

# Fiduciary Litigation Update Fall 2011

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### **Court Decides Issue Of First Impression Regarding Irrevocable Will Agreements**

By: Paul W. Minnich

In a case of first impression in Pennsylvania, the York County Orphans' Court recently clarified the law regarding irrevocable will agreements. Irrevocable will agreements are an estate planning tool through which an individual who makes a will also signs an agreement that the will cannot be subsequently revoked or altered in any respect.

In the case of *In re: Estate of Charlotte M. Bankert*, a husband and wife executed wills leaving the property to nine surviving children, four of whom were children from the husband's prior marriage and the five children that the husband and wife had together. Subsequent to the husband's death, the wife made financial gifts to her five children. Following the wife's death, the four stepchildren challenged the gifts by the wife to her five children as being in violation of the irrevocable will agreement.

The Court reviewed the irrevocable will agreement and noted that it did not obtain any prohibition on the use or transfer of assets by the surviving spouse during her lifetime. However, after observing that no Pennsylvania appellate courts had addressed the issue, the Court adopted the standard set forth in the classic treatise *Page on the Law of Wills* and held that even in the absence of an express restriction on inter vivos transfers, inter vivos gifts could be challenged as violative of the irrevocable will agreement under certain circumstances. Specifically, the Court held that to prevail on their claim, the stepchildren would have to establish by clear and convincing evidence that the wife's gifts to her children were made to evade performance of the irrevocable will agreement and were in fraud of the husband's rights. Also, the stepchildren would be required to prove that the gifts were (a) unreasonable in amount or represented a considerable part of the wife's estate or were substantial gifts made to only some beneficiaries who were to receive equal shares under the will; (b) were received gratuitously; and (c) received by children of the wife who had notice of the contents of the irrevocable will agreement. The Court's decision is published in the *York Legal Record* in Volume 125, page 37-41.

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### **Administration Of Special Needs Trusts: Extraordinary Duties For Trustees**

By: Michael L. Mixell

Corporate trust officers have a great deal of experience determining how to properly exercise their fiduciary duty to make discretionary payments of income and/or principal for the beneficiaries of the trusts they administer. The administration of a special needs trust, and in particular, the determination of what constitutes a "special need" for which expenditures properly may be made, requires an additional layer of knowledge and expertise on a trust officer's part.

The purpose of a special needs trust is to hold assets for the benefit of a disabled person in a manner that will not jeopardize the person's eligibility for government benefits. Trust officers thus need to be mindful of appropriate expenditures so that the assets of the trust are not considered "available resources" that would disqualify the disabled person from receiving benefits. Most special needs trusts provide that funds may not be disbursed from the trust if the proposed expenditure is provided as a benefit from any governmental agency. Special needs trusts are not intended to pay for basic support, food or shelter expenses.

There are two broad categories of special needs trusts: (i) a first party special needs trust, and (ii) a third party special needs trust. A first party special needs trust is funded with the disabled person's own assets and must meet certain statutory requirements. During the lifetime of the disabled person, distributions from the trust must be used for the sole benefit of the disabled person. First party special needs trusts are often referred to as "payback trusts" because, at the death of the disabled person, funds remaining in the trust must be used to reimburse the Commonwealth of Pennsylvania for benefits paid on behalf of the disabled person.

A third party special needs trust is funded with money from a source other than the disabled person - perhaps a parent or a grandparent. Third party special needs trusts may be created in a parent's will or as a separate trust document during the lifetime of a parent or other donor, and are sometimes referred to as "supplemental needs trusts." One key difference between a first party special needs trust and a third party special needs trust is that a third party special needs trust does not need to include a "payback" provision for the Commonwealth of Pennsylvania for benefits paid on behalf of a disabled person. A third party special needs trust typically includes other possible beneficiaries to whom the trustees may make discretionary distributions during the lifetime of the disabled person, as well as remainder beneficiaries.

Because of restrictions placed upon special needs trusts, and indirectly the trustees, a trust officer administering a special needs trust must have a fundamental understanding of the basic government entitlement programs, including Social Security Disability Income (SSDI), Supplemental Security Income (SSI), Medicare and Medicaid (also known as Medical Assistance or MA). The Medicaid program includes some basic health insurance for disabled persons which becomes a key issue when the trust officer seeks to supplement medical expenses and supplies from a special needs trust.

First party special needs trusts are subject to the scrutiny of the Orphans' Court and the Pennsylvania Department of Public Welfare (DPW) with regard to expenditures of principal. The trustee of a first party special needs trust generally will seek court approval and will request consent from DPW before making principal expenditures. In some cases, the trustee may obtain blanket approval for ongoing expenses. Third party special needs trusts do not have this limitation, but a thorough understanding of the governmental benefit programs is critical to determine if a desired expenditure, however legitimate, is properly disburseable as a "special need."

In summary, trust officers need to have additional expertise to properly administer a special needs trust. We at Barley Snyder have extensive experience and expertise in advising trustees of their extraordinary duties as they seek to enrich a disabled person's life while only paying for expenses that properly qualify as "special needs."

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## **Successful Will Contest Defense**

By: Paul W. Minnich

The firm recently handled the successful defense of a will contest case in the York County Orphans Court. The Decedent, a widow with no children, made a \$10,000 bequest to her niece and left the balance of her estate, approximately \$700,000, to a friend who worked at a bank where the Decedent maintained her accounts. The niece filed a will contest alleging that the bequest to the Decedent's friend was the subject of undue influence. Following a non-jury trial, the Court issued a 28 page decision upholding the validity of the Decedent's will. The Court rejected arguments that the Decedent's friend improperly utilized her position as the Decedent's banker to obtain the bequest. Rather, the Court found that trial testimony, including the testimony of the scrivener of the will and two medical experts, established that the will, including the bequest to the Decedent's friend, was proper in all respects. This case highlights the important role of the attorney who prepares the estate planning document subject to challenge. In its ruling, the Court specifically noted the careful attention to detail by the attorney who drafted the will as being key to the Court upholding the will. The case was tried by Paul W. Minnich, an attorney at the firm's York Office, who handles will contest and other fiduciary litigation throughout South Central Pennsylvania.

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