* Instead of property left to him by will, the surviving spouse may elect to take a one-third share of the net estate if there is also a surviving issue, or one-half share of the net estate if there is no surviving issue.
>
> (c) *Limitation*. The surviving spouse who makes this election may not take more than a one-half share of the net estate.
>
> (d) *Calculation of net estate*. For the purposes of this section, the net estate shall be calculated without a deduction for the tax as defined in § 7-308 of the Tax-General Article. (An. Code 1957, art. 93, § 3-203; 1974, ch. 11, § 2; 1978, ch. 111; 1992, ch. 346; 2003, ch. 234.)[10]

[10] Md. Code Ann. (2001 Repl. Vol., 2008 Cum. Supp.) Estates and Trusts Article § 3-203 (hereafter Est. & Trusts § ___.)

As is clear from the statute, net estate means that estate passing by testate succession or, in other words, the net probate estate. Herein lies the conceptual problem with the elective share statute. Increasingly, a person's wealth consists of non-probate assets: retirement plans, revocable trusts, annuities. Thus, the relationship between one's wealth and probate assets may be somewhat haphazard.[11]

This shift in the nature of property ownership caused many states to adopt an "augmented estate" approach by applying the election against probate and non-probate property.[12]

The mechanism in Maryland for expanding the elective share right to non-probate property traditionally relied on suits based on the so-called "fraud upon the marital rights." Indeed, existing Est. & Trusts § 3-203 was a rejection of an augmented estate approach and an affirmation of this case-by-case method:

> In recent years, with the increasing use of various estates and interests created during lifetime, life insurance, etc., a great portion of the property owned by married persons does not become part of the "estate" of the spouse first dying. This has the result – frequently unintended – of allowing the surviving spouse a disproportionately large share of the decedent's total property, while at other times the share of the spouse is actually less than that contemplated by the statute.
>
> The Boulder Draft of the Uniform Probate Code attempts to resolve this problem as to the share of the surviving spouse by giving the spouse of a testate or intestate decedent an elective share of a "net augmented estate." Under this proposal, the property in which the surviving spouse would have an interest would include, in addition to the probate estate, transfers incident to death, transfers with retained control or survivorship, and other gratuitous transfers, as well as life insurance proceeds, annuities, pensions and community property. See *2-202* (UPC).
>
> The Commission felt that the question of whether an estate should be augmented by inclusion of property, other than that being administered upon, for purposes of *increasing* the interest of the surviving spouse could be satisfactorily handled in accordance with the existing law relating to fraud upon marital rights. See, *e.g., Sykes*, "Inter Vivos Transfers in Violation of the Rights of Surviving

[11] John H. Langbein, "The Non-Probate Revolution and the Future of the Law of Succession", 97 Harv. L. Rev. 1108 (1984).

[12] Angela M. Vallario, "Spousal Election: Suggested Equitable Reform for the Division of Property at Death", 52 Cath. U. L. Rev. 519 (2003).

Spouses," 10 Md. L. Rev. 1 (1949); *Sykes*, §§ 183 and 184.[13]

Until 1990, the case law approach employed an examination of whether a non-probate disposition was a fraud on the marital right to election based on a facts and circumstances test:

> In Maryland, the completeness of the transfer and the extent of control retained by the transferor, the motive of the transferor, participation by the transferee in the alleged fraud and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent have all been considered material, and no one test has been adopted to the exclusion of all other tests. As pointed out by Mr. Sykes in his article above referred to, there are several other factors which have been or may be considered as pertinent, such as the relative moral claims of the surviving spouse and of the transferees, other provisions for the surviving spouse, whether or not he or she has independent means and the interval of time between the transfer and the death of the transferor.
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> No general and completely satisfactory rule to determine the validity or invalidity of transfers alleged to be in fraud of marital rights has yet been evolved in this State. The test of degree has been recognized, and so have its shortcomings. It remains a very practical consideration among the facts and circumstances to be considered in connection with the completeness and genuineness of a transfer where the transferor, by naming himself as trustee and as a beneficiary, or by means of an agreement with his donees, has retained some control over the subject of the gift or trust under scrutiny. In the light of the family relationships of the parties involved in this case, in the absence of any fraud or undue influence practiced by the decedent's sons and in view of the amount and proportion of the property formerly owned by the decedent which the widow will receive, we do not find any basis upon which the trusts created in these savings accounts should be stricken down.[14]

