



DCBA  
MEMBER BENEFIT  
COMPLIANCE SESSION  
HANDOUTS

WEDNESDAY  
AUGUST 17, 2022

WIDENER COMMONWEALTH LAW  
SCHOOL (3737 Vartan Way, Harrisburg)

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## CAMPUS MAP LEGEND

Numbers on map indicate Building Name & Offices.

- 1 Classroom and Law Library Building, Classrooms, Faculty Offices, I.T.S., Library
- 2 Basketball/Tennis Courts
- 3 Student Activities Offices, Bookstore
- 4 Cafeteria
- 5 Courtroom Annex/A180, Classroom, Nursing School, Moot Courtrooms
- 6 Administration Building, Deans, Admissions, Career Development, Business Office, Registrar, Financial Aid, Social Work Program
- 7 Central Pennsylvania Law Clinics



# **SESSION AGENDA**

**8:30 – 8:55am – Pick up your registration form at registration table**

**9:00 - 10:00am | Session # 1 | Parental Alienation - It's Impact and How to Deal With It | Allison Hastings, Esquire**

**10:15 - 11:15am | Session # 2 | Immigration Law | Troy Mattes, Esquire**

**11:30am - 12:30pm | Session # 3 | PBA Malpractice Avoidance (ethics) | Josh T. Byrne, Esquire & Mark Lefever, CIC**

**LUNCH PROVIDED FOR THOSE WHO  
HAVE SIGNED UP FOR IT**

**1:30 - 2:30pm | Session # 4 | Workers' Compensation Case Law Update | Steven Ryan, Esquire & Lucas Csovelak, Esquire**

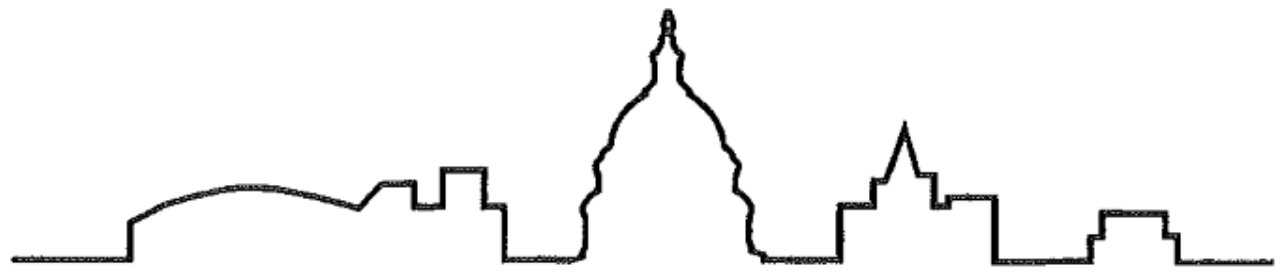
**2:45 - 3:45pm | Session # 5 | Bankruptcy's Impact on the Rest of the Legal Community | James K. Jones, Esquire & Tracy L. Updike, Esquire**

**4:00 - 5:00pm | Session # 6 | Estate Tax Planning in 2022 | Neil W. Yahn, Esquire**

## **Important Info:**

- When entering the facility, please enter using the side door of the Administration Building.
- Coffee and lunch are sponsored by CENTRIC BANK. (Please note that you MUST HAVE signed up for lunch)
- The Wi-Fi password and log in information will be at the TOP of your CLE confirmation form that you will pick up at the registration table.
- Sessions are come and go as you like – BUT, you must be in attendance for the complete HOUR of the program to receive credit.
- After completion of your last session, please drop off your SIGNED CLE form that you picked up at the registration table in the morning and RETURN it to the registration table as well.

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## Dauphin County Bar Association

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# SESSION #1

## Family Law

### **“Parental Alienation - Its Impact and How to Deal with It”**

Allison Hastings, Esquire  
Purdy Law Office, LLC



## Allison G. Hastings | Purdy Law Office, LLC

Allison has been an associate attorney at Purdy Law Office for 10 years where she focuses her practice on all areas of family law, including support, custody, divorce, equitable distribution, termination of parental rights, adoption, and paternity. She has also acted as a Guardian ad Litem in contested termination of parental rights and custody matters.

Allison particularly enjoys helping clients resolve their family law disputes outside of court. She is a trained Collaborative Law Attorney and mediator and utilizes this training to help parents and spouses reach agreements that take into account the needs and interests of their families.

She is a past member of the William Lipsitt Inn of Court, past president of the Central Pennsylvania Collaborative Professionals, current chair of the Family Law Section of the Dauphin County Bar association, and member of the Family Law Section of the Pennsylvania Bar Association and the International Academy of Collaborative Professionals.

Education: Widener University School of Law, Harrisburg, Pennsylvania, J.D. | James Madison University, Harrisonburg, Virginia, B.A. | Major: English | Minor: Family Studies

Practice Areas: Family Law 100%

Bar Admissions: Pennsylvania, 2012

Pro-Bono Activities: Guardian Monitor for the Dauphin County Guardianship Monitor Program

Professional Associations: William Lipsitt Inn of Court, Past Member | Central Pennsylvania Collaborative Professionals, Past President | Family Law Section of the Dauphin County Bar association, Current Chair | International Academy of Collaborative Professionals, Member

Certified Legal Specialties: Collaborative Law Attorney

## COMMENTARY

# The Five-Factor Model for the Diagnosis of Parental Alienation

William Bernet, MD<sup>Q1</sup>, and Laurence L. Greenhill, MD<sup>Q2</sup>

**A**lthough the phenomenon that we know as parental alienation (PA) had been described in the mental health and legal literature for many years, it was given its name—parental alienation syndrome—by Richard Gardner in 1985. As time went on, most writers abandoned the use of the word syndrome and simply referred to this mental condition as parental alienation. The definition of PA is a mental state in which a child—usually one whose parents are engaged in a high-conflict separation or divorce—aligns strongly with one parent (the favored parent) and rejects a relationship with the other parent (the alienated parent) without legitimate reason. Of course, it is a major loss for a child to experience the removal of a parent from their life in that manner. The purposes of this commentary are to explain definitions and distinctions related to PA; describe the five-factor model (FFM) for the identification of PA; and offer clinical, legal, and training implications stemming from an understanding of PA.

It is important to distinguish PA from parental alienating behaviors (ABs). PA refers to the behaviors and signs manifested by the alienated child; ABs refer to the activities of the alienating parent that contribute to the child's rejection of the alienated parent. Thus, the alienating parent is the parent who is indoctrinating or influencing the child to fear or reject the other parent. On the other hand, the alienated parent is the parent that the child refuses to visit or communicate with.

Another difference between PA and ABs is their prevalence. ABs are very common; many divorced parents engage in ABs to some degree, such as bad-mouthing the other parent and interfering with the other parent's time with the child. However, PA occurs less frequently. Harman *et al.*<sup>1</sup> reported that more than 30% of parents in the United States described being the target of multiple ABs, while only 1.3% of parents described being moderately or highly alienated from a child. Many children are exposed to ABs, but only a few develop PA.

Although the words parental alienation are not in *DSM-5* or *ICD-11*, the concept of PA is found in those manuals. In *DSM-5*, there are 3 diagnoses that can be used when PA has been identified in a child or a family. For example, the diagnosis child affected by parental relationship distress can be used in cases involving PA.<sup>2</sup> Other diagnoses, such as parent-child relational problem and child psychological abuse, may also be used in cases involving PA. Likewise, with regard to *ICD-11*, the diagnosis of caregiver-child relationship problem can be used.

## FIVE-FACTOR MODEL

The FFM is a method for diagnosing PA by understanding and identifying the components of this condition. Although all 5 factors are typically required to diagnose PA, there may be exceptions to this general rule. The features of the FFM are summarized in this commentary; additional information is available in Bernet<sup>3</sup> and Lorandos and Bernet.<sup>4</sup>

### Factor One

*The Child Manifests Contact Resistance or Refusal, ie, Avoids a Relationship With One of the Parents.* The first factor is inherent in the definition of PA, ie, that the child is refusing or resisting a relationship with the rejected parent. There are several causes of contact refusal, and it is necessary to conduct an evaluation to determine whether the cause in a particular case is PA or some other issue within the child or the family. Other causes of contact refusal include an understandable preference the child might have for one parent over the other; avoiding a loyalty conflict by gravitating to one parent and shunning the other; being worried or depressed, such as experiencing separation anxiety; being overly stubborn or oppositional; and estrangement due to previous maltreatment.<sup>5</sup>

### Factor Two

*The Presence of a Prior Positive Relationship Between the Child and the Rejected Parent.* This factor requires that the rejected parent was an involved and loving parent



before the breach, even if imperfect, as all parents are. The favored parent and the child may claim that the rejected parent never had a good relationship with the child—a common refrain from alienated children and their favored parents. However, it is usually easy for the evaluator to determine whether factor two is present in the family. There may be photographs and videos showing the parent and child enjoying vacations together and being affectionate with each other. There may be information from neutral third parties (eg, teachers, babysitters, family friends, therapists, clergy) who say that the parent was involved in their child's life and that the parent and child had a healthy attachment to each other.

### Factor Three

*The Absence of Abuse, Neglect, or Seriously Deficient Parenting on the Part of the Rejected Parent.* It is essential to determine whether the now-rejected parent engaged in the types of abusive or neglectful behaviors that would justify fear, hatred, and rejection by the child. This factor requires that the child's rejection of the targeted parent is far out of proportion to anything that the parent has done to justify the rejection. The inquiry regarding factor three requires a detailed history from the parents and the child (as appropriate) regarding possible domestic violence and child maltreatment; information from relatives and family friends; and a review of records from medical personnel, child protection agencies, and law enforcement. Currently, most authors use estrangement to refer to a child's rejection of a parent for a legitimate reason; alienation is used for rejection of a parent without a good reason.

### Factor Four

*The Use of Multiple Alienating Behaviors on the Part of the Favored Parent.* For a child to be considered alienated, the child must be exposed to ABs by the favored parent. It is not appropriate to assume that ABs are occurring simply based on the behavioral signs of PA in the child. Rather, the ABs must be observed through the actions and attitudes of the preferred parent, their written statements and social media posts, interviews of the parents, reports from collaterals, and so forth. The premise underlying factor four is that the actions and attitudes of one parent can influence the child's perception of the other parent. The process of interpersonal persuasion has been studied extensively. Baker and Chambers<sup>6</sup> developed the Baker Strategies Questionnaire by operationalizing a list of behaviors and iteratively piloting the list with community samples of adults who had experienced ABs as children. That process resulted in a list of 17 primary ABs, which are presented in Table 1.

**TABLE 1** Factor Four of the Five-Factor Model

Factor four requires that the preferred parent has manifested several of the 17 common alienating behaviors that have been observed in cases of parental alienation.<sup>5</sup>

- Bad-mouthing the rejected parent
- Limiting the child's contact with the rejected parent
- Interfering with the child's communications with the rejected parent
- Limiting mention of the rejected parent
- Withholding approval when the child shows an interest in the rejected parent
- Telling the child that the rejected parent does not love them
- Allowing the child to choose between their parents
- Creating the impression that the rejected parent is dangerous
- Forcing the child to reject the alienated parent
- Confiding in the child about adult topics
- Asking the child to spy on the rejected parent
- Asking the child to keep secrets from the rejected parent
- Referring to the rejected parent by their first name
- Referring to a stepparent as "Mom" or "Dad"
- Withholding medical, social, or academic information from the rejected parent
- Changing the child's name to remove association with the rejected parent
- Undermining the authority of the rejected parent

### Factor Five

*The Child Exhibits Many of the Eight Behavioral Manifestations of Alienation.* The 8 generally accepted behavioral signs of PA, which were originally identified in Gardner's seminal paper,<sup>7</sup> are listed in Table 2. The 8 signs of PA are manifested by alienated children, while the 17

**TABLE 2** Factor Five of the Five-Factor Model

Factor five requires that the child, who is engaging in contact refusal, has manifested some or all of the common behavioral signs of parental alienation.<sup>8</sup>

- Campaign of denigration, whereby the child repeats their list of criticisms of the rejected parent to counselors, evaluators, attorneys, and, ultimately, the judge
- Weak, frivolous, and absurd rationalizations for the child's rejection of a parent
- Lack of ambivalence regarding both the favored parent and the rejected parent, ie, the child considers one parent all good and the other parent all bad
- The independent thinker phenomenon, whereby the child strongly professes that the decision to cut off the rejected parent is theirs alone
- Absence of guilt about their rude, hurtful treatment of the rejected parent
- Reflexive support for the favored parent in parental conflict
- Presence of borrowed scenarios, ie, making accusations about the rejected parent that use phrases and ideas adopted from the favored parent
- Rejection of the rejected parent's extended family



common ABs are manifested by the favored or alienating parent. Various authors have described the behaviors typical of PA, and the clinician or forensic practitioner should consider these signs of PA in the context of the particular case being evaluated. Baker *et al.*<sup>9</sup> developed the Baker Alienation Questionnaire (BAQ), which has 2 identical sets of items, one about the mother and another about the father. Items were designed to elicit the child's thoughts and feelings about each parent in a way that would map onto the key signs of PA. Each pair of items was scored for extremeness. For example, a child could claim to have not one good memory of one parent and nothing but good memories of the other parent. When the alienation-consistent responses were summed, the researchers used the scores to classify the children as alienated or not with a 96% accuracy rate.

## ACCEPTANCE OF THE FIVE-FACTOR MODEL

The four-factor model—the precursor of the FFM—was found to be a reliable instrument by Baker,<sup>10</sup> who studied the opinions of 68 mental health professionals who rated 16 variations of a vignette. The FFM consists of the four-factor model plus factor one, ie, the threshold requirement that the child manifests contact refusal. Bernet *et al.*<sup>11</sup> found that more than 85% of 119 child custody evaluators agreed or strongly agreed with the definition of the FFM discussed in this commentary. Although use of the FFM for the diagnosis of PA is new, all the individual components of the model have a long history in the PA literature; the model is simply a compilation of preexisting terms and concepts, not a new creation.

## CONTROVERSIAL TOPIC

While most practitioners and researchers agree with the basic premise of PA—ie, that one parent may inappropriately influence a child to reject the other parent—some aspects of PA theory are controversial. Meier,<sup>12</sup> one of the most vigorous critics of PA theory, wrote, “Nothing is more polarized in the family law field than the debate over domestic abuse and parental alienation [p. 220].” Meier and her colleagues are concerned that PA theory may encourage skepticism regarding abuse allegations against fathers and inappropriately attribute children's contact refusal to ABs of their mothers. A balanced analysis holds: child abuse is real, although false allegations of abuse sometimes occur, and PA is real, although false allegations of PA sometimes occur. Of course, everyone votes for

precision and accuracy in conducting complex evaluations. For example, Warshak<sup>13</sup> addressed “false positive identifications of parental alienation—concluding that parental alienation exists in cases where it really does not. Such mistaken conclusions ... contribute to skepticism about the concept.”

## CONCLUSIONS

The FFM appears to be a reliable way to identify PA; it can be used to differentiate between alienation and estrangement. Research regarding factor four and factor five was summed up by Saini *et al.*,<sup>14</sup> who stated, “There is remarkable agreement about the behavioral strategies parents can use to potentially manipulate their children's feelings, attitudes, and beliefs in ways that may interfere with their relationship with the other parent. The cluster of symptoms or behaviors indicating the presence of alienation in the child can also be reliably identified [p. 423].”

Clinicians need a reliable way to identify PA, especially as a correct diagnosis drives the choice of a suitable intervention and may influence the outcome of contentious hearings and trials. The FFM may become a useful tool for both mental health clinicians and forensic practitioners to identify PA in children and adolescents. At this stage, more research needs to be done to further strengthen the reliability of the FFM. Also, trainees in mental health and law will benefit from a clearer understanding of PA, its impact on child development, and information on psychiatric and legal interventions that are most helpful.

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Dr. Bernet is with Vanderbilt University School of Medicine, Nashville, Tennessee. Dr. Greenhill is with the University of California San Francisco.

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### Author Contributions

Conceptualization: Bernet

Writing — original draft: Bernet

Writing — review and editing: Greenhill

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All statements expressed in this column are those of the authors and do not reflect the opinions of the *Journal of the American Academy of Child and Adolescent Psychiatry*. See the Guide for Authors for information about the preparation and submission of Commentaries.

# SESSION #2

Government Law Section

**“Immigration Law”**

Troy Mattes, Esquire  
Mattes & Mahon, PC



## **Troy James Mattes | Mattes & Mahon, P.C.**

Troy James Mattes has been practicing immigration law for over 21 years and has a special interest in immigration law matters. After graduating from the University of Wisconsin-Madison in 1990, and prior to law school, Mr. Mattes spent three years overseas in Gabon, Africa with the United States Peace Corps. During his time in Africa, Mr. Mattes gained a unique knowledge of life in other countries. This insight contributes to his appreciation for his clients' special circumstances and the personal attention he gives to each client's case.

Since 1998, Mr. Mattes has been representing clients in all types of immigration matters before the Immigration Courts including bail/bond matters at the York County Prison in York, Pennsylvania. Further, Mr. Mattes has successfully helped many clients in obtaining lawful permanent resident status and waiver approvals from U.S. Consulates abroad where he enjoys a success rate of over 95% in consular waiver cases.

Mr. Mattes graduated from Widener University School of Law in 1998 and earned a Bachelor of Science Degree in Political Science from the University of Wisconsin-Madison in 1990. He is a member of the American Immigration Lawyers Association (AILA) and has served as Vice President of the AILA Philadelphia Chapter. Mr. Mattes is also a member of the Pennsylvania and Lancaster Bar Associations. He serves annually as an Arbitrator for the Lancaster Court of Common Pleas. Mr. Mattes is capable in Spanish and fluent in French.

Mr. Mattes is admitted to practice before the United States Citizenship and Immigration Services, and is able to represent clients before the Immigration Court in all 50 States. Mr. Mattes is also admitted to practice in the State Courts of Pennsylvania, the U.S. Court of Appeals for the 3rd Circuit and the U.S. District Court for the Eastern District of Pennsylvania.

**AREAS OF PRACTICE:** Immigration

**LITIGATION PERCENTAGE:** 75% of Practice Devoted to Litigation

**BAR ADMISSIONS:** Pennsylvania, 1998 | U.S. District Court Eastern District of Pennsylvania, 1999 | U.S. Court of Appeals 3rd Circuit, 1998

**EDUCATION:** Widener University School of Law, Harrisburg, Pennsylvania, J.D. – 1998 | University of Wisconsin, Madison, WI, B.S. – 1990 | Major: Political Science

**CLASSES/SEMINARS:** Presenter, American Immigration Lawyers Association, 2004

**REPRESENTATIVE CASES:** Matter of Nwozuzu, 24 I&N 609 (BIA 2008) (Board of Immigration Appeals 2008)

**PROFESSIONAL ASSOCIATIONS:** American Immigration Lawyers Association, Member, 2000 to Present | Pennsylvania Bar Association, Member, 1998 to Present

**LANGUAGES:** Spanish | French

## Immigration Law & Crimes

Dauphin County Bar Association

CLE

August 17, 2022

## “Immigration Consequences of Criminal Activity”

## The Duty of Criminal Defense Counsel

The Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel

### *Padilla v. Kentucky* 559 U.S. 356 (2010)

- Petitioner was a lawful permanent resident facing deportation after conviction for transporting a large amount of marijuana
- Petitioner alleged that his counsel not only failed to advise him, but also told him he wouldn't have to worry about immigration consequences because he had been in the U.S. for so long
- Petitioner relied on the misadvice
- Kentucky Supreme Court: Sixth Amendment does not protect a criminal defendant from erroneous advice on a "collateral" consequence of conviction
- U.S. Supreme Court: deportation is an "integral part" of the penalty that may be imposed to a non-citizen; in Mr. Padilla's case the representation fell below the objective standard of reasonableness

## *Padilla v. Kentucky*

### Key Points

- Deportation is a “particularly severe penalty” that is “intimately related” to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel
- Professional standards for defense lawyers provide the guiding principles for what is effective assistance
- The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice is insufficient
- The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea bargaining

## *Padilla v. Kentucky*

- Three duties:
  - Duty to inquire about citizenship/immigration status at initial interview stage
  - Duty to investigate and advise about immigration consequences of plea alternatives
  - Duty to investigate and advise about immigration consequences of sentencing alternatives



## *Padilla v. Kentucky*

- Duty to inquire about citizenship/immigration status at initial interview stage
  - interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces.
  - Counsel should determine the specific immigration status of every client (not just whether they are a citizen or noncitizen) at the initial interview.

## *Padilla v. Kentucky*

- Duty to investigate and advise about immigration consequences of plea alternatives
  - As part of the overall “negotiation plan” prior to plea discussions, counsel should ensure the client is fully aware not only of the maximum term of imprisonment, but also of additional consequences, including deportation.
  - Counsel must explain to the client the “full content” or “any agreement,” including “the advantages and disadvantages and potential consequences.”
  - Prior to entry of a plea, counsel must make certain the client “fully and completely” understands “the maximum punishment, sanctions, and other consequences” of the plea.

## *Padilla v. Kentucky*

- Duty to investigate and advise about immigration consequences of sentencing alternatives
  - Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including...deportation.
  - Client must be informed of the likely and possible consequences of sentencing alternatives.
    - e.g., 8 U.S.C. § 1101(a)(43) (prison sentence of one year for theft offense results in “aggravated felony” mandatory deportation for many noncitizens; 364-day sentence may avoid deportability or preserve relief from deportation)

### MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

### MOST COMMON MYTHS

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: Immigration  
consequences are only an issue  
if the person is here “illegally.”***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: Immigration consequences  
are only an issue if the conviction is a  
felony.***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: There will be no immigration consequences if the defendant does not serve time.***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: There will be no immigration consequences if the defendant serves only a year or less.***

**Under Pennsylvania sentencing, it is the maximum term of imprisonment imposed that is used to determine whether a sentence is 1 year or more**

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: There will be no immigration consequences if the sentence is suspended.***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: If the person is here “illegally,” it doesn’t matter what they’re convicted of since they’ll get deported anyway.***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: The record in this particular case will be sealed or expunged, so there won't be any immigration consequences.***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: My clients just want to avoid serving time and they won't care about the immigration consequences.***

MYTHS ABOUT IMMIGRATION CONSEQUENCES OF CRIMINAL  
CONVICTIONS

***MYTH: This issue is just too complicated and there's nothing I can really do about it.***

## Definitions

- Crime Involving Moral Turpitude (CIMT):
  - Broad range of crimes, including:
    - Crimes with an intent to steal or defraud as an element (e.g., theft, forgery)
    - Crimes in which bodily harm is caused or threatened by an intentional act, or serious bodily harm is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
    - Most sex offenses



## Definitions

- Aggravated Felony (enumerated in 8 U.S.C. § 1101(a)(43)), for instance:
  - Murder
  - Rape
  - Sexual Abuse of a Minor
  - Drug Trafficking
  - Firearm Trafficking
  - Crime of Violence + at least 1 year prison sentence
  - Theft or Burglary + at least 1 year prison sentence
  - Fraud or Tax Evasion + loss to victim >\$10,000
  - Prostitution Business Offenses
  - Commercial Bribery, Counterfeiting, or Forgery + at least 1 year prison sentence
  - Obstruction of Justice or Perjury + at least 1 year prison sentence
  - Various federal offenses (e.g. money laundering, firearms, alien smuggling, etc.)
  - Attempt or Conspiracy to commit any of the above

## Definitions

- Particularly Serious Crime (PSC):
  - Aggravated Felony
  - Violent or Dangerous Crime
  - Other PSCs—no statutory definition; see case law

## Definitions

- “Conviction”:
  - A formal judgment of guilt of the noncitizen entered by a court  
OR
  - if adjudication of guilt has been withheld, where
    - A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
    - The judge has ordered some form of punishment, penalty, or restraint on the noncitizen’s liberty to be imposed
    - Examples:
      - a court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
      - **a pre-trial diversion program, such as ARD in Pennsylvania, without a guilty plea is not a conviction**
      - a youthful offender adjudication is not a conviction if analogous to a federal juvenile delinquency adjudication

## Definitions

- Inadmissibility vs. Deportability
- Two ways to bar noncitizens from being in the U.S.
- Inadmissibility Grounds are in Immigration and Nationality Act (INA) § 212(a), e.g., crime-related; health-related; national security-related, etc.
- Deportability Grounds are in INA § 237(a), e.g., crime-related; inadmissibility at time of entry; false documents, etc.

## Who Is Subject to Inadmissibility

- Noncitizens who entered without inspection (inadmissible even if in the U.S.)
- Noncitizens paroled into the U.S.
- Noncitizens arriving at border or port of entry
- Noncitizens applying for visa or adjustment of status
- Noncitizens applying for certain benefits

## Who Is Subject to Deportation

- Noncitizens who were “inspected and admitted”
  - e.g., Lawful Permanent Resident, visa overstay, etc.

## Criminal Inadmissibility Grounds

- Will or may prevent a noncitizen from being able to obtain lawful status in the U.S.
- May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future

## Criminal Inadmissibility Grounds

- Conviction or admitted commission of a Controlled Substance Offense, or DHS reason to believe that the individual is a drug trafficker
- Conviction or admitted commission of a CIMT
- Petty Offense Exception: for 1 CIMT if the client has no other CIMT plus the offense is not punishable by > 1 year + does not involve a prison sentence > 6 months
- Prostitution and Commercialized Vice
- Conviction of two or more offenses of any type + aggregate prison sentence of 5 years

## Criminal Deportation Grounds

Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder

## Criminal Deportation Grounds

- Conviction of a Controlled Substance Offense EXCEPT a single offense of simple possession of 30 g or less of marijuana
- Conviction of a Crime Involving Moral Turpitude
  - One CIMT committed within 5 years of admission into the U.S. and for which a prison sentence of 1 year or longer may be imposed
  - Two CIMTs committed at any time after admission and “not arising out of a single scheme”
- Conviction of a Firearm or Destructive Device Offense
- Conviction of Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order
- Conviction of an Aggravated Felony

What if there would be extreme hardship to USC or LPR spouse, parent, son or daughter?

- 212(h) Waiver of Criminal Inadmissibility, but not if:
  - Conviction or admitted commission of a Controlled Substance Offense other than a single offense of simple possession of 30 g or less of marijuana
  - Conviction or admitted commission of a violent or dangerous crime
  - If LPR, conviction of an aggravated felony, or any criminal inadmissibility grounds if removal proceedings initiated before 7 years of lawful residence in the U.S.

What if the client would qualify for asylum or withholding of removal?

- Asylum: based on a well-founded fear of persecution in country of removal
- Withholding: based on threat to life or freedom in country of removal
- Conviction of a Particularly Serious Crime:
  - Aggravated Felonies:
    - All aggravated felonies will bar asylum
    - Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding
    - Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding of removal
  - Violent or dangerous crimes will presumptively bar asylum
  - Other PSCs—no statutory definition (see case law)

## What if my client has asylum or refugee status?

- Bars on 209(c) waiver, for humanitarian purposes, family unity, or public interest:
  - DHS has reason to believe the individual is a drug trafficker
  - Conviction or commission of a violent or dangerous crime will presumptively bar 209(c) relief

## What about Cancellation of Removal?

- Cancellation of Removal could apply to persons with an LPR status of 5 years or more and continuous residence in the U.S. for 7 years after admission
- But not if:
  - Convicted of an aggravated felony
  - Offense triggering removability would make the person inadmissible (see above), if committed before 7 years of continuous residence in the U.S.



## Advising Clients re. DACA

- Who was eligible for DACA (Deferred Action for Childhood Arrivals)?
  - Entered the U.S. as a child under the age of 16 before June 15, 2007
  - Continuous residence in U.S. since June 15, 2007
  - In high school, high school degree or GED, or honorably discharged veteran

## Advising Clients re. DACA

- Must ask if client has DACA
  - Main proof is a work permit
- Does the disposition of a case even matter, if the client is losing DACA anyway?
  - Yes! Although may lose DACA, many people may be eligible for other forms of immigration relief, e.g., Special Immigrant Juvenile Status, asylum, or permanent residency through a family member. However, they could be barred from obtaining such relief, depending on the conviction.

Questions?

# SESSION #3

## **PBA Malpractice Avoidance**

Josh J.T. Byrne, Esquire  
Marshall Dennehey Warner Coleman & Goggin

Mark Lefever  
USI Affinity



## **Josh J.T. Byrne | Marshall Dennehey Warner Coleman & Goggin**

Josh J.T. Byrne is a member of the Professional Liability Department where he concentrates his practice on representing and defending professionals in a variety of professional liability matters. Josh regularly represents attorneys in legal malpractice, wrongful use of civil proceedings and disciplinary matters. He also represents many other types of professionals, including those in the health care field, in the federal and state courts in Pennsylvania and New Jersey and before disciplinary boards.

Josh has devoted his legal career to the protection of professionals and is highly regarded in this arena throughout the state. He is Chair of the Pennsylvania Bar Association's Professional Liability Committee; Co-Chair of the Amicus Curiae Brief Committee; and an active member of the Ethics Committee. He is also Co-Chair of the Philadelphia Bar Association's Professional Responsibility Committee, the former Co-Chair of the Philadelphia Bar Association's Professional Guidance Committee and is a former Hearing Committee Member serving the Disciplinary Board of the Supreme Court of Pennsylvania. He serves as a Zone One delegate to the Pennsylvania Bar Association's House of Delegates and as a Judge Pro Temp for the Philadelphia Court of Common Pleas.

A prolific writer, Josh publishes extensively on malpractice avoidance and authors a recurring column in The Legal Intelligencer on professional liability topics. Josh frequently presents to legal and business organizations throughout Pennsylvania on professional liability themes.

Josh graduated with a dual major in Political Science and Japanese Studies From Earlham College in Richmond, Indiana. After college, he worked for two years as a coordinator for international relations in Chiba, Japan. He then obtained his juris doctor from Rutgers University School of Law. He is rated AV-Preeminent by Martindale-Hubbell, the highest rating for professional competence.

**ADMISSIONS:** New Jersey 1998 | Pennsylvania 2000 | U.S. District Court of New Jersey | U.S. District Court Eastern District of Pennsylvania | U.S. District Court Middle District of Pennsylvania | U.S. Court of Appeals 3rd Circuit

**EDUCATION:** Rutgers University, Camden, NJ (J.D., 1997) | Earlham College (B.A., 1992)

**HONORS & AWARDS:** AV® Preeminent™ by Martindale-Hubbell® | Pennsylvania Super Lawyers Rising Star 2008

**ASSOCIATIONS & MEMBERSHIPS:** Pennsylvania Bar Association, Chair, Professional Liability Committee; Co-Chair, Amicus Curiae Brief Committee; Ethics Committee; Zone One Delegate, House of Delegates | Philadelphia Bar Association, Co-Chair, Professional Responsibility Committee, 2022 - present; former Co-Chair of the Philadelphia Bar Association's Professional Guidance Committee

**YEAR JOINED:** 2021



## **Mark Lefever, CIC | Vice President, Sales and Client Management –USI Affinity**

Mark Lefever is a Vice President of Sales and Client Management for USI Affinity.

With 15 years of experience in the Insurance Industry, Mark has extensive knowledge on many different insurance programs and has worked in a few different positions. Prior to joining USI Affinity Mark worked for American Income Life where he gained experience in several different roles. Most Notably, Mark was a Supervising Agent and oversaw a team of sales representatives. In this role Mark oversaw the interviewing potential hires and training new hires on American Income Life's products. In addition, Mark was responsible for the Life and Health program for the state of Pennsylvania.

Mark frequently speaks at PA Bar Association events, Philadelphia Bar Association Events and other Local PA Association events on avoiding malpractice claims, Cyber Exposures and the importance of insurance in the legal industry. Mark also is engaged in many speaking events for the DC Bar and the DC Bar members.

Mark has a Life and Health Insurance License in Pennsylvania as well as a Property and Casualty License in Pennsylvania. Also, Mark holds many non-resident producers Licenses for various other states. Mark also holds the CIC designation as a member of the society of Certified Insurance Counselors. He graduated from The University of Pittsburgh in Pennsylvania with a bachelor's degree in political science.



We value your membership and are here to help.  
[www.pabar.org](http://www.pabar.org)



# Avoiding Legal Malpractice

## *Identifying actions you can take to more effectively manage your risks*

To access the information provided in today's Avoiding Legal Malpractice program and more valuable law practice resources, please visit:

[pabar.org/site/ALM](http://pabar.org/site/ALM)

The PBA Professional Liability Committee is charged with conducting legal malpractice avoidance and loss-prevention programs. The Avoiding Legal Malpractice seminars are a benefit provided to all counties each year. With the Pennsylvania Bar Association Insurance Program, advised and administered by USI Affinity, you have the ability to gain valuable malpractice avoidance information, receive up to a 7.5% discount\* on your malpractice insurance and earn up to 1.5 hours of ethics, professionalism or substance abuse CLE credit.

PBA Endorsed (CNA) Claims Assistance Hotline.  
A confidential call that can make a difference.

**888-200-5212**

PBA members with questions related to ethics, professionalism or the business side of practicing law, have access to our full-time ethics counsel and law practice management resources as an included member benefit. Call us.

**Ethics Hotline:** 800.932.0311 ext. 2214

**Law Practice Management:** 800.932.0311 ext. 2228

Members also have unlimited access to **Casemaker**, a powerful tool for online legal research, with a full Pennsylvania library, federal-level materials, and resources from all 50 states.

**We value your membership and are here to help.**

Not already a member, join today!

**Join. Connect. Succeed.**

[www.pabar.org](http://www.pabar.org)

\*The 7.5% credit will be pro-rated on the number of attorneys in the firm who attend the seminar. The discount does not apply to part-time policies.



The PBA strives to be “your other partner” and is always looking for ways to be a responsible steward of resources while still providing you with the highest quality member benefits and services. One of the measures we have taken to preserve our environment and to reduce operating costs, is to provide resources and materials online, allowing you to choose whether you want to print, and if so, which materials are most relevant to your practice. This also allows us to provide a greater variety of useful materials and resources to you. All of the resources (and many more ) are available for your use on the PBA web site at [www.pabar.org/site/alm](http://www.pabar.org/site/alm). *Please note*, you will need to use this address as the materials are only available to people who registered for the Avoiding Legal Malpractice (ALM) seminar.

#### Examples of the information available to you on the ALM web page...

- The Pennsylvania Bar Insurance Program with USI Affinity
- CNA Lawyers Professional Liability Program Policy Highlights
- CNA Lawyer’s Toolkit 4.0

This year’s vignettes - I Will Never Be Sued

#### Supporting Materials for this year’s program

- Anti-Harassment and Anti-Discrimination, Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct PA RPC 8.4(g)
- Client Intake Best Practices, PBA Law Practice Management article by Ellen Freedman
- Client Sex: Usually Unethical, Never a Good Idea, ABA Special Report, ABA/BNA Lawyers’ Manual on Professional Conduct
- Declining and Firing Clients, PBA Law Practice Management article by Ellen Freedman
- Fee Division with Client’s Prior Counsel, ABA Formal Opinion 487
- Ten Tips to Assist in Avoiding a Malpractice Claim, CNA

#### Client Files

- Client Files – Rights of Access, Possession and Copying, Along with Retention Consideration, PBA Formal Opinion 2007-100
- Creating a File Retention and Destruction Policy, CNA
- It’s Not Your File Actually It Is Your Client’s File -The Legal Intelligencer 092217
- Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information, ABA Formal Opinion 473

#### Communication with Clients

- A Lawyer’s Duty to Inform a Current or Former Client of the Lawyer’s Material Error, ABA Formal Opinion 481
- Lawyer Error - Communication with Clients - ABA Special Report, ABA/BNA Lawyers’ Manual on Professional Conduct –09-21-16

#### Conflict

- Maintaining your Conflict of Interest System, PBA Law Practice Management article by Ellen Freedman

#### Duty to Supervise

- Ethical Consideration in the Use of Nonlawyer Assistants, PBA Formal Opinion 98-75
- Law Firm Support Staff : Recognizing Their Role in Avoiding Legal Malpractice Claims, CNA

#### Engagement Agreement

- Better with a Letter: Why Attorneys Should Use Engagement Letters, CNA
- Lawyers Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship, CNA
- Start the Attorney-Client Relationship Right (Engagement Agreement), Voices and Views 2015

#### Succession Planning

- Succession Planning Toolkit
- Closing a Firm: Problems that Many Don’t Anticipate, PBA Law Practice Management
- Closing your Practice, PBA Law Practice Management article by Ellen Freedman
- Expect the Unexpected: Succession Planning for Lawyers, CNA
- Life Is Too Short, PBA Law Practice Management article by Ellen Freedman
- Musical Chairs and Retirement Policies, PBA Law Practice Management article by Ellen Freedman
- Protecting your Practice: Preparing for Disability, Death or Retirement, PBA Law Practice Management article by Ellen Freedman
- Responsible Succession Planning: Ethically Planning for Death & Disability, The Philadelphia Lawyer, Daniel J. Siegel
- Retiring from Practice: Understanding your Options, CNA
- Succession Planning – Is It Mandatory for Lawyers in Pennsylvania, PA Disciplinary Board 02-11-19
- What’s your Exit Strategy? , PBA Law Practice Management article by Ellen Freedman

#### Wills, Trusts and Estates

- Lawyer Serving as Fiduciary for an Estate or Trust, ABA Formal Opinion 02-426
- Wills, Trusts and Estates - Professional Liability Fact Sheet, CNA





## Avoiding Legal Malpractice Program

### Presenters

- Josh J.T. Byrne, Marshall Dennehey
- Mark Lefever, CIC, USI Affinity
- Susan Etter, Pennsylvania Bar Association

Presented August 17, 2022

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## PBA – Your Other Partner

What we do to help you avoid, or at least minimize, your risk of legal malpractice and make management of your practice easier, so you can spend more time on your clients and their cases.

- Guidance on Ethical Issues
- Answers to Law Practice Management
- High-quality CLE programs that keep you up-to-date in substantive law, competence (*be sure to check-out ProPass!*)
- Legislative Department working on your behalf
- Opportunities to engage with statewide network of attorneys and judges – more than 50 committees/18 sections
- Excellent Lawyers Professional Liability insurance coverage and discounts through USI Affinity
- Avoiding Legal Malpractice CLE programs
- ...many other benefits

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## PBA member benefits that can help you manage your risks

- Law Practice Management, Ellen Freedman, CLM
  - 800-932-0311, x. 2228 or [Ellen.Freedman@pabar.org](mailto:Ellen.Freedman@pabar.org)
- Ethics Hotline/Ethics Counsel, Victoria White
  - 800-932-0311, x. 2214 or [Victoria.White@pabar.org](mailto:Victoria.White@pabar.org)
- PBA Legislative Department, Fred Cabell
  - 800-932-0311, Ext. 2232 or [Fredrick.Cabell@pabar.org](mailto:Fredrick.Cabell@pabar.org)
- Avoiding Liability column in the Bar News

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## PBA member benefits that can help you manage your risks

- Make sure you have a succession plan and that it is up-to-date. There are numerous resources to help you develop succession plans available through our Law Practice Management page and the Solo and Small Firm Section.
- At least 10 documents are provided in the ALM materials web page which you received as part of your materials today - [pabar.org/site/ALM](http://pabar.org/site/ALM)
- Exclusive to PBA members, the Solo and Small Firm Section has developed a "Succession Planning Toolkit." It is available on the PBA website.

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## Avoiding Legal Malpractice Website

- All of the materials covered today and many more valuable resources related to the featured professional liability and responsibility topics are available online.

[pabar.org/site/ALM](http://pabar.org/site/ALM)

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## Avoiding Legal Malpractice Website

- Lawyers' Toolkit by far one of the most requested resources in follow-up to the program
- About 80 pages of sample engagement letters, disengagement letters, termination or withdrawal, conflict of interest, and more
- And on page 7 at the bottom you will find sample file retention and destruction language
- All of this is provided for your reference, to edit, copy and use to strengthen your letters and help protect you from misunderstandings with clients and clarify your relationship with them.



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## PBA member benefit ...

### Professional Liability Insurance

- Lawyers Professional Liability insurance program administered by USI Affinity
- As a PBA member you can qualify for a 5% discount on your premium and for attending today's program you may qualify for an additional 7.5% discount.
- The PBA and USI work hard on your behalf to find the most comprehensive and stable LPL coverage available.

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The New Graduate Lawyers Professional Liability Program from the PBA, USI Affinity and CNA provides up to two years of complimentary professional liability insurance to PBA member attorneys who have been admitted to practice in Pennsylvania within the past three years!

There are two ways to save through this program (restrictions and qualifications do apply)

1. If a new attorney, who is a PBA member, decides to open their own firm or join a small firm with up to four attorneys, the new attorney can receive up to two years of complimentary professional liability insurance.

2. Larger firms, who are existing CNA policyholders, that hire new Pennsylvania attorneys who are PBA members, can receive a discount on their per-attorney rate.

The new attorney is required to participate in a special risk management webinar.

To learn more, call 1.855.USI.0100  
[www.mybarinsurance.com/pba/](http://www.mybarinsurance.com/pba/)



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## Avoiding Legal Malpractice Program

Josh J.T. Byrne  
 215-575-2805  
[JTByrne@mdwccg.com](mailto:JTByrne@mdwccg.com)

Mark Lefever, CIC  
 717-572-2858  
[Mark.Lefever@usi.com](mailto:Mark.Lefever@usi.com)

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## Poll

- I maintain a separate cyber insurance policy
  - Yes
  - No

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## Security

Attorneys and staff working remotely must consider the security and confidentiality of their client data, including the need to protect computer systems and physical files, and to ensure that telephone and other conversations and communications remain privileged.



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## Cyber Exposures – Law Firms Are Prime Targets

### Rich Collection of Data

- Sensitive Information
- Bank Information
- PII

### Poor Safeguards

- Lack of internal training and controls
- Lack of IT resources
- Wireless access
- Vendor Management
- Lost or stolen devices

### Internal Exposures

- Rogue employees
- Careless staff

### External Exposures

- Business associates, vendors and suppliers
- Organized crime
- Hackers

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### Cyber Exposures – Cyber Loss

- Loss or damage to data/information
- Loss of revenue due to a computer attack
- Extra expense to recover/respond to a computer attack
- Legal liability to others for computer security breaches
- Legal liability to others for privacy breaches (not just computers!)
- Regulatory actions and scrutiny
- Loss or damage to reputation
- Cyber-extortion
- Cyber-terrorism
- Management time expended on breach response

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### Cyber Exposures – How a Law Firm can Protect itself

- Buy Cyber Coverage!
- Incident Response Planning
- Employee Training
- Risk Analysis
- Encryption
- Two-factor Authentication
- Back-ups
- Document Retention Policy
- Penetration Testing
- Anti-virus and Patching
- Intrusion Prevention and Detection
- Vendor Risk Management

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### Ethical Considerations

- ABA Formal Opinion 477 - Requires lawyers to make reasonable efforts to ensure that communications with their clients are secure and not subject to inadvertent or unauthorized cybersecurity breaches.
  - *This update of May 2017 addressed the use of tablets, smartphones and cloud storage.*
- Model Rule 1.1 – Competence - New commentary: "keep abreast of changes in the law and its practice, including the benefits and risk associated with relevant technology."
- Model Rule 1.6 – Confidentiality – A lawyer shall not reveal information relating to the representation of a client...
- Model Rule 1.6(c) – A Lawyer shall make a reasonable effort to prevent the unintended disclosure of, or unauthorized access to, information relating to the representation of a client.
- Model Rule 1.4 – Communication – A lawyer shall keep the client informed and consult with the client about the representation.
- Model Rule 5.1, 5.2, and 5.3 – Supervision – Supervisory lawyers within a law firm have a duty to ensure that all members of the firm comply with the Rules.

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## Poll

What is Your Primary Area of Practice?

- Personal Injury
- Real Estate
- Estates and Trusts
- Family Law
- Corporate/Business Transactions
- Criminal
- Other

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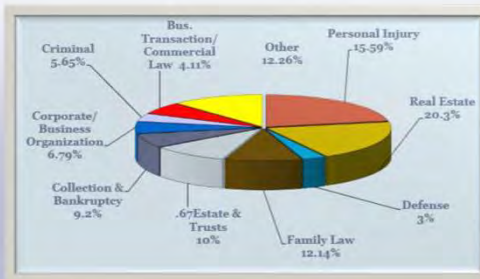
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## Claims - Claims by Areas of Practice



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## Poll

What Size is Your Practice?

- Solo
- 2-5 Attorneys
- 6-10 Attorneys
- 11-39 Attorneys
- 40-99 Attorneys
- 100 Plus

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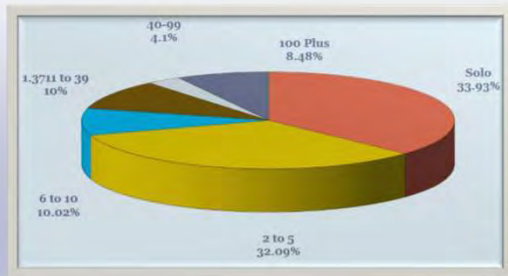
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### Claims - Percentage of Claim by Size of Firm



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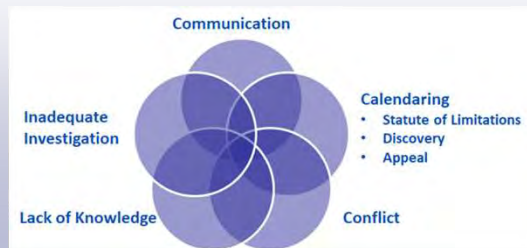
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### Most Common Attorney Errors



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### Poll

What is Your Plan?

- Succession Plan
  - In place: Successor is Attorney
  - In place: Successor is Law Firm
  - Do not have
  - Prefer not to say

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## Succession planning

A message from the D-Board...

Commencing with the 2019-2020 annual attorney registration, an additional section regarding succession planning will be on the registration form. The section will require you to indicate whether you have or have not designated a successor. Although you are required to provide a response in this section, failure to have a designated successor is NOT a violation of the Rules of Professional Conduct or the Pennsylvania Rules of Disciplinary Enforcement. Succession planning is essential to every attorney's practice. Recognizing that the future is unpredictable, attorneys should strive to lessen the impact of unexpected interruption in their relationships with clients by taking protective measures. We believe by asking the question and sparking dialogue in the profession, perhaps we can address the concern that exists nationwide.

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## Succession planning

- Data released on October 16, 2020 from the Disciplinary Board
- Available of the D-Board website

Succession Planning Responses from Active Pennsylvania Attorneys.

Response	Total	Percent
I have a successor attorney. My successor is an individual.	2,361	3.65%
I have a successor attorney. My successor is a law firm.	8,959	13.86%
I do not have a successor because I do not have PA clients.	19,947	30.86%
I do not have a successor and i do have PA clients.	5,283	8.17%
Prefer not to answer.	28,088	43.45%
Total	64,638	100%

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## Poll

### Engagement Letters?

- Engagement Letters
  - Always use
  - Almost always use
  - Rarely use
  - Never use

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## Engagement Letters

Include, at a minimum, the following information:

- **Scope of representation**  
Documentation of the scope of the representation and the mutual responsibilities of the attorneys and their clients can often be a deciding factor in determining the responsibilities of both parties.
- **Identity of client**
- **Fee arrangement**
- **File retention and destruction procedure**
- **Signed by the client.**

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## Poll

### Engagement Letter Elements

- **My Engagement Letters**
  - Have all five elements required
  - Do not have all five elements required
  - Will have all five elements required

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## Sample Language File Retention and Destruction

File Retention and Destruction: At the conclusion of your matter, this matter will be closed, and we will retain a client file of your matter for a period of \_\_\_\_ years. We may store some or all client file materials in a digital format. In the process of digitizing such documents, any original paper documents provided by you will be returned to you. Any copies of paper documents provided by you will not be returned to you unless you request such copies in writing. After any or all paper documents are digitized, we will destroy all paper documents in the client file, subject to the exceptions noted above. At the expiration of the \_\_\_\_-year period, we will destroy all client file materials unless you notify us in writing that you wish to take possession of them. This clause applies to any client file materials being held or stored by a third-party vendor. [Before including the following language, law firms should research whether their jurisdiction permits the following types of expenses to be charged to clients.] We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files, as delineated in the Expenses section of the Engagement Agreement.



Bottom of page 7  
CNA Lawyer's Toolkit

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## Dabbling



- More than 60% of claims involve attorneys who practice less than 20% of the time in the area that is the subject of the claim.
- Lawyers who practice almost exclusively in one area of law account for less than 7% of claims.

The ABA "Profile of Legal Malpractice Claims: 2012-2015"

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## Important Reminders For When Things Go Wrong

### Questions

- Am I in a conflict position?
- What do I do now?
- What do I tell my client?
- Do I have to report this to my professional liability carrier?

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## Claim Mitigation: Do's and Don'ts

### What to do:

- Furnish notice of any claim or potential claim to LPL carrier
- Make copy of entire underlying file
- Keep client informed
- Cooperate with successor counsel, if any, to protect client's interests

### What NOT to do:

- Avoid or mislead client as to bad developments
- Refuse to turn over a client file
- Turn over a client file without making a copy

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Questions or Concerns?

**PBA Endorsed (CNA)  
Claims Assistance Hotline:  
888-200-5212**

Members covered by the PBA –endorsed professional liability insurance program can **speaK confidentially** with a representative who my help them **head off** or **mitigate** a potential malpractice claim. Your **early call** to the Claims Repair Hotline may make all the difference!

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**LAWYERS CONCERNED FOR LAWYERS  
PENNSYLVANIA**

Brian S. Quinn, Esq.  
Education and Outreach Coordinator

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- Free evaluation by a healthcare professional
- Free assistance with interventions
- Peer support
- Lawyer/Judge/Law Student-only support group meetings
- LCL staff support
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365 days/year**

[www.lclpa.org](http://www.lclpa.org)

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# SESSION #4

Workers' Compensation

## **“Workers' Compensation Case Law Update”**

Steven R. Martin, Esquire  
Martin Law LLC

Lucas Csovelak, Esquire  
Weber Gallagher



## **Steven R. Ryan | Martin Law LLC**

STEVE RYAN is an associate with Martin Law who practices workers' compensation law. Prior to joining the firm, Mr. Ryan worked for a regional firm that helped claimants secure Workers' Compensation benefits in the Susquehanna Valley. Before practicing claimant's workers' compensation, he had worked at a top defense firm, but he left to focus his practice on injured workers after observing the difficulties that many workers faced in the workers' compensation system. In the Spring of 2015, Mr. Ryan became a certified specialist in Pennsylvania Workers' Compensation by the PA Bar Association's Section on Workers' Compensation Law as authorized by the PA Supreme Court.\*

Mr. Ryan is an active member of the Pennsylvania Association for Justice (PAJ), Dauphin County Bar Association, and the Pennsylvania Bar Association. He is an avid writer and has written on numerous topics from workers' compensation in newspapers to fictional short stories.

Mr. Ryan received his law degree from Widener University School of Law in 2007. He received his undergraduate degree in English from Brooklyn College in 2002. During law school, he was a Senior Staff Member of the Widener Law Journal and highly involved in the Intensive Trial Advocacy Program (ITAP).

Areas of Practice: Workers Compensation

Certified Legal Specialties: Pennsylvania Workers' Compensation



## **Lucas J. Csovelak | Weber Gallagher**

Lucas Csovelak focuses his practice on defending employers, insurance companies, and third-party administrators in workers' compensation matters in central Pennsylvania.

Lucas represents a variety of clients, including multinational package delivery companies, retail corporations, healthcare facilities, and insurance carriers. He is involved in all aspects of litigation, utilization reviews, depositions, mediations, hearings, and testimonies.

Focused on managing risk and exposure, Lucas conducts a thorough review of claims to provide clients with strategies to achieve cost-effective results. He has been instrumental in obtaining favorable decisions for clients before workers' compensation judges, the Pennsylvania Workers' Compensation Appeal Board, and the Commonwealth Court.

Central Penn Business Journal recognized Lucas as one of "the most influential people in law" in 2021. Since 2020, Lucas has been recognized by the publisher of the Pennsylvania edition of Super Lawyers Magazine as a "Rising Star," an honor given to the top 2.5 percent of attorneys in the Commonwealth who are 40 years old or younger, or in practice for 10 years or less. In 2015, Lucas was named a "Select Lawyer" of Harrisburg by Susquehanna Style Magazine in workers' compensation law.

# Workers' Compensation Case Law Update

Steven Ryan, Esquire & Lucas Coovelak, Esquire



*Dauphin County*  
BAR ASSOCIATION

## General Practice Updates

- Impact of COVID-19 on PA Workers' Compensation Practice
  - Wide use of remote hearings throughout the Commonwealth
    - Microsoft Teams adopted as official format for use in hearings via video
  - Present transition back to "live" hearings in special circumstances
  - Expect there to be a variety of procedures used by workers' compensation judges for live hearings
    - Some judges continue to use exclusive virtual hearings, except when live hearing is requested by parties
    - Many judges are using a hybrid model – all testimonial hearings live with status and Compromise and Release hearings via Microsoft Teams
    - Disfigurement/scarring cases for purposes of viewing
    - Pros and cons of virtual hearings



## **General Practice Updates**

- Updated judge practice questionnaires based upon post-COVID-19 procedures
  - <https://www.dli.pa.gov/Individuals/Workers-Compensation/wcoa/judge/Pages/default.aspx>
  - Important for submission of evidence – uploading procedures from judge to judge will vary with specific deadlines sometimes requested given documents are not submitted at live hearings
  - Procedures for submission of settlement documents
  - Procedures for presentation of witnesses and participation by claimants (video sometimes always required, even for status, pre-trial, and supersedeas hearings)
- Telemedicine
- Medical expert depositions still primarily remote

## ***Sicilia v. API Rooders Advantage Program (WCAB)***

- Issue: Did the WCJ err when she rejected a portion of IRE doctor's testimony expanding the description of the accepted injury and credited only the portion of the testimony that limited the description of injury to a degree that provided a whole-person impairment rating of less than 35%?
- Holding: Yes. The court held the WCJ erred as a matter of law when she constrained the IRE solely to the earlier accepted injuries based upon a "misapprehension" of the discretion given to IRE physicians while performing IREs.

## ***Sicilia v. API Rooders Advantage Program (WCAB)***

- Analysis and Facts
  - Employer accepted claim via NTCP for a lumbar strain and left knee contusion with the injury later expanded to include chronic pain syndrome and chronic adjustment disorder with anxiety and depression.
  - Employer eventually sought to modify benefits to partial disability based upon IRE.
  - Impairment rating physician assigned impairment rating of 23% with respect to the accepted diagnoses. The physician also noted there were additional diagnoses involving the lumbar spine that she believed were related but not accepted.
  - Employer requested addendum report asking for impairment rating with these additional diagnoses and received an impairment rating over the threshold of 35%. Employer argues modification and IRE should only include accepted diagnoses of parties.
  - Commonwealth Court ultimately holds IRE physician may consider unaccepted diagnoses in determining impairment.

## ***Keystone Rx LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (CompServices Inc./AmeriHealth Casualty Services)***

- Issue: Whether non-treating providers need to be given notice to intervene in Utilization Review proceedings.
- Holding: No. Court found that non-treating providers have no protected property interest in their billings, rising to the level that their due process rights are triggered and/or are being violated. What they have is a "mere expectation" of payment, pending a UR result. Thus, they have no requirement to be served with notice nor do they have a constitutionally protected opportunity to defend.



***Keystone Rx LLC v. Bureau of Workers' Compensation Fee Review  
Hearing Office (Compservices Inc./AmeriHealth Casualty  
Services)***

- Facts and Analysis
  - Relevant case for employers seeking Utilization Review of treatment involving pharmacies, especially prevalent when compound creams are involved.
  - Based upon prior Commonwealth Court holding, employers had to provide notice to non-treating providers, often a pharmacy, during Utilization Review proceedings.
  - Complicating litigation, certain pharmacies would intervene in litigation, even if claimant may not dispute ultimate outcome of Utilization Review determination against treatment.

***Ralph Martin Construction v.  
Miguel Casteneda-Escobar (WCAB)***

- Issue: Is Employer responsible for costs of home modifications if Claimant never performs the modifications but chooses to buy a new home instead?
- Holding: No. Court held that the purchase of a new home extends the phrase "orthopedic appliance" [a term in the Act] beyond reasonable construction.

## ***Ralph Martin Construction v. Miguel Casteneda-Escobar (WCAB)***

- Analysis and Facts
  - Claimant sustained a construction accident rendering him a paraplegic. After the injury, he lived on first floor of his brother's home. It was estimated it would cost \$119,722.21 to modify the home taking 16 weeks to complete the project with occupants vacating the premises.
  - Rather than modifying the home, Claimant purchased a new home for \$230,000.00, to suit his needs. Further modifications costing \$5,905.04 were required for shower and master bedroom. Carrier voluntarily paid the modification costs.

## ***Vincent Lorino v. WCAB (Commonwealth of Pennsylvania)***

- Issue: Whether claimants may obtain attorney's fees even when there is a basis for a reasonable contest established by employers.
- Holding: Yes. Section 440 states attorneys fees shall be awarded when there is an unreasonable contest. Even in the event of a reasonable contest, Section 440 states attorneys fees may be awarded by the workers' compensation judge.



## ***Vincent Lorino v. WCAB (Commonwealth of Pennsylvania)***

- Pennsylvania Supreme Court interprets language of Section 440:
  - In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employee or his dependent, as the case may be, in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.
- Allows judges to award attorneys fees in reasonable contest cases at discretion.
- Judge-by-judge basis for attorney's fees in these circumstances, so practitioners will need to learn tendencies of specific judges.
- Many judges have indicated they will not change prior practices of not awarding attorney's fees in reasonable contest cases. May be more likely to do so in "medical only" cases where a percentage cannot be taken from indemnity benefits awarded.
- Provides incentive for claimant's attorneys to pursue litigation and represent claimants in medical only cases.

## ***Stanley Henderson v. WP Ventures (WCAB)***

- Issue: Did an employee sustain an injury within the course and scope of his employment (engaged in the furthering of his employer's business) when he left the employer's premises for a cigarette and sandwich?
- Holding: Yes. After a thorough review of the driver contract and UBER app, the court concluded that the level of control exerted by UBER over drivers suggests that the drivers are not free from control and not engaged in independently established business.

## ***Stanley Henderson v. WP Ventures (WCAB)***

- Claimant was assigned as a custodial worker in a senior citizen community center located inside of a small public park.
- On DOI, the facility he worked in was being cleaned as a result of a roof leak and he was unable to do most of his tasks
- At 4:00 pm, he became hungry and took a break to have a cigarette and get a sandwich at a shop located just outside the park.
- He testified that, when his supervisor was present, he'd ask for permission but if he was busy or not present, Claimant could take limited breaks without permission.
- While walking in the park, he slipped on some ice and was injured.
- "Actually engaged in business affairs" is given liberal construction because of humanitarian purposes of the Act
- Personal comfort doctrine

## ***Skay v. Borjeson (WCAB)***

- Issue: Can a claimant meet her burden of proof on a penalty petition for nonpayment of medical bills using only utilization review determinations that establish care is reasonable and necessary?
- Holding: No. UR Determinations do not decide causal relationship between treatments and the work-related injury.
- Analysis: UR Determination cannot be used to establish causal relationship, as other vehicles available for this purposes, such as a Petition to Review. Payment of medical bills also does not establish causation. Seeking a UR by an employer also does not establish causation.



## ***Webb v. Prime Healthcare Services, Inc. (WCAB)***

- Issue: Whether *Yellow Freight* applies when corporate affiliate address of the employer is used on Claim Petition rather than location where Claimant worked.
- Holding: No. An adequate excuse exists when the wrong address, although affiliated with the Employer, is used for the Claim Petition and Notice of Assignment.

## ***Webb v. Prime Healthcare Services, Inc. (WCAB)***

- Facts and Analysis
  - Several locations used by the employer and WCAIS used an address where the Claimant did not work.
  - Important issue as there has seem to be more late Answer / *Yellow Freight* issues lately due to WCAIS errors, where WCAIS is linking wrong addresses to claims.
  - Just because WCAIS identifies an address, it may not be sufficient to support a *Yellow Freight* motion when it is discovered the address is not accurate for the employer or the proper location where the claimant worked.

## Questions and Comments



*Dauphin County*  
BAR ASSOCIATION

# SESSION #5

## Bankruptcy Law

### **“Bankruptcy’s Impact on the Rest of the Legal Community”**

James K. Jones, Esquire  
Cunningham, Chernicoff & Warshawsky, P.C.

Tracy L. Updike, Esquire  
Mette, Evans & Woodside



## **JAMES K. JONES | Cunningham, Chernicoff and Warshawsky, P.C.**

Mr. Jones is an associate with the Harrisburg firm of Cunningham, Chernicoff and Warshawsky, P.C. in the areas of bankruptcy and civil litigation. He formerly practiced as a staff attorney for the Standing Chapter 13 Trustee for the Middle District of Pennsylvania from 2006 through April of this year. He conducted several seminars on various bankruptcy topics for the Middle District Bankruptcy Bar Association and other groups as well as recently presenting a seminar on judicial estoppel for the Dauphin County Bar Association.



## **Tracy L. Updike | Mette, Evans & Woodside**

Ms. Updike is Of Counsel at Mette, Evans & Woodside in Harrisburg. She focuses her practice in the field of consumer and commercial bankruptcy and creditors' rights. She is a frequent lecturer on bankruptcy topics at the Pennsylvania Bar Institute and for the Middle District Bankruptcy Bar Association. She is an adjunct professor for Bankruptcy Law at Widener Law Commonwealth in Harrisburg.

Tracy received her J.D. from Southwestern University School of Law in Los Angeles, CA. She graduated with high honors from the Pennsylvania State University with a Bachelor of Arts in Psychology. Before returning to Pennsylvania after law school, Tracy worked in the entertainment industry in Los Angeles, California. She is currently licensed to practice law in Pennsylvania and admitted to practice in the United States District Court for the Middle and Eastern Districts of Pennsylvania.

Tracy is currently a member of the Dauphin County, Pennsylvania and American Bar Associations, an active member of both the Board of Middle District Bankruptcy Bar Association and the Advisory Committee to the Middle District Bankruptcy Court, and a member of the National Association of Consumer Bankruptcy Attorneys. She is the Bankruptcy Section Chair for the DCBA.

**Practice Areas:** Bankruptcy and Restructuring | Consumer Bankruptcy | Real Estate Transactions & Litigation | Taxation

**Professional:** National Association of Consumer Bankruptcy Attorneys | Middle District Bankruptcy Bar Association (Past President and current Board Member) | Middle District Bankruptcy Court Advisory Committee | Pennsylvania Bar Association | Dauphin County Bar Association (Bankruptcy Law Section Chair) | Adjunct Professor of Bankruptcy Law, Widener University Commonwealth Law School



# **BANKRUPTCY UPDATE—NOW WHAT DO I DO?**

## **Bankruptcy's Impact Upon the Rest of the Legal Community**

By James K. Jones and Tracy L. Updike

### **I. "Automatic" Stay--§362<sup>1</sup>**

- A. The filing of a bankruptcy petition operates as a stay for most entities and actions.
- B. The stay applies whether the entity knows or does not know of the filing. *Constitution Bank v. Tubbs*, 68 F.3d 685,691 (3<sup>rd</sup> Cir., 1995)
- C. Major Exceptions--§362(b):
  - 1. Criminal actions (§362(b)(1))—Including collection of federal criminal restitution awards. *Partida v. USDOJ*, 862 F. 3d 908 (9<sup>th</sup> Cir., 2013); *Perry Petroleum Ltd., Inc. v. Commonwealth of Pa and E.O. Habegger Co., Inc.*, 2017 WL 123733 (Bankr. M.D.Pa. 2017).
  - 2. Commencement or continuation of paternity, support, custody, divorce (except division of property) and domestic violence actions, and enforcement thereof (wage attachments [limited in Ch. 13 cases by a controlling plan – *See e.g. In re Gonzalez*, 832 F3d 1251 (11<sup>th</sup> Cir., 2016), license suspensions [likewise limited by controlling plan – *See e.g. In re Cobb*, 2006 WL 6591596 (Bankr. N.D.Ga., 2006), tax refund intercepts [also *Gonzalez*], enforcement of medical obligations, etc.) (§362(b)(2)(A)-(G))
  - 3. Enforcement of police and regulatory powers to effect public policy (not for pecuniary purposes) (§362(b)(4)) *In re Kupperstein*, 994 F.3d 673 (1<sup>st</sup> Cir., 2021)
  - 4. Tax audits and deficiency determinations (§362(b)(9)) *H&H Beverage Distributors v. Pa. Dept. of Revenue*, 850 F. 2d 165 (3<sup>rd</sup> Cir., 1988)
  - 5. Eviction under a non-residential lease that terminated pre-petition (§362(b)(10)) *In re Truong*, 557 B.R. 326 (Bankr. D.N.J., 2016)
  - 6. Assessment of real estate taxes (§362(b)(18)) *In re Garnier*, 557 B.R. 349, 351 (Bankr. M.D. Pa., 2016) But the taxing authority cannot attempt to collect such assessment under this exception *Rosas v. Monroe Co. Tax Claim Bureau*, 323 B.R. 893 (Bankr. M.D. Pa., 2004)

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<sup>1</sup> All section references are to the Bankruptcy Code (11 U.S.C) unless otherwise noted.

7. Continuation of a residential eviction if judgment for possession is entered pre-petition (§362(b)(22)) *In re Mason*, 527 Fed. Appx. 118, 119 n. 2 (3<sup>rd</sup> Cir., 2013)

8. Stay applies only to debtor and not to entities owned by the debtor, such as corporations and LLCs. *Maritime Electric Co., v. United Jersey Bank*, 959 F. 2d 1194 (3<sup>rd</sup> Cir., 1991); *In re Zack*, 632 B.R. 168 (Bankr. W.D. Pa., 2020). Conversely a stay against an entity does not generally stay actions against its principals. See *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 509-510 (3<sup>rd</sup> Cir., 1997).

D. Serial Filers (§362(c))

1. If a case was pending but dismissed within a one-year period prior to the filing of the current petition, the stay continues for 30-days, but may be extended upon the showing of good faith and a showing of changed financial circumstances (§362(c)(3))

2. If two or more cases were pending but dismissed within a one-year period prior to the filing of the current petition, the stay does not go in effect until the debtor requests the stay to be imposed and, after notice and hearing, the court grants the request (§362(c)(4))

3. On request of a party, the bankruptcy court will issue an order confirming that the automatic stay is terminated or not in effect (§362(j))

E. Violations of the automatic stay can result in recovery of actual damages, including costs and attorney fees, and punitive damages (§362(k))

II. **Personal Injury and Other Causes of Action**

A. Filing a bankruptcy creates an estate--§541 and 1306

1. The estate includes all legal interests in property of the debtor.

2. The estate includes interests in civil claims held by the debtor *In re Kane*, 628 F. 3d 631 (3<sup>rd</sup> Cir., 2010)

B. The claim remains property of the estate until it is administered §554(d)

1. Includes debtor's recovery in a civil claim.

2. Includes attorney fees and costs recovered in a case.

C. Recommendations:

1. Inquire of clients whether they are in bankruptcy and require disclosure of the claim in their bankruptcy documents if they are in bankruptcy. Do this not just at your intake, but at the time of any settlement or trial – before disbursement!
2. Contact client's bankruptcy attorney to determine remaining exemptions (property debtors can keep) §522. Sometimes you can craft together a settlement that protects a debtor better.
3. Notify Trustee (if in Chapter 7) or debtor's attorney (if in Chapter 13) upon settling the matter. All settlements must be conditioned upon approval of the bankruptcy court.

D. Judicial Estoppel

1. Equitable remedy applicable when a claimant pursues a civil claim in one court and fails to disclose the claim in bankruptcy court. This double dealing can lead to the conclusion that the claim is worthless or has no value due to the representations in the bankruptcy court.
2. Standards—*In re King*, 628 F.3d 631, 638 (3<sup>rd</sup> Cir., 2010)
  - a. Party to be estopped must have taken two positions that are irreconcilably inconsistent;
  - b. Judicial estoppel is unwarranted unless a party changed his or her position in bad faith such as with the intent to play fast and loose with the court;
    - i. A rebuttable inference of bad faith arises when averments in a bankruptcy pleading demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose. *Krystal Cadillac-Olds GMC Truck v. General Motors*, 337 F.3d 314, 321 (3<sup>rd</sup> Cir., 2003)
    - ii. Judicial estoppel does not apply where the prior inconsistent position occurred because of mistake or inadvertence, debtor lacks a motive to conceal the claim (for example, exemptible or pays all creditors), or where debtor rebuts bad faith. *Javery v. Lucent Technologies, Inc.*, 741 F.3d 686,698 (6<sup>th</sup> Cir., 2014)

c. Remedy must be tailored to address the harm identified and no lesser sanction would adequately remedy the damage done.

3. Case example: *Hardee-Guerra v. Shire Pharmaceuticals*, 737 F. Supp. 2d 318 (E.D. Pa., 2010)

a. In 2007, Plaintiff cross-filed complaints with the EEOC and PA Human Relations Commission alleging unlawful discrimination against her because of her pregnancy.

b. In February, 2009, PA HRC issued a “right to sue” letter and in December, 2008, EEOC confirmed the matter was still under investigation and issued a “right to sue” letter on February 26, 2009.

c. On February 22, 2009, plaintiff filed for bankruptcy through another attorney. Plaintiff disclosed none of the claims in her bankruptcy schedules or statements.

d. After the civil suit was filed, District Court granted defendant’s motion for summary judgment based on judicial estoppel. Remedy was to bar her compensatory claims but allow her to pursue equitable relief.

e. Other courts have substituted the bankruptcy trustee for plaintiff to pursue the claim for creditors. *Owens v. Dolgencorp, LLC*, 2013 WL 6795415 (S.D. Ohio, 2013)

f. Also applies while bankruptcy is pending. While plaintiff’s bankruptcy case was pending, plaintiff was terminated on June 9, 2010. Plaintiff made her last payment under her chapter 13 plan on July 20, 2010 without amending her schedules. About a year after the bankruptcy case was closed, plaintiff filed suit. The 6<sup>th</sup> Circuit upheld the district court’s granting of defendant’s motion for judgment on the pleadings thus dismissing the case. *Kimberlin v. Dollar General Corp.*, 520 Fed. Appx. 312 (6<sup>th</sup> Cir., 2013)

### III. Domestic Relations

#### A. Automatic Stay

1. Most actions are not stayed. *Pa DER v. Ingram*, 658 A.2d 435,436 (Pa. Cmwlth., 1995); *Brock v. Marysville Body Works*, 829 F. 2d 383,387 (3<sup>rd</sup> Cir., 1987)

2. State court has concurrent jurisdiction with the bankruptcy court to determine whether the automatic stay applies *Constitution Bank v. Tubbs*, 68 F.3d 685,691 (3<sup>rd</sup> Cir., 1995); *In re Gandy*, 327 B.R. 796 (Bankr. S.D. Tex., 2005); *Brock v. Marysville Body Works*, 829 F. 2d 383,387 (3<sup>rd</sup> Cir., 1987); *In re Welsh*, 2019 WL 3425185 (Bankr. N.D. Ill., 7/30/19) [state court can determine if stay applies but cannot lift it if it does apply]; *contra. In re Dingley*, 514 B.R. 591,597 (9<sup>th</sup> Cir. BAP, 2014)

3. Although bankruptcy courts have jurisdiction over domestic issues, bankruptcy courts may exercise discretion to permissively abstain 28 U.S.C. §1374(c)(1)

4. Bankruptcy court often will accommodate requests to lift the stay to continue pending litigation in state court provided the bankruptcy court retains jurisdiction over property of the estate, which therefore requires bankruptcy court approval of property divisions.

B. Discharge of marital claims

1. Chapter 7 excepts from discharge

a. domestic support obligations (§523(a)(5)) and

b. property settlement agreements and divorce decrees (§523(a)(15))

2. Chapter 13 excepts from discharge domestic support obligations but not property settlement agreements or divorce decrees (§1328(a)(2))

3. “Domestic support obligation” is defined as “. . .a debt. . .that is owed to. . .a spouse [or] a former spouse. . .*in the nature of* alimony, maintenance or support . . . without regard to whether such debt is expressly so designated.” (§101(14A) [emphasis added])

4. The Third Circuit determined the factors to be considered in *Gianakis v. Gianakis*, 917 F. 2d 759 (3<sup>rd</sup> Cir., 1990)

a. The court must look beyond the label attached to an obligation by a settlement agreement to determine its true nature—p.762

b. Determination is a question of federal law—p.762

c. Determination depends upon the intent of the parties or court at the time of the settlement. Intent can best be found by three principal indicators:

- i. The court must examine the language and substance of the agreement in the context of the surrounding circumstances, using extrinsic evidence if possible—p. 762 *In re Stamp*, 626 B.R. 397 (Bankr. E.D. Pa., 2021)
  - ii. The court must examine the financial circumstances at the time of the settlement—p. 762 *In re Bereziak*, 160 B.R. 533 (E.D. Pa., 1993)
  - iii. The court should examine the function served by the obligation at the time of the settlement. An obligation that serves to maintain daily necessities such as food, housing and transportation is indicative of a debt intended to be in the nature of support—p. 762-763 *In re Pollock*, 150 B.R. 584 (Bankr. M.D. Pa., 1992)
- d. In *Gianakis*, since wife had no income at the time of the settlement, and since both parties agreed that it was their intent that wife and their four children would live in the marital residence, the court affirmed the district court's and the bankruptcy court's conclusion that the obligation of husband to pay the second mortgage on the marital residence, in addition to alimony and child support, was in the nature of support.
- e. If the obligation is awarded by a divorce master or state court, *Gianakis* factors are used to determine the intent of the court. *In re Miller*, 424 B.R. 171 (Bankr. M.D. Pa., 2010)
- f. State courts and bankruptcy courts exercise concurrent jurisdiction regarding the federal question of dischargeability. *In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich., 2010) However, once one court determines the issue, the parties are collaterally estopped from relitigating the issue in another court. *In re Bereziak*, 160 B.R. 533 (E.D. Pa., 1993)
- g. Bankruptcy court's determination that an obligation is nondischargeable as not being in the nature of support is not binding on the state court as not being support for enforcement purposes. *In re Tielsch*, 299 B.R. 114 (Bankr. W.D. Pa., 2003)

#### IV. Landlord-Tenant Law

##### A. Automatic Stay--§362(a)(3)

1. Non-residential lease evictions are not stayed by the filing of a bankruptcy provided the lease terminated pre-petition §362(b)(10) *In re Truong*, 557 B.R. 326 (Bankr. D.N.J., 2016)

2. Residential lease evictions for monetary default are not stayed if final judgment for possession (*In re Brown*, 545 B.R. 123 (Bankr. W.D. Pa., 2016) [not applicable if appeal pending]) is entered pre-petition (§362(b)(22)) *In re Williams*, 371 B.R. 102 (Bankr. E.D. Pa., 2007), unless:

a. Under §362(l), debtor files with the bankruptcy petition and serves upon the lessor a certification that:

i. under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor/lessee would be permitted to cure the monetary default after the judgment was entered; and

ii. the debtor has deposited with the clerk of the bankruptcy court any rent that would become due during the 30-day period after filing the petition, which is then transmitted to the lessor;

iii. under these circumstances, exception to stay does not apply for 30 days.

b. If, within 30 days after filing the petition, debtor files a certification with the court and serves it on the lessor that the debtor has cured, under applicable nonbankruptcy law, the entire monetary default that gave rise to the judgment, the exception to the stay does not apply unless ordered to apply by the court.

c. The court can order that the (b)(22) exception does apply if the lessor files and serves an objection to either of the debtor's certifications. If an objection is filed, the court shall hold a hearing within 10 days after the objection is filed to determine if the objected to certification is true. If the court upholds the objection, (b)(22) shall apply immediately and relief from the stay shall not be required to enable the lessor to compete the process to recover full possession of the property.

d. If the debtor indicates on the petition that there was a judgment for possession of residential rental property in which the debtor resides

and does not file either certification as provided, (b)(22) applies immediately and relief from stay is not required to enable the lessor to complete the process to recover full possession of the property.

3. Residential lease objections for property endangerment or drug use are not stayed if (§362(b)(23)):

a. Lessor files and serves upon lessee/debtor a certification that an eviction was filed or during the 30-day period prior to filing the certification the debtor has endangered the property or illegally used or allowed to be used a controlled substance on the property. Under §362(m), the §362(b)(23) exception to the stay becomes effective 15 days after the certification is filed and served.

b. If the debtor files and serves an objection to the truth or legal sufficiency of the certification, the (b)(23) exception does not apply unless ordered by the court. §362(m)(2)(A)

c. If the debtor objects, the court will hold a hearing within 10 days to determine if the situation giving rise to the lessor's certification existed or has been remedied.

d. If the debtor demonstrates that the situation giving rise to the lessor's certification did not exist or has been remedied, the stay remains in effect until otherwise terminated. §362(m)(2)(C) If the debtor is not successful, relief from the stay is not required to proceed with the eviction. §362(m)(2)(D)

e. If the debtor does not object to lessor's certification within 15 days, the (b)(23) exception applies immediately upon the failure to file the objection and relief from the stay is not required to proceed with the eviction. §362(m)(3)



# SESSION #6

Estate Planning & Probate

**“Estate Tax Planning in 2022”**

Neil W. Yahn, Esquire  
JSDC Law



## Neil Warner Yahn, Sr., Partner | JSDC Law Offices

Neil Warner Yahn, Sr., is a partner with the firm of JSDC Law Offices and he also serves on the faculty at Villanova University since 2011 as an adjunct professor where he teaches Individual Taxation and Taxation of Business Entities.

Neil primarily concentrates his law practice on income, partnership, corporate and estate tax matters and related litigation. Neil advises clients with respect to the use of partnerships, S corporations, limited liability companies (LLCs) and other pass-through entities to assist clients in a wide range of tax planning matters. He works with our clients to use pass-through entities to avoid double taxation, to allow business owners to obtain the full benefit of tax losses or tax incentives, and to minimize the tax impact of various asset acquisitions or dispositions. In the controversy area, Neil has represented clients at the audit and appellate levels of the IRS and in litigation before the U.S. Tax Court. He has also represented large estates and beneficiaries in disputes over testamentary documents and claims of undue influence.

Neil also writes and lectures extensively on tax planning topics and related matters for the Pennsylvania Bar Institute, the Pennsylvania Institute for Certified Public Accountants and the Financial Planning Association. He is a graduate of the Villanova University School of Law. At Villanova, Neil earned his Juris Doctorate and Masters in Taxation (LL.M.). Neil supplemented his Masters in Taxation from the Georgetown University Law Center where he focused on employee benefits, employer plan designs and fiduciary provisions under ERISA.

Neil is AV Rated.

**PRACTICE AREAS:** Estate Planning and Administration | Business Law | Tax Law | Funeral Law

**EDUCATION:** Georgetown University Law Center (C.E.B., 2006) | Villanova University (LL.M. Taxation, 2002) | Villanova University School of Law (J.D., 1998) | West Chester University (B.S., 1992)



# Estate Tax Planning in 2022

DAUPHIN COUNTY BAR ASSOCIATION

AUGUST 2022

NEIL WARNER YAHN, ESQUIRE (LL.M.) – JSDC LAW



# Today's Agenda

## **Federal Estate and Gift Tax**

1. 706 - Federal Estate Tax – Rev Proc – 2022-32
2. 709 - Federal Gift Tax

## 2. FEDERAL ESTATE TAX

Form <b>706</b> (Rev. August 2013) Department of the Treasury Internal Revenue Service		<b>United States Estate (and Generation-Skipping Transfer) Tax Return</b>  ▶ Estate of a citizen or resident of the United States (see instructions). To be filed for decedents dying after December 31, 2012. ▶ Information about Form 706 and its separate instructions is at <a href="http://www.irs.gov/form706">www.irs.gov/form706</a> .		OMB No. 1545-0015
Part 1—Decedent and Executor	1a Decedent's first name and middle initial (and maiden name, if any)	1b Decedent's last name	2 Decedent's social security no. .....	
	3a City, town, or post office; county; state or province; country; and ZIP or foreign postal code.	3b Year domicile established	4 Date of birth	5 Date of death
		6b Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code) and phone no.          Phone no.		
	6a Name of executor (see instructions)			
	6c Executor's social security number (see instructions) .....			
6d If there are multiple executors, check here <input type="checkbox"/> and attach a list showing the names, addresses, telephone numbers, and SSNs of the additional executors.				
7a Name and location of court where will was probated or estate administered				7b Case number



# Federal Estate Tax (Cont.)

- **40% tax**
- Date of death value
- Basic exclusion amount (unified Estate and Gift):

1997	\$ 600,000
2002	\$ 1,000,000
2017	\$ 5,490,000
2018	\$11,180,000
2019	\$11,400,000
2020	\$11,580,000
2021	\$11,700,000
<b>2022</b>	<b>\$12,060,000</b>

The current estate and gift tax exemption is scheduled to end on the last day of 2025 and thus in 2026 \$ 5,000,000 (\*\* as adjusted for inflation)



# Federal Estate Tax (Cont.)

- 40% tax
- Basic exclusion amount (unified Estate and Gift):  
**2021    \$11,700,000**

*So what is the Estate Tax Credit on \$11,700,000?*

$$\begin{array}{r} \text{First} \quad \$ 1,000,000 = \$345,800 \\ \quad \$10,700,000 \\ \quad \quad \times 40\% = \$4,280,000 \\ \hline \quad \quad \quad \$4,625,800 \end{array}$$

Generally each individual taxpayer is allocated a dollar amount to give away during his or her lifetime and bequeath at death to avoid a federal transfer tax. For 2021, that dollar amount is \$11,700,000, which is referred to as the federal basic exclusion amount (also known as “estate and gift tax exemption”). This exclusion or exemption amount correlates to an actual tax amount known as the “applicable credit” (formerly “unified credit”). Thus as per above the \$11,700,000 exclusion produces an Estate Tax or/and Gift Tax of \$4,625,800 (“credit”).



- ## So what is the Estate Tax Credit on \$12,060,000?

Generally each individual taxpayer is allocated a dollar amount to give away during his or her lifetime and bequeath at death to avoid a federal transfer tax. For 2022, that dollar amount is \$12,060,000, which is referred to as the federal basic exclusion amount (also known as “estate and gift tax exemption”). This exclusion or exemption amount correlates to an actual tax amount known as the “applicable credit” (formerly “unified credit”). Thus as per above the \$12,060,000 exclusion produces an Estate Tax or/and Gift Tax of \$4,769,800 (“credit”).



# What are the current estate and gift tax exemptions, and do they 'expire'?

- The increased exemption amounts are scheduled to cease at the end of the year **2025**, but see:
  - IRS, “Final regulations confirm: Making large gifts now won’t harm estates after 2025.”
    - [https://www.irs.gov/newsroom/final-regulations-confirm-making-large-gifts-now-wont-harm-estates-after-2025?fbclid=IwAR1KvcLVEM2T1wr2E\\_eEqWRZX36vqyUI\\_N1WWUwa0BDEMTtIVz3ce\\_iPdRI](https://www.irs.gov/newsroom/final-regulations-confirm-making-large-gifts-now-wont-harm-estates-after-2025?fbclid=IwAR1KvcLVEM2T1wr2E_eEqWRZX36vqyUI_N1WWUwa0BDEMTtIVz3ce_iPdRI)

# Estate Tax – Portability

- Decedents dying after 1/1/2011
- Elect to transfer unused basic exclusion amount to surviving spouse, known as the **Deceased Spousal Unused Exclusion (DSUE)**
- **Code § 2010(c)(5)(A)** states that an election must be made on a return that must be filed within the time “prescribed by law.”
- Why file the 706 if under the Estate Tax exemption?

## Preserve the DSUE



# Revenue Procedure 2022-32

## New tax savings opportunity was effective July 8, 2022!

- ▶ The Section 2010 (c)(5)(A) of the Internal Revenue Code allows certain taxpayers a simplified way to make a portability election in order to reduce the number of letter ruling requests.

## The portability election to elect DSUE:

- ▶ **Previously:** had to be made within nine months of the decedent's date of death if a Form 706 was required **or within two years of death if a Form 706 was not required as per Rev Proc 2017-34**
- ▶ **Now: within five years of the decedent's date of death under Rev Proc. 2022-32**

# Estate Tax – Portability (Cont.)

- Timely filed federal estate tax return or filed “Pursuant to Rev. Proc. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(a)”
- But now use
  - <https://www.irs.gov/pub/irs-drop/rp-22-32.pdf>



# Qualify for Revenue Procedures:

- ▶ Since the publication of Rev. Proc. 2017-34, the IRS has continued to issue numerous letter rulings under § 301.9100-3 granting an extension of time to elect portability under § 2010(c)(5)(A) in situations in which the decedent's estate was not required by § 6018(a) to file an estate tax return and the time for obtaining relief under the simplified method had expired. The IRS has observed that a significant percentage of these ruling requests have been from estates of decedents who died within five years preceding the date of the request. The number of these requests continues to place a significant burden on the available resources of the IRS. The Treasury Department and the IRS have determined that the considerable number of ruling requests for an extension of time to elect portability received since the publication of Rev. Proc. 2017- 34 indicates a need for continuing relief for the estates of decedents having no filing requirement under § 6018(a).
- ▶ Accordingly, this revenue procedure supersedes Rev. 4 Proc. 2017-34 and updates the procedures set forth therein by extending the period within which the estate of a decedent may make the portability election under that simplified method to on or before the fifth anniversary of the decedent's date of death.



# Estate Tax – Portability (Cont.)

- Rev Proc 2032-32
- SECTION 3. SCOPE
- The simplified method of this revenue procedure is available to the executor (either an appointed executor or, if none, a non-appointed executor, as provided in § 20.2010-2(a)(6)) of the estate of a decedent if:
  - (1) The decedent: (a) was survived by a spouse; (b) died after December 31, 2010; and (c) was a citizen or resident of the United States on the date of death.
  - (2) The executor is not required to file an estate tax return under § 6018(a) as determined based on the value of the gross estate and adjusted taxable gifts and without regard to the need to file for portability purposes;
  - (3) The executor did not file an estate tax return within the time required by § 20.2010-2(a)(1) for filing an estate tax return; and
  - (4) The executor satisfies all requirements of section 4.01 of this revenue procedure.



# Revenue Procedure 2022-32 (Cont.)

- ▶ If the surviving spouse has already passed away and paid the estate tax, the executor of the surviving spouse's estate can file a protective claim for a refund or credit. This credit is for any over payment of tax within the next three years after filing.
- ▶ The statute of limitations still applies under the IRC Section 6511(a) if the increase in the surviving spouse's exemption amount with the addition of the DSUE is now an overpayment of gift or estate tax.
  - ▶ In anticipation of the DSUE being added to the exemption, the surviving spouse can file a protective claim for credit in anticipation of the DSUE. This will prevent the spouse from the statute of limitations barring their credit.
- ▶ The grant of relief will be null if it is later determined that the estate needed to file a return.
- ▶ IRS Revenue Procedure 2022-32 PDF:
  - ▶ <https://www.irs.gov/pub/irs-drop/rp-22-32.pdf>



# Estate Tax Portability – (Example)

- John dies 1/1/2022 with \$3,000,000 passing all to wife
- Jane, wife, already has \$3,000,000 and John's basic exclusion \$12,060,000 in 2022 (year of his death)
- DSUE to wife by filing a timely 706 \$12,060,000 (marital deduction)
- **What if missed the filing – are we too late?**
  - \*\*\* Filed Pursuant to Rev. Proc. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(a) \*\*\* Nine months from date of death the 706 is due.



# Estate Tax – Portability (Example)

- DSUE applies to:

- Surviving spouse lifetime gifting first
- Then to surviving spouse's estate

- Wife can shield  
her Exemption in 2026\*\*\*

\$12,060,000	(DSUE) and
<u>\$ 5,000,000</u>	<u>(Exemption phased out)</u>
\$17,060,000	DSUE and Exemption

► \*\*\* 2026 Exemption is unknown – illustration only

# Estate Tax – Portability (Cont.)

- Filing for portability only:
  - Page 1 – Box 11: If you are estimating the value of assets included in the gross estate on line 1 pursuant to the special rule of Reg. section 20.2010-2T(a)(7)(ii) check here.



# Estate Tax – Portability (Cont.)

**Table of Estimated Values**

<b>If the total estimated value of the assets eligible for the special rule under Reg. section 20.2010-2T(a)(7)(ii) is more than</b>	<b>But less than or equal to</b>	<b>Include this amount on lines 10 and 23:</b>
\$0	\$250,000	\$250,000
\$250,000	\$500,000	\$500,000
\$500,000	\$750,000	\$750,000
\$750,000	\$1,000,000	\$1,000,000

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**MARY AND BILL SMITH –  
Estate Tax Form 706  
DCBA HYPO**

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**Smith Family**



# Bill & Mary Smith – Married 2019 – Second Marriage





# The New Smith Family

Susan (Mary's daughter from  
prior marriage)

Mary

Bill

Neil (Bill's son from  
prior marriage)





## Mary's Estate \$11,000,000

- ▶ Marketable Securities: \$4,000,000
  - ▶ Apple Inc Stock \$2,000,000
  - ▶ Rite Aid Stock: \$1,000,000
  - ▶ Hershey Stock: \$1,000,000
- ▶ Cocoa LLC (closely held business): \$4,000,000 (Valuation - Capitalization of Earnings)(makes wrappers for Hershey Kisses)
- ▶ Commercial Property – Cocoa Ave Hershey, PA: \$3,000,000 \*(20,000 SF)

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## Bill's Estate \$6,000,000

- ▶ Shore Property: Avalon NJ 08008 – Parcel 10 – Block 8 Cape May County NJ: \$2,000,000
- ▶ Marketable Securities: IRA – \$2,000,000
- ▶ Life Insurance: \$2,000,000 (owned by Bill on his life payable to Neil on his death)

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Owned Jointly by and between Bill and Mary

- ▶ Primary Residence: \$2,000,000 – 124 Bloomingdale Ave Wayne, Pa (not encumbered)

Total Combined Assets: \$ 19,000,000 (with insurance)



Bill dies in 2021 leaves life insurance to Neil and IRA DB Form. The Avalon shore property into a QTIP Trust for Mary (valued at \$2,000,000)



- **Estate Tax Exemption 2021: \$11,700,000**
- **Complete Form 706 and use DSUE**
- **At end of QTIP, trust assets go to Neil**



Mary dies in 2026 and  
leaves all her assets to  
Susan... what is exemption?  
\$5,000,000? Joint Property?

Prepare 706 – QTIP Trust  
assets now worth \$3,000,000  
which goes to Neil?



Cocoa LLC - U.S. Income Tax Return (Form 1120) HYPO DCBA						
2017 to 2021						
		12/01/2017 - 11/30/2018	12/01/2018 - 11/30/2019	12/01/2019 - 11/30/2020	12/01/2020 - 11/30/2021	Average
1a	Gross receipts or sales	\$ 17,142,632.00	\$ 18,848,679.00	\$ 14,940,017.00	\$ 12,414,075.00	\$ 15,836,350.75
1b	Returns and Allowances					#DIV/0!
1c	Balance. Subtract line 1b from line 1a	\$ 17,142,632.00	\$ 18,848,679.00	\$ 14,940,017.00	\$ 12,414,075.00	\$ 15,836,350.75
2	Cost of goods sold	\$ 13,862,568.00	\$ 14,333,073.00	\$ 11,425,012.00	\$ 10,279,061.00	\$ 12,474,928.50
3	Gross Profit	\$ 3,280,064.00	\$ 4,515,606.00	\$ 3,515,005.00	\$ 2,135,014.00	\$ 3,361,422.25
4	Interest	\$ 21,568.00	\$ 54,468.00	\$ 40,767.00	\$ 15,958.00	\$ 33,190.25
5	Net Gain/Loss		\$ (68,140.00)			\$ (68,140.00)
6	Other Income	\$ 283,007.00	\$ 269,391.00	\$ 193,136.00	\$ 1,430,902.00	\$ 544,109.00
7	Total Income	\$ 3,584,639.00	\$ 4,771,325.00	\$ 3,748,908.00	\$ 3,581,874.00	\$ 3,921,686.50
8	Compensation of officers	\$ 593,414.00	\$ 579,826.00	\$ 858,512.00	\$ 736,066.00	\$ 691,954.50
9	Salaries and wages	\$ 1,437,230.00	\$ 1,785,543.00	\$ 1,295,795.00	\$ 1,702,716.00	\$ 1,555,321.00
10	Repairs and maintenance	\$ 72,589.00	\$ 82,309.00	\$ 60,838.00	\$ 75,711.00	\$ 72,861.75
11	Bad Debts	\$ 19,900.00	\$ 1,643.00	\$ 207.00	\$ 1,250.00	\$ 5,750.00
12	Rents	\$ 100,027.00	\$ 104,569.00	\$ 116,356.00	\$ 82,182.00	\$ 100,783.50
13	Taxes and licenses	\$ 246,712.00	\$ 323,378.00	\$ 313,199.00	\$ 309,830.00	\$ 298,279.75
14	Interest	\$ 79,986.00	\$ 90,955.00	\$ 92,787.00	\$ 68,899.00	\$ 83,156.75
15	Charitable contributions	\$ 37,662.00	\$ 14,687.00	\$ 81,756.00	\$ 30,962.00	\$ 41,266.75
16	Depreciation not claimed	\$ 741,902.00	\$ 1,343,545.00	\$ 404,591.00	\$ 341,661.00	\$ 707,924.75
17	Depletion					
18	Advertising	\$ 36,524.00	\$ 10,369.00	\$ 9,293.00	\$ 18,155.00	\$ 18,585.25
19	Pension, profit-sharing, etc.	\$ 67,801.00	\$ 164,283.00	\$ 136,342.00	\$ 177,494.00	\$ 136,480.00
20	Employee benefit programs	\$ 211,515.00	\$ 200,755.00	\$ 203,374.00	\$ 196,360.00	\$ 203,001.00
21	Domestic Production activites deduction	\$ 30,356.00				\$ 30,356.00
22	Other deductions	\$ (399,578.00)	\$ (623,863.00)	\$ (684,378.00)	\$ (801,265.00)	\$ (627,271.00)
23	Total deductions	\$ 3,276,040.00	\$ 4,077,999.00	\$ 2,888,672.00	\$ 2,940,021.00	\$ 3,295,683.00
24	Ordinary business income (pre tax)	\$ 308,599.00	\$ 693,326.00	\$ 860,236.00	\$ 641,853.00	\$ 626,003.50

Capitalization Rate	12%
Value of Asset (Business)	\$ 5,216,695.83
Capitalization Rate	14%
Value of Asset (Business)	\$ 4,471,453.57
Capitalization Rate	16%
Value of Asset (Business)	\$ 3,912,521.88
Capitalization Rate	17.66%
Value of Asset (Business)	\$ 3,544,753.68
Capitlization Rate	20%
Value of Asset (Business)	\$ 3,130,017.50





**Please see handout – Bill Smith and Mary Smith Forms 706**



## 2. Federal Gift Tax - Who must file a Gift Tax Return and the Annual Exclusion?

If a gift qualifies for the Gift Tax Annual Exclusion, then some or all of the gift will not utilize the donor's applicable exclusion amount for lifetime gifts, depending on the size of the gift. For 2022, the gift tax annual exclusion is \$16,000 per donor per donee.

This amount is indexed for inflation. I.R.C § 2503(b)(1). If a donor makes a gift to a donee in excess of the gift tax annual exclusion, assuming the gift qualifies for the gift tax annual exclusion, then the reportable value of the gift will be reduced by \$16,000. Only gifts of "present interests" qualify for the gift tax annual exclusion.

A gift is a present interest if the donee has an immediate right to use, possess, or enjoy the property. Treas. Reg. § 25.2503-3. When gifts are made to a trust, the terms of the trust will often provide beneficiaries with a Crummey right of withdrawal, which gives the beneficiary an absolute right to withdraw the gift or a certain portion of the gift during a stated time. Frequently this right of withdrawal is for 60 days. This right of withdrawal helps to qualify the gift as a present interest. Gifts of future interests do not qualify for the gift tax annual exclusion. Examples of future interests include remainders, reversions, and any other interest that commences in use, possession, or enjoyment at some future time. Treas. Reg. § 25.2503-2. A gift of a future interest must be reported at its full value and uses an amount of the donor's lifetime gift tax exemption equal to the fair market value of the gift.



# Gift Tax Return – Form 709

Gift Tax Return is due by **April 15th** of the year after the gift was made.

- If the taxpayer files for an extension of time to file his or her personal Income Tax Return, the taxpayer will also receive a 6-month extension to file the Gift Tax Return. (See Treas. Reg. § 25.6081-1(a)).
- The taxpayer may also request an extension specific only to the filing of the Gift Tax Return by filing a Form 8892 and will receive a 6-month extension to file the Gift Tax Return.
- This might mean that there is a great advantage to using the current \$12,060,000 exemption now, or as much of it as possible before a change is enacted as per above.



# Who must file a Form 709?

A donor **does not need to file a 709** if one of the following exceptions applies:

1) If the donor transfers amounts to donees that do not exceed the “annual exclusion;”

- If the donor transfers an amount in excess of the annual exclusion to a donee and splits the gift with his or her spouse, a gift tax return will need to be filed even if the amount is less than twice the annual exclusion. In such cases, only the donor spouse needs to file a gift tax return.

- For example, if Husband’s only gift is a \$25,000 gift to Son, Wife makes no gifts during the year. Husband splits the gift with Wife. A 709 will need to be filed by Husband even though the gift is less than \$30,000 which is two times the \$15,000 annual exclusion. In this example, Wife will not need to file a separate 709 but will need to sign Husband’s 709 indicating her consent to split the gift.

2) If the donor and the donor’s spouse are U.S. citizens, and the donor transfers assets to his or her spouse that qualify for the gift tax marital deduction;

In order to qualifying for the Gift Tax Marital Deduction: The spouses must have been married to each other at the time the gift was made; The donee spouse must have been a U.S. citizen; and the asset transferred by the donor must NOT have been a nondeductible terminable interest as defined by I.R.C § 2523(b). If a donor transferred assets to his or her spouse that would qualify as QTIP property, the donor MUST file a Form 709 to make such election. Treas. Reg. § 25.6019-1(a). There is no relief available for late filing to make the QTIP election.



# Common 709 Mistakes

- 1. Failure to properly use the DSUE! Attached the first four pages of the 706 granting the DSUE.**
2. Insufficient information to provide “adequate disclosure” to the IRS. This prevents the statute of limitations on the ability of the IRS to audit the gift from starting to run. As a result, the IRS will have an unlimited time to audit the gift.
3. The return is filed and does not utilize the client’s annual exclusion to reduce the value of the reportable gifts that are made. When the preparer does not reduce the value of the reported gifts by the donor’s applicable annual exclusions, then a portion of the donor’s gift and estate tax exemption is wasted, which could cause the family to owe unnecessary gift or estate tax.



# Common 709 Mistakes

4. The gift tax return does not exclude from the reportable gifts the gifts which qualify for the educational or medical exclusion. This oversight will also unnecessarily use the donor's lifetime gift and estate tax exemption, which could cause the family to owe additional gift or estate tax.
5. The return misreports gifts to 529 plans that exceed the annual exclusion. Gifts to 529 plans can be spread out over a period of 5 years, but this election must be affirmatively made on a gift tax return. If a gift to a 529 plan in excess of the annual exclusion is not split, then the gift will use some of the donor's gift tax exemption, which could cause the family to owe unnecessary gift or estate tax.



# Common 709 Mistakes

6. The return is prepared assuming that annual exclusion gifts also qualify for the GST tax annual exclusion. Most gifts that qualify for the gift tax annual exclusion that are made to **trusts do not qualify for the GST tax annual exclusion and utilize some of the client's GST tax exemption**. If these are misreported, then the client may have less GST tax exemption remaining than what is stated on the return, which could significantly impact future planning.
7. When a gift is made to a trust (including a trust for Crummey), the 709 is filed without attaching either a copy of the trust or a brief description of the trust's terms to the return. Pursuant to Treasury Regulations, if a reportable gift is made to a trust and the gift tax return is filed without attaching either a copy of the trust or a brief description of the trust's terms, then adequate disclosure has not been provided to the IRS.



# Common 709 Mistakes

8. Gifts made to trusts which are not direct skips for GST tax purposes are reported on Schedule A Part 2 and not on Schedule A Part 3. Returns prepared this way are incorrect and might be considered to not provide adequate disclosure.
9. The possibility of opting out of the automatic allocation of GST Exemption is not considered. If the value of property that was an indirect skip has decreased when the gift tax return is filed, the return preparer should consider opting out of the automatic allocation of GST Exemption. In this case, a second return could be filed allocating GST exemption equal to the reduced value of the property, thereby saving the client's GST exemption. It is important to note that this should only be considered for indirect skips and not direct skips, otherwise GST tax would be payable.



Form **706**

(Rev. August 2019)

Department of the Treasury  
Internal Revenue Service**United States Estate (and Generation-Skipping Transfer)  
Tax Return**► **Estate of a citizen or resident of the United States (see instructions). To be filed for  
decedents dying after December 31, 2018.**► **Go to [www.irs.gov/Form706](http://www.irs.gov/Form706) for instructions and the latest information.**

OMB No. 1545-0015

<b>Part 1—Decedent and Executor</b>	<b>1a</b> Decedent's first name and middle initial (and maiden name, if any) <b>Bill</b>	<b>1b</b> Decedent's last name <b>Smith</b>		<b>2</b> Decedent's social security no. <b>000 00 0000</b>		
	<b>3a</b> City, town, or post office; county; state or province; country; and ZIP or foreign postal code <b>Wayne, PA</b>	<b>3b</b> Year domicile established	<b>4</b> Date of birth	<b>5</b> Date of death <b>2021</b>		
	<b>6a</b> Name of executor (see instructions) <b>xxx xxxxxx</b>	<b>6b</b> Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code) and phone no. <b>800 E Lancaster AVE, Villanova, PA</b>  Phone no.				
	<b>6c</b> Executor's social security number (see instructions) <b>000 00 0000</b>					
	<b>6d</b> If there are multiple executors, check here <input type="checkbox"/> and attach a list showing the names, addresses, telephone numbers, and SSNs of the additional executors.					
<b>7a</b> Name and location of court where will was probated or estate administered				<b>7b</b> Case number		
<b>8</b> If decedent died testate, check here <input type="checkbox"/> and attach a certified copy of the will. <b>9</b> If you extended the time to file this Form 706, check here <input type="checkbox"/>						
<b>10</b> If Schedule R-1 is attached, check here <input type="checkbox"/> <b>11</b> If you are estimating the value of assets included in the gross estate on line 1 pursuant to the special rule of Reg. section 20.2010-2(a)(7)(ii), check here <input type="checkbox"/>						
<b>Part 2—Tax Computation</b>	<b>1</b> Total gross estate less exclusion (from Part 5—Recapitulation, item 13)			<b>1</b>	<b>7,000,000</b>	
	<b>2</b> Tentative total allowable deductions (from Part 5—Recapitulation, item 24)			<b>2</b>	<b>3,000,000</b>	
	<b>3a</b> Tentative taxable estate (subtract line 2 from line 1)			<b>3a</b>	<b>4,000,000</b>	
	<b>b</b> State death tax deduction			<b>3b</b>	<b>0</b>	
	<b>c</b> Taxable estate (subtract line 3b from line 3a)			<b>3c</b>	<b>4,000,000</b>	
	<b>4</b> Adjusted taxable gifts (see instructions)			<b>4</b>	<b>0</b>	
	<b>5</b> Add lines 3c and 4			<b>5</b>	<b>4,000,000</b>	
	<b>6</b> Tentative tax on the amount on line 5 from Table A in the instructions			<b>6</b>	<b>1,545,800</b>	
	<b>7</b> Total gift tax paid or payable (see instructions)			<b>7</b>	<b>0</b>	
	<b>8</b> Gross estate tax (subtract line 7 from line 6)			<b>8</b>	<b>1,545,800</b>	
	<b>9a</b> Basic exclusion amount			<b>9a</b>	<b>11,700,000</b>	
	<b>b</b> Deceased spousal unused exclusion (DSUE) amount from predeceased spouse(s), if any (from Section D, Part 6—Portability of Deceased Spousal Unused Exclusion)			<b>9b</b>	<b>0</b>	
	<b>c</b> Restored exclusion amount (see instructions)			<b>9c</b>	<b>0</b>	
	<b>d</b> Applicable exclusion amount (add lines 9a, 9b, and 9c)			<b>9d</b>	<b>11,700,000</b>	
	<b>e</b> Applicable credit amount (tentative tax on the amount in line 9d from Table A in the instructions)			<b>9e</b>	<b>4,625,800</b>	
	<b>10</b> Adjustment to applicable credit amount (May not exceed \$6,000. See instructions.)			<b>10</b>	<b>0</b>	
	<b>11</b> Allowable applicable credit amount (subtract line 10 from line 9e)			<b>11</b>	<b>4,625,800</b>	
<b>12</b> Subtract line 11 from line 8 (but do not enter less than zero)			<b>12</b>	<b>0</b>		
<b>13</b> Credit for foreign death taxes (from Schedule P). (Attach Form(s) 706-CE.)			<b>13</b>	<b>0</b>		
<b>14</b> Credit for tax on prior transfers (from Schedule Q)			<b>14</b>	<b>0</b>		
<b>15</b> Total credits (add lines 13 and 14)			<b>15</b>	<b>0</b>		
<b>16</b> Net estate tax (subtract line 15 from line 12)			<b>16</b>	<b>0</b>		
<b>17</b> Generation-skipping transfer (GST) taxes payable (from Schedule R, Part 2, line 10)			<b>17</b>	<b>0</b>		
<b>18</b> Total transfer taxes (add lines 16 and 17)			<b>18</b>	<b>0</b>		
<b>19</b> Prior payments (explain in an attached statement)			<b>19</b>	<b>0</b>		
<b>20</b> Balance due (or overpayment) (subtract line 19 from line 18)			<b>20</b>	<b>0</b>		

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than the executor) is based on all information of which preparer has any knowledge.

**Sign  
Here**

Signature of executor

Date

Signature of executor

Date

**Paid  
Preparer  
Use Only**

Print/Type preparer's name

**Neil Yahn**

Preparer's signature

Date

Check ☐ if  
self-employed

PTIN

Firm's name ► **JSDC LLP**

Firm's EIN ►

Firm's address ► **11 East Chocolate AVE, Hershey, PA, 17033**

Phone no.



Decedent's social security number

Estate of:

**Part 4—General Information** (continued)

If you answer "Yes" to any of the following questions, you must attach additional information as described.

	Yes	No
<b>10</b> Did the decedent at the time of death own any property as a joint tenant with right of survivorship in which (a) one or more of the other joint tenants was someone other than the decedent's spouse, and (b) less than the full value of the property is included on the return as part of the gross estate? If "Yes," you must complete and attach Schedule E . . . . .		
<b>11a</b> Did the decedent, at the time of death, own any interest in a partnership (for example, a family limited partnership), an unincorporated business, or a limited liability company; or own any stock in an inactive or closely held corporation? . . . . .		
<b>b</b> If "Yes," was the value of any interest owned (from above) discounted on this estate tax return? If "Yes," see the instructions on reporting the total accumulated or effective discounts taken on Schedule F or G . . . . .		
<b>12</b> Did the decedent make any transfer described in sections 2035, 2036, 2037, or 2038? See instructions. If "Yes," you must complete and attach Schedule G . . . . .		
<b>13a</b> Were there in existence at the time of the decedent's death any trusts created by the decedent during his or her lifetime? . . . . .		
<b>b</b> Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship? . . . . .		
<b>c</b> Was the decedent receiving income from a trust created after October 22, 1986, by a parent or grandparent? . . . . . If "Yes," was there a GST taxable termination (under section 2612) on the death of the decedent? . . . . .		
<b>d</b> If there was a GST taxable termination (under section 2612), attach a statement to explain. Provide a copy of the trust or will creating the trust, and give the name, address, and phone number of the current trustee(s).		
<b>e</b> Did the decedent at any time during his or her lifetime transfer or sell an interest in a partnership, limited liability company, or closely held corporation to a trust described in line 13a or 13b? . . . . . If "Yes," provide the EIN for this transferred/sold item. ►		
<b>14</b> Did the decedent ever possess, exercise, or release any general power of appointment? If "Yes," you must complete and attach Schedule H		
<b>15</b> Did the decedent have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? . . . . .		
<b>16</b> Was the decedent, immediately before death, receiving an annuity described in the "General" paragraph of the instructions for Schedule I or a private annuity? If "Yes," you must complete and attach Schedule I . . . . .		
<b>17</b> Was the decedent ever the beneficiary of a trust for which a deduction was claimed by the estate of a predeceased spouse under section 2056(b)(7) and which is not reported on this return? If "Yes," attach an explanation . . . . .		

**Part 5—Recapitulation.** **Note:** If estimating the value of one or more assets pursuant to the special rule of Reg. section 20.2010-2(a)(7)(ii), enter on both lines 10 and 23 the amount noted in the instructions for the corresponding range of values. See instructions for details.

Item no.	Gross estate	Alternate value	Value at date of death
<b>1</b>	Schedule A—Real Estate . . . . .	<b>1</b>	<b>2,000,000</b>
<b>2</b>	Schedule B—Stocks and Bonds . . . . .	<b>2</b>	
<b>3</b>	Schedule C—Mortgages, Notes, and Cash . . . . .	<b>3</b>	
<b>4</b>	Schedule D—Insurance on the Decedent's Life (attach Form(s) 712) . . . . .	<b>4</b>	<b>2,000,000</b>
<b>5</b>	Schedule E—Jointly Owned Property (attach Form(s) 712 for life insurance) . . . . .	<b>5</b>	<b>1,000,000</b>
<b>6</b>	Schedule F—Other Miscellaneous Property (attach Form(s) 712 for life insurance) . . . . .	<b>6</b>	
<b>7</b>	Schedule G—Transfers During Decedent's Life (att. Form(s) 712 for life insurance) . . . . .	<b>7</b>	
<b>8</b>	Schedule H—Powers of Appointment . . . . .	<b>8</b>	
<b>9</b>	Schedule I—Annuities . . . . .	<b>9</b>	<b>2,000,000</b>
<b>10</b>	Estimated value of assets subject to the special rule of Reg. section 20.2010-2(a)(7)(ii) . . . . .	<b>10</b>	
<b>11</b>	Total gross estate (add items 1 through 10) . . . . .	<b>11</b>	<b>7,000,000</b>
<b>12</b>	Schedule U—Qualified Conservation Easement Exclusion . . . . .	<b>12</b>	
<b>13</b>	Total gross estate less exclusion (subtract item 12 from item 11). Enter here and on line 1 of Part 2—Tax Computation . . . . .	<b>13</b>	<b>7,000,000</b>
Item no.	Deductions		Amount
<b>14</b>	Schedule J—Funeral Expenses and Expenses Incurred in Administering Property Subject to Claims . . . . .	<b>14</b>	
<b>15</b>	Schedule K—Debts of the Decedent . . . . .	<b>15</b>	
<b>16</b>	Schedule K—Mortgages and Liens . