

SELECT ISSUES IN ESTATE AND TRUST ADMINISTRATION

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I. FUNDING/LIQUIDITY ISSUES

A. Initial Evaluation of Estate

- 1) Administration expenses and debts
- 2) Death taxes
- 3) Distribution to beneficiaries
- 4) State law rules regarding abatement when estate is insolvent (20 Pa. C. S. A. §3392)

B. Administration expenses

- 1) Funeral, expenses of last illness, other expenses pertaining to decedent's death
- 2) Miscellaneous expenses, appraisals, management of assets
- 3) Executors' commissions
- 4) Counsel fees
- 5) Amounts permissible under governing instrument, applicable state law and, potentially, federal law

C. Debts

- 1) Debts certain to become due (20 Pa. C. S. A. §3387)
 - Upon satisfactory proof or admission of a claim which is not due but certain to become due, the court may provide for payment by one of the following methods:
 - ◇ (1) Awarding the present value of the claim, as agreed to by the claimant and the personal representative.
 - ◇ (2) Ordering the personal representative to retain or pay into the court sufficient assets to pay on maturity of the claim the whole amount then due, or a proportionate amount in case of insolvency.
- 2) Potential claims (limitation issues, notice of claim, etc.) (20 Pa. C. S. A. §3388)
 - Upon satisfactory proof or admission of a claim which may or may not become due at a future time, the court may provide for payment by one of the following methods:
 - ◇ (1) Awarding the present value of the claim, as agreed to by the claimant and the personal representative.
 - ◇ (2) Ordering the personal representative to distribute the estate but to retain or pay into court sufficient assets to pay the claim, or a proportionate amount in case of insolvency, if and when it becomes absolute.
 - ◇ (3) Making such other provisions for the disposition or satisfaction of the claim as shall be equitable.

D. Death taxes

- 1) Federal estate tax (26 U.S.C.A. §2001)
 - Normally due nine months after death

- Permissive extension of time to pay under Code §6161
 - Extension of time to pay with respect to business under Code §6166
 - Other extensions
- 2) State death tax (72 Pa. C. S. §9107)
 - Varies state by state and may be due in more than one state
 - Be alert to potential for discounts from early payments
 - 3) Apportionment rules
 - Obligation to pay administration expenses and debts
 - Obligation to pay death taxes under Code or under state law (20 Pa. C. S. §3701)
- E. Distributions to beneficiaries
- 1) Outright pre-residuary bequests (timing and possible payment of interest)
 - 2) Pre-residuary bequests in trust
 - 3) Residuary bequests
 - Timing of distribution
 - Entitlement to interest or share of income
 - Recognition or non-recognition of gain
- F. Sources of funds to meet liquidity needs
- 1) Assets within probate estate or revocable trust
 - Identifying and collecting “probate” assets (UPC §3-706; 20 Pa. C. S. A. §3301)
 - Sale or other disposition of probate assets (UPC §3-711; 20 Pa. C. S. A. §3351)
 - ◊ Tax cost basis issues (2010 vs. 2009 and perhaps later years)
 - ◊ Mechanics of gaining ability to liquidate
 - 2) Assets external to probate estate or revocable trust
 - Assets available for the payment of administration expenses and debts (POD and ITF accounts; assets in irrevocable trusts; etc.)
 - Assets free from those obligations (qualified plans; IRA’s; life insurance; jointly-owned assets, etc.).
 - ◊ Direct payment of expenses, debts, taxes
 - ◊ Loans
 - ◊ Purchase of assets
 - 3) Third party loans
- G. Internal Revenue Code source of payment issues
- 1) Governing document

- In general, the will or revocable trust will address the matter of the source of payment through a “broad” or a “narrow” tax clause
 - Examples:
 - ◊ Narrow Tax Clause:
 - ⇒ “All estate, inheritance and other death taxes (other than generation-skipping taxes) and any interest and penalties thereon imposed by reason of my death on property passing under my will shall be paid out of the principal of my residuary estate, without apportionment or reimbursement.”
 - ◊ Broad Tax Clause:
 - ⇒ “All estate, inheritance and other death taxes (other than generation-skipping taxes) and any interest and penalties thereon imposed by reason of my death on property, whether passing under my will or not, shall be paid out of the principal of my residuary estate, without apportionment or reimbursement.”
- 2) In the absence of such a provision, or where the provision does not address the issue, you will need to rely on the apportionment act of the applicable jurisdiction (UPC §3-9A-101 *et seq.*) or in some cases the apportionment provisions of the Code (§§2205 - 2207A).
- ◊ “A testator, settlor, donor or possessor of any appropriate power of appointment may direct how the Federal estate tax or the Federal generation-skipping transfer tax due because of his death, including interest and penalties, shall be apportioned or may grant a discretionary power to another so to direct . . .” (20 Pa. C. S. A. §3701)
 - ◊ “Subject to the provisions of section 3701 (relating to power of decedent), the Federal estate tax shall be apportioned equitably among all parties interested in property includible in the gross estate for Federal estate tax purposes in proportion to the value of the interest of each party, subject to the rules stated in this section.” (20 Pa.C.S.A. §3701)
- 3) Personal liability of executor
- ◊ “The tax imposed by this chapter shall be paid by the executor.” (26 U.S.C.A. § 2002)

II. THIRD-PARTY CREDITOR CLAIMS

A. Type of Notice Required for Creditors

- 1) Unknown creditors - publication in newspaper of general circulation in county where probate estate opened.
- 2) Known creditors (or reasonably ascertainable creditors) - written notice (by mail or personal delivery) of opening of probate estate and right to file a claim.
 - Generally, representative may not send a notice if representative is going to or has paid creditor.

- Requires good faith search of decedent's personal and business records to determine creditors/debts.

B. Statute of Limitations for Filing Claims

1) UPC (§3-803)

- If probate estate opened: later of 4 months from first publication of claims notice in newspaper or 60 days from actual notice for known creditors.
- If no probate estate opened (or notice not given): 1-year from date of death.
- Also provides limit for claims arising at or after death against the estate/personal representative in tort or contract to 4-month period after performance by the personal representative is due, or after claim arises.

2) Illinois (755 ILCS 5/18-12)

- If probate estate opened: later of 6 months from first publication of claims notice in newspaper or 60 days from actual notice for known creditors.
- If no probate estate opened (or required notice not given): 2-year from date of death.

3) Pennsylvania (20 Pa. C. S. §3532(b.1))

- Later of one year after notice of grant of letters to personal representative or distribution of assets, or later of 60 days or one year after grant of letters if representative makes demand that known creditor file claim.

C. Filing of Claim (What constitutes a Claim?)

- 1) Claim must contain enough information to apprise representative of nature, type and amount of claim.
- 2) Can generally be filed "informally" with estate's representative or attorney for representative, or formally with court (with copy mailed to attorney).
 - In Pennsylvania, claim against real property must be filed with court. 20 Pa. C.S. §3532(b)(2)

D. Disallowance/Contest of Claim

1) UPC (§3-806)

- Representative can disallow any part or all of a claim by sending notice of disallowance
 - ◊ Creditor must then file petition for allowance or commence proceeding against personal representative within 60 days or claim will be barred

2) Illinois (760 ILCS 5/18-11)

- Representative can disallow any part or all of a claim.
- If claim was not filed with a court, the personal representative can disallow the claim at any time by filing "Notice of Disallowance"

- ◇ Creditor must then file petition for allowance or commence proceeding against personal representative within 60 days or claim will be barred
- If claim is filed with court, personal representative must file disallowance of claim with court within 30 days of when claim is filed.

3) Pennsylvania (20 Pa. C. S. §3532(b.1))

- Personal representative may make written demand to creditor to given written notice of his claim within later of 60 days from the mailing or delivery of the demand or within one year from notice of the grant of letters, whichever is later.

E. Classification

1) UPC (§3-805)

- 1st: costs and expenses of administration.
- 2nd: reasonable funeral expenses.
- 3rd: debts and taxes with preference under federal law.
- 4th: reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him.
- 5th: debts and taxes with preference under other laws of this state.
- 6th: all other claims.

2) Illinois (755 ILCS 5/18-10)

- 1st: funeral, burial, expenses of administration (including attorney's fees).
- 2nd: surviving spouse's award/child's award.
- 3rd: debts due U.S.
- 4th: Employees of decedent for services rendered in 4 months prior to death and attending to last illness (up to \$800).
- 5th: property held by decedent in trust which cannot be identified or traced.
- 6th: debts due Illinois or any county, township, city, etc.
- 7th: all other claims.

3) Pennsylvania (20 Pa. C. S. §3392)

- 1st: costs of administration.
- 2nd: family exemption.
- 3rd: costs of the decedent's funeral and burial, and the costs of medicines furnished to him within six months of his death, of medical or nursing services performed for him within that time, of hospital services including maintenance provided him within that time, and of services performed for him by any of his employees within that time.
- 4th: cost of a grave marker.
- 5th: rents for the occupancy of the decedent's residence for six months immediately prior to his death.
- 6th: all other claims, including claims by the Commonwealth.

- 4) Classification generally only becomes relevant when there are insufficient assets to pay all claimants.
- 5) Note: secured claims are payable from property securing debt regardless of whether claim filed against the estate or whether estate is insolvent.

III. SPOUSE/FAMILY "CREDITOR" CLAIMS

A. Spousal Support/Homestead Claims

1) UPC

- §2-402 - a surviving spouse is entitled to \$15,000 homestead allowance.
- §2-403 - up to \$10,000 in household furniture, automobiles, furnishings, appliances and personal effects.
- §2-404 - surviving spouse is entitled to a reasonable allowance for maintenance during the period of administration, which allowance is limited to one year if the estate is inadequate to discharge allowed claims.
 - ◊ Payment is not chargeable against what spouse receives unless will provides otherwise.
 - ◊ Payment terminates at death of spouse.

2) Illinois Spouse's Award (755 ILCS 5/15-1 et seq.)

- Allows spouse an award equal to 9-months for support of spouse and for minor or adult dependent child of decedent who resides with surviving spouse.
- Minimum award is \$10,000 for spouse and \$5,000 for each dependent child residing with spouse.
- If spouse dies prior to payment of award, her estate is entitled to unpaid amount
- Award not available if decedent's will expressly provides that provisions in will for spouse are in lieu of an award and spouse does not renounce will.
- In independent administration, representative may pay up to 5% of value of probate estate as spouse's award without application to court.
- Spouse can elect to take goods and chattels not specifically bequeathed in lieu of cash for award.

3) Pennsylvania (20 Pa. C. S. §3121)

- Spouse entitled to "family exemption," which allows spouse to retain or claim property equal to \$3,500.

B. Spousal Elective Share

1) General Right of Renunciation

- Spouse has right to renounce will, whether or not will contains any provisions for surviving spouse.
- If spouse exercise's right of election, spouse will take statutory defined amount rather than amount provided in will. State law will differ on (1)

2) UPC (§2-201, et. seq.)

- Provides an accrual-type elective share by tying the surviving spouse's ultimate entitlement to the length of the marriage (the longer the marriage, the larger the elective-share percentage), starting with 3% for 1 year of marriage, and increasing each additional year of marriage until it reaches the maximum 50% after 15 years of marriage.
- UPC employs an "augmented estate" concept where percent is applied to sum of four elements: (1) decedent's net probate estate (§2-204); (2) decedent's nonprobate transfers to others consisting of will-substitute-type inter-vivos transfers made by the decedent to others (§2-205); (3) decedent's nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse (§2-206); and (4) the surviving spouse's net assets at the decedent's death, plus any property that would have been in the surviving spouse's nonprobate transfers to others under §2-205 had the surviving spouse been the decedent (§2-207).
- Petition must be filed with court within the later of 9 months after the date of the decedent's death or within 6 months after the probate of the decedent's will. Court may extend time for filing petition upon request of spouse during period.
- Surviving spouse must be living to exercise right of election. Election can be exercised by guardian of disabled surviving spouse or agent under durable power of attorney but not by representative (since spouse is not living).

3) Illinois (755 ILCS 5/2-8)

- Elective share is 1/3 of probate estate (net of claims) if testator has descendant(s) or 1/2 of probate estate if testator has no descendants.
- No augmented estate concept. *Johnson v. LaGrange State Bank*, 383 N.E.2d 185 (Il. 1978) (holding that non-probate property, including property transferred to a revocable trust, is not subject to surviving spouse's elective share unless deceased spouse's transfer to trust was illusory or tantamount to fraud).
- Renunciation is a complete bar to any distribution under the will, including a trust under will, but is not a bar to surviving spouse taking under joint tenancy or beneficiary designation, to claiming spouse's award, or to acting as executor under the will.
 - ◇ There is no specific case law in Illinois regarding spouse's right to take under an inter vivos trust (to which will added property), but *Johnson v. LaGrange* decision indicates (in dicta) that spouse would still take interest in inter vivos trust.

- Renunciation must be filed within (a) 7-months after admission of will to probate or (b) within such time as allowed by court if, within 7-month period or before expiration of any extended period, surviving spouse files a petition with court to request extension and sets forth facts as to pending issues which affect the share of the surviving spouse in the estate (i.e., spouse gets additional time by making a “protective renunciation”).
- Right of renunciation can be exercised by guardian of disabled surviving spouse but not by executor/administrator of spouse who dies before exercising right. *Rock Island Bank & Trust Co. v. First Nat’l Bank*, 185 N.E.2d 890 (Ill. 1962).

4) Pennsylvania (20 Pa. C.S. § 2201, et. seq.)

- Award is 1/3 of the following property: (1) probate property, (2) life estate of any property conveyed by decedent at death if decedent had the use of the property or an interest in or power to withdraw the income of the property, (3) property conveyed by the decedent during his lifetime if decedent retained a power to revoke the conveyance or to consume, invade or dispose of the principal for his/her own benefit, (4) property conveyed by the decedent during marriage to himself and another or others with right of survivorship if decedent had the power at the time of death unilaterally to convey property absolutely or in fee, (5) survivorship rights of an annuity contract purchased by the decedent during marriage if the decedent was receiving annuity payments at the time of death, and (6) property conveyed by the decedent during the marriage and within one year of death if the aggregate amount conveyed to each donee exceeds \$3,000, valued at the time of conveyance.
- Property excluded from elective share: (1) any conveyance made with the express consent or joinder of the surviving spouse; (2) proceeds of insurance on decedent’s life of the decedent; (3) interests under pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other employer-sponsored plan; (4) property passing by the decedent's exercise or nonexercise of a power of appointment given by third party.
- If spouse exercises right of election, spouse cannot receive: (1) any property the is subject to the spouse's election not awarded as part of his elective share; (2) property appointed by the decedent's exercise of a general or special power of appointment, and passing in default of appointment if decedent had power to exclude his spouse from any interest therein; (3) property in any trust created by the decedent during his lifetime; (4) proceeds of insurance on decedent’s life attributable to premiums paid by decedent or decedent’s employer, partner or creditor; (5) any annuity contract purchased by the decedent or decedent’s employer, partner or creditor; (6) any pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other employer-sponsored plan, exclusive of the Federal social security system and railroad retirement system, by reason of services performed or disabilities

incurred by the decedent; (7) community property attributable to decedent's earnings or contributions; (8) all intangible or tangible personal property and all real property owned by the decedent and his spouse by the entireties or jointly with right of survivorship, attributable to decedent's contributions; and (9) all intangible or tangible personal property and all real property given to spouse by the decedent during lifetime which, or the proceeds of which, are still owned by spouse at decedent's death.

- The election must be filed with the clerk of the orphans' court division by the later of (1) 6 months after the decedent's death or (2) six months after the date of probate. The court may extend the time for making the election as the court deems proper on application of the surviving spouse filed with the clerk within the time limit to file the right of election (i.e., spouse can make "protective election").

C. Other Family Awards

1) UPC

- §2-402 - if there is no surviving spouse, each minor/dependent child of the decedent is entitled to a homestead allowance of \$15,000, divided by the number of minor and dependent children.
- §2-403 - if there is no surviving spouse, minor/dependent children are entitled to up to \$10,000 in household furniture, automobiles, furnishings, appliances, and personal effects.

2) Illinois Minor/Dependent Child (755 ILCS 5/15□2)

- Allows an award to each minor or adult dependent child of the decedent who does not reside with the surviving spouse equal to 9-months for support.
- Minimum award is \$5,000.

3) Illinois Caregiver (755 ILCS 5/18-1.1)

- statutory award for certain family members (spouse, parent, sibling or child) who provided care for disabled decedent for at least three years.
- Amount of award depends on claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress due to care of disabled decedent.
- Minimum amount of claim:
 - ◇ \$180,000 for 100% disability
 - ◇ \$135,000 for 75% disability
 - ◇ \$90,000 for 50% disability
 - ◇ \$45,000 for 25% disability
- Court may reduce award if claimant otherwise received a benefit from decedent (e.g., other compensation, including living arrangements that benefited claimant).

4) Pennsylvania (20 Pa. C.S. §3121)

- If there is no spouse, or if spouse has forfeited right, then children who are members of the same household as the decedent, or if there are no such children, then the parent(s) of the decedent who are members of the same household as the decedent, are entitled to “family exemption,” which allows them to retain or claim property equal to \$3,500.

IV. POST-MORTEM PLANNING

A. Spousal Support/Election and/or Family Support

- 1) Spouse (and to a limited extent, other family members) can modify the disposition of assets by having the surviving spouse exercise the statutory right of election or by having family member make support/exemption claims.
 - Marital deduction is allowed for property passing to spouse under right to election against will (property is treated as passing *from decedent* outright to surviving spouse under Code §2056).
 - Marital deduction is allowed for surviving spouse’s support/exemption awards unless award is terminable (e.g., right to award would terminate upon spouse’s death or remarriage prior to payment of award). *Jackson v. United States*, 376 U.S. 503, 11 L.Ed.2d 871, 84 S.Ct. 869 (1964); Rev. Rul. 83, 1953-1 Cum.Bull. 395.

B. Disclaimers

- 1) Federal Tax Requirements (Code §2518)
 - In writing
 - Within 9 months
 - No acceptance of benefits
 - Pass to someone other than disclaimant (except for surviving spouse)
 - Not at direction of disclaimant
 - Comply with state law disclaimer requirements (e.g., delivery, filing, court approval, etc.)
- 2) Common Issues with Qualified Disclaimers
 - Acceptance of benefits - beneficiary accepts some part or portion of interest bequeathed (that cannot be severed) or accepts consideration in exchange for disclaimer.
 - Property passes to disclaimant in another capacity (e.g., as beneficiary of trust to which disclaimed property passes, as residuary legatee, or as intestate heir, etc.)
 - Retaining power to direct disclaimed property (e.g., having a power of appointment over trust to which disclaimed property passes).
- 3) Fiduciary Disclaimers

- May be permitted under state law, typically predicated on whether disclaimer is within best interests of estate/beneficiary affected by disclaimer and may require court approval.
- Uniform Disclaimer Act
 - ◊ §2-1108 - permits trustee to disclaim (comments provide that disclaimer by a trustee must be compatible with the trustee's fiduciary obligations)
 - ◊ §2-1111 - permits fiduciary to disclaims a power held in a fiduciary capacity which has been exercised (comments provide that disclaimer of fiduciary powers must be compatible with the fiduciary's duties).
- Illinois (755 ILCS 5/2-7)
 - ◊ Representative of a decedent or ward may disclaim on behalf of the decedent or ward with leave of court, upon determination if court finds that the disclaimer benefits the estate as a whole and those interested in the estate generally or, in the case of a decedent, if the decedent's will authorizes the representative to disclaim without court authorization
- Pennsylvania (20 Pa.C.S. § 6202)
 - ◊ Representative of decedent, a minor or an incapacitated person or agent under a durable power of attorney which confers the authority to disclaim may disclaim if the court having jurisdiction of the estate authorizes the disclaimer after finding that it is advisable and will not materially prejudice the rights of creditors, heirs or beneficiaries of the decedent, the minor or his creditors, or the incapacitated person or his creditors, and a personal representative may make a disclaimer on behalf of a decedent without court authorization if the will of the decedent so authorizes.
- Restatement (Third) of Trusts §86 (2007), *cmt f.* - trustee has authority to disclaim property or disclaim a fiduciary power to further a trust purpose so long as the action is taken in the interest of the beneficiaries and is consistent with the trustee's other fiduciary duties.

C. Family Settlement Agreements

1) Statutory Criteria

- Uniform Acts
 - ◊ UPC §3-1101 - allows compromise of any controversy as to admission of instrument to probate, the construction, validity, or effect of any governing instrument, and the rights or interests in the estate if approved in a formal proceeding in the court for that purpose, is

binding on all the parties, including unborn or unascertained parties, or parties who could not be located.

- ◇ UTC §111 - allows “interested persons” to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust, to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court, including specifically: (A) the interpretation or construction of the terms of the trust, and (B) transfer of a trust’s principal place of administration.
- Illinois Virtual Representation/Non-Judicial Settlement (760 ILCS 5/16.1)
 - ◇ If all “Primary Beneficiaries” are all competent adults, or all “interested persons” are competent adults or are otherwise represented, may enter into an agreement with the trustee regarding any matter involving a trust, to the extent the terms and conditions of the agreement could be properly approved under applicable law by a court of competent jurisdiction.
 - ◇ Matters that can be resolved include: (A) interpretation or construction of the terms of the trust; (B) the grant to a trustee of any necessary or desirable administrative power; (C) transfer of a trust’s principal place of administration; (D) resolution of disputes or issues related to administration, investment, distribution; (E) modification of terms of the trust pertaining to administration of the trust; and (F) termination of the trust, with court approval upon determination that continuance of the trust is not necessary to achieve any material purpose of the trust.
 - ◇ Agreement is binding on all future or successor beneficiaries to the same extent as if entered by a court.

2) Marital Deduction Issues

- Marital deduction will only be allowed if property treated as passing *from decedent* to surviving spouse and, if not outright, meets statutory criteria under Code §2056(b) (which covers requirements in the case of life estate or other terminable interest given to surviving spouse).
- Marital deduction is allowed for property/assets awarded or paid to spouse via a settlement agreement if spouse has bona fide, enforceable right to the asset or amount claimed.
 - ◇ Standard is presumed met if there is a decision by a local court, upon merits of spouse’s claim, in an adversarial proceeding, following a genuine and active contest, and court passes upon facts on which deductibility depends.
- IRS will generally follow reformation/construction of document that resolves an ambiguity and will allow marital deduction. However, if reformation of will/trust arises from a drafting error such that provisions for spouse do not qualify under Code §2056, marital deduction will not be allowed (e.g., reformation of a “marital” trust to change discretionary income interest of surviving spouse to mandatory income interest).

3) Gift Tax Issues

- Shifting or changing property interests via a voluntary settlement is a gift unless there is full and adequate consideration.
- Modification/reformation of a trust that shifts the beneficial interests in a trust or changes the quality, value, or timing of any of the powers or rights can be a gift.
- Courts look at various factors to determine whether there is full and adequate consideration: (1) genuine controversy between parties; (2) parties represented by separate counsel; (3) bona fide, arm's-length negotiations; (4) value of the property involved; and (5) whether the settlement appears motivated by the parties' desire to avoid uncertainty and expense of litigation.

D. Tax elections

- 1) QTIP or partial QTIP election.
- 2) State QTIP election.
- 3) Alternate valuation date.
- 4) Allocation of \$1,300,000 and \$3,000,000 step-up basis provided under Code §1022 (if carry-over basis rules remain in 2010).
- 5) 645 Election.
- 6) Fiscal year vs. calendar year income tax filing election.
- 7) Claiming deduction on income tax return or estate tax return.
 - Deductions allowed for income taxes and for estate taxes can be claimed on either return but generally not on both. Code §642(g).
 - Deductions in respect of decedent can be claimed on both (e.g., income and real estate taxes deductible under Code §164, mortgage and investment interest deductible under Code §163, and nontrade or business expenses deductible under Code §§162 and 212).

E. Allocation of assets

- 1) Allocate assets with income tax obligation or similar "wasting assets" to spouse/marital trust (e.g., allocate IRA to marital, non-GST exempt trust).
- 2) Allocate assets with more growth potential to credit shelter, GST-exempt trust.

V. HANDLING SPECIAL ASSETS

A. General Concepts

- 1) Most estates are comprised of a variety of more or less "normal" assets, cash, marketable securities (including mutual funds), residential real estate, tangible personal property, and the like. However, some estates include interests in what might be characterized as "special assets." These might include interests in closely-held businesses, partnership interests, non-traditional real estate and particularly valuable or vulnerable tangible personal property.

- 2) While many of the issues facing executors or trustees do not vary whether the assets are “normal” or “special”, there are often issues that are unique to the nature of the assets.
- 3) In many cases, the will or deed of trust will contain specific provisions regarding these assets.
 - Pre-residuary disposition in whole or in part.
 - Direction to effectuate plan contained in outside documents.
 - ◊ E.g., “To sell or otherwise dispose of my interest in Acme Co., which I may own at my death, pursuant to the contract entered into between me and Acme.”
 - Direction to sell or otherwise liquidate.
 - ◊ E.g., “To sell at public or private sale for cash or credit, to exchange, or to lease for any period of time, any real or personal property, and to give options for sales, exchanges or leases.”
- 4) Similarly, state law may contain provisions applicable to the retention and disposition of special assets. For example, in Pennsylvania, an executor has the power to sell or lease real property, to continue a business of the estate, to organize a corporation to carry on the business of the estate, to invest or liquidate funds and to vote stock.

B. Real estate (20 Pa. C. S. A. § 3311)

- 1) Preservation/safeguarding of decedent’s interest
- 2) Valuation
- 3) Insurance
- 4) Environmental issues.
- 5) Sale alternatives.

C. Tangible personal property (20 Pa. C. S. A. § 3301 *et seq.*)

- 1) Preservation/safeguarding such assets.
- 2) Valuation.
- 3) Insurance.
- 4) Sale alternatives.

D. Closely-held business interests.

- 1) May include stock of corporation, membership interest in LLC, partnership interest in general or limited partnership or proprietorship. (20 Pa. C. S. A. §3314)
- 2) Provisions of governing documents. It is critical to review the provisions of the governing documents pertaining to the closely-held business interest. The documents may provide for a mandatory redemption or other sale at an agreed-upon price or under a formula or mechanism, a conversion in the type

and nature of the interest, limitations on the disposition of the interests to third persons, etc.

- Partnership agreement.
- LLC management agreement.
- Articles of Incorporation, by-laws and shareholders' agreements.

3) Voting/participation in management decisions.

4) Types of interests that may not pass to an estate.

- Interests in professional corporations or entities (law firms, accounting firms, engineering firms, etc.) or that can only be owned by licensed individuals (e.g. funeral homes, for profit cemeteries, etc.) (15 Pa. C. S. A. §2923)

VI. FIDUCIARY DUTIES OF REPRESENTATIVE VS. DUTIES OF TRUSTEE

A. Same/Similar Duties

- 1) Duty to Account/Duty to Inform
- 2) Duty of Loyalty
- 3) Duty of Impartially
- 4) Duty to Collect/Administer Assets

B. Differing Duties

1) Duty to Invest

- Prudent investor rule generally governs trustees
 - ◇ Duty to diversify
 - ◇ Duty to make trust property productive of income and capital appreciation based on interest of current and remainder beneficiaries
 - ◇ Duty to delegate (or otherwise retain investment advisor services) if trustee lacks degree of skill and knowledge required.
- Prudent investor rule generally does not govern representatives (or, at a minimum, applies differently).

2) Duty to Preserve

- Trustee's duty to preserve falls under duty to collect/administer trust assets and under the prudent investor rule.
- Representative's duty to preserve falls under duty to collect/administer estate assets and, generally, minimize losses.