In *Knell v. Price*, 318 Md. 501, 569 A.2d 636 (1990), the Court of Appeals seemed to change the approach of weighing various factors in favor of a bright-line test. *Knell* "had a cast of three: William A. Knell – the husband, Violet E. Knell – his wife, and Jesse Annabelle Price – the 'other woman'.[15]" The Knells lived together as husband and wife for 22 years at which point they separated due to marital difficulties. The Knells remained separated and living apart for the

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[13] Governor's Commission to Review and Revise the Testamentary Law of Maryland, Article 93 Decedent's Estate (1968) (hereafter "Henderson Commission Report") Cmt. 3-102.

[14] *Whittington v. Whittington*, 205 Md. 1, Cmt. 12-13 (1954).

[15] 318 Md. at 502.

following 27 years although no formal separation agreement was executed nor was a divorce action ever filed. Mrs. Knell continued to live in the marital home that the couple had purchased together during the marriage; Mr. Knell began living with Ms. Price a year after the separation and continued to live with her until Mr. Knell's death. Sometime during the period when Mr. Knell and Ms. Price were together, Mr. Knell purchased another house with the title in his name. After acquiring the property, Mr. Knell conveyed the property to a straw man who immediately re-conveyed the property to Mr. Knell as life tenant with full powers and the remainder to Ms. Price. After Mr. Knell's death, his estranged wife elected against the will (which, presumably, left her nothing) and sought to have the spousal election apply to the property. The trial Court and the Court of Special Appeals applied the *Whittington* test and found that no fraud had been committed. The Court of Appeals, however, reversed the decision of the lower courts and held that the elective share extended over non-probate property when a decedent retained substantial control over that property during his or her lifetime.

Knell v. Price seemed to establish a per se rule when dominion and control is retained over property by the decedent:

> But here, it is perfectly clear that Mr. Knell retained control of the property during his lifetime by establishing a life estate in himself with unfettered power in him, while living (except by will), to dispose of all interests in the property fee simple. He did not part with the absolute dominion of the property during his life. His conveyance, through a straw man, of the remainder of the property was not complete, absolute, and unconditional. The law pronounces this to be a fraud on the marital rights of Mrs. Knell. His reluctance to relinquish control over the disposition of the property during his lifetime defeated his intention.[16]

Knell is consistent with decisions rendered by other jurisdictions in interpreting elective share statutes. This trend may reflect the practice of avoiding probate through use of jointly-held accounts, revocable trusts, or similar devices which has made obsolete the use of the probate estate as the sole measurement. *Seifert v. So. Nat'l Bank,* 305 S.C. 353, 409 S.E.2d 337 (1991), held that in giving a spouse an elective share right the legislature did not intend to limit this right to the probate estate when a decedent exercised power over that property:

> Surely, then, it was not the legislature's intent to allow this substantial right (to the elective share) to be circumvented as respondents urge. Thus, we hold that, where a spouse seeks to avoid payment of the elective share by creating a trust over which he or she exercises substantial control, the trust may be declared invalid as illusory, and the trust assets may be included in the decedent's estate for the calculation of the elective share.

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[16] *Id.* at 512.

Id.; see also *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d. 966 (1937); *Staples v. King*, 433 A.2d 407, 409-10 (Me. 1981) ("However, where the married person purports to transfer property out of his estate but in fact retains substantial control over the property for his lifetime, such a transfer will not be effective against claims of the surviving spouse…").

Similarly, in *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d. 571 (1984), the Massachusetts Supreme Court used non-probate assets to establish a baseline in calculating the elective share when control of the asset was retained by the deceased spouse. The court held that it was proper to extend the elective share beyond the probate estate because of the significant changes happening in the law:

> The interests of one spouse in the property of the other have been substantially increased upon the dissolution of the marriage by divorce. We believe that, when a marriage is terminated by the death of one spouse, the rights of the surviving spouse should not to be so restricted as they are by the rule in Kerwin v. Donaghy. It is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an *inter vivos* trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse.

Id. at 577.

In *Schoukroun v. Karsenty*, 177 Md. App. 615 (2007), the Court of Special Appeals extended the principle of *Knell v. Price* to a revocable trust and pay on death accounts. Because the inter vivos transfers are not "complete, absolute, and unconditional," the transfers are per se funds on the spousal election.

The Court of Appeals reversed, effectively returning to a pre-*Knell* approach.[17] Interestingly, however, *Knell* itself was left standing (although one wonders how.) *Schoukroun* invites one to look at various elements to determine whether the elective share extends to non-probate transfers:

> To summarize, when a surviving spouse seeks to invalidate the non-probate disposition of an asset, a scrutinizing court must focus on the nature of the underlying *inter vivos* transfer. If it was "complete and bona fide" or done in "good faith" (both phrases meaning the same thing in this context), the court must respect the estate planning arrangements of the decedent and may not invalidate the transaction; however if it was "a mere device or contrivance," "a mere fiction," "a sham," or "colorable" (each also sharing the same meaning in this

[17] *Karsenty v. Schoukroun,* 406 Md. 469, 959 A.2d 11476 (2008).

context), the court shall invalidate the underlying transaction as to the surviving spouse… In order to answer this question, a court must consider whether the decedent truly intended that the *inter vivos* transfer divest her or him of ownership in form, but not in substance. Stated in more practical language, the question for a court to decide is whether the decedent intended that the transfer change nothing, except how the property is directed at the decedent's death. Notwithstanding our previous references to "fraud" on marital rights, because we ultimately are not concerned with whether a decedent intended to deprive her or his surviving spouse of property, we emphasize today that it is more helpful for a court to think of a sham transfer in this context as an unlawful frustration of the surviving spouse's statutory share.

* * *

First, as a threshold matter, a surviving spouse must show that the decedent retained an interest in or otherwise continued to enjoy the transferred property. In Mushaw, we said that "where [a decedent] does not part with dominion over the property transferred, the issue of good faith is immediately raised."

* * *

Second, as a guiding principle, courts should not employ their equity powers to second-guess reasonable and legitimate estate planning arrangements. Cf. Winters, 254 Md. at 585, 255 A.2d at 27 (noting that the decedent's decision to provide for his grandchildren and great-grandchildren was "not only understandable but legitmate"); Whitehill v. Thiess, 161 Md. 657, 661, 158 A. 347, 348 (1932) (noting that, under the circumstances, decedent's decision to leave everything to her children despite her surviving husband was "reasonable and just"); Brown, 126 Md. at 180, 94 A. at 524 (stressing the "reasonable character" of the decedent's trust). For this reason, we think that a surviving spouse has a high hurdle to overcome.

Third, our case-law offers considerable guidance with respect to what factors are relevant to determining, in this context, whether a decedent intended that an *inter vivos* transfer be a sham. For the guidance of the trial court (and posterity), we will chronicle and elucidate those factors that we consider most relevant, beginning with the factors that we approved expressly in Whittington.

* * *

The extent of the control retained by the decedent probably is the most useful indicator when scrutinizing an *inter vivos* transfer.

* * *

A decedent's motives are also cogent to consider. Whittington, 205 Md. at 12, 106 A.2d at 77. In an early case, Collins v. Collins, we invalidated a deceased husband's *inter vivos* transfer of all of his real and personal property, on the eve of his second marriage, to his children from a prior marriage. 98 Md. 473, 474, 57 A. 597, 597 (1904). There, the decedent's motives revealed themselves in the fact that he led his surviving wife to believe that he continued to own the property outright and that she would receive a share of it when he died.

* * *

In other cases, however, we have relied on evidence of the decedent's motives as an indicator that the assailed *inter vivos* transfer actually was intended to be complete and bona fide. As we already explained, in Gianakos, we considered the trial court's finding that the decedent wanted to retain control over his restaurant property so that he could keep his son, to whom he transferred the remainder, "active in the business."

* * *

Part and parcel to assessing the motives of the decedent is consideration of the transferee's motives as well. See Whittington, 205 Md. at 12, 106 A.2d at 77. This requires that a court consider what were the true terms of the transfer. We could envision a scenario in which the decedent gave her or his property to someone, subject to a mutual understanding that the decedent remain the real owner. Unfortunately, there is a dearth of precedent on this point. Hays, however, provides some insight.

* * *

Whittington also provides some insight about how a transferee's actions may bear on the validity of a decedent's *inter vivos* transfer. We noted there the absence of "fraud on the part of the donees shown as to their father [the decedent] or their step-mother." Whittington, 205 Md. at 13, 106 A.2d at 78. In other words, a court should consider not only whether there was collusion between the decedent and the beneficiary, but also whether the beneficiary intended to defraud the

> decedent or the surviving spouse.
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> The degree to which an *inter vivos* transfer deprives a surviving spouse of property that she or he would otherwise take as part of the decedent's estate is also extremely significant.
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> Looking at the degree to which an assailed *inter vivos* transfer depleted the value of property available to a surviving spouse necessarily requires a court to consider also non-probate arrangements that the decedent made for the surviving spouse.
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> Another factor that commands weight is whether the decedent actually exercised the retained control or otherwise enjoyed the property at issue, and, if so, to what extent. Simply put, use of the property suggests that the decedent did not intend really to part with ownership; conversely, failure to exercise retained powers may suggest that the decedent intended to alienate the property.
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> A final factor that courts should pay particular attention to is the familial relationship between the decedent and the person or persons who benefit by the challenged *inter vivos* transfer.

It would appear that we have returned to *Whittington* with a vengeance!

One question not addressed is whether the transfer is actually reversed (thus bringing the property into the probate estate for the benefit of creditors) or whether it is simply a reversal for the benefit of the spouse.

Schoukroun presented planning opportunities. If a client wishes to by-pass the spouse (and does not want, or cannot get, a marital agreement) the use of revocable trusts or pay-on-death designations may work. It is important, of course, to establish a permissible intent as in *Schoukroun*. [As discussed below, however, use of a revocable trust may not work if the General Assembly revisits this issue next year.]

The right to make the election is personal to the surviving spouse. If, however, the surviving spouse is under a disability, the election may be exercised by a court having jurisdiction over the person or property of the surviving spouse. Est. & Trusts § 3-204.

The right of a surviving spouse to take the elective share is treated as an "asset" for medical assistance or Medicaid purposes. COMAR 10.09.24.08-1 provides that if an individual is entitled to receive but does not (including could receive by an act of a court) such asset shall nevertheless be included as an available resource of that individual. To avoid triggering the penalties, the non-disabled spouse ought to include provisions for an amount equal to the elective share amount in his or her planning documents.

The "safest" way to so provide is to simply refer to the statute by leaving an amount equal to the spouse's elective share pursuant to the statute. This leaves open the issue of the extent of that enforceable right.

In 2015 the General Assembly considered a provision that incorporates assets held by a revocable trust as part of the asset base for elective share purposes. It did not, however, address pay-on-death accounts or other devices that avoid probate. It passed the House but not the Senate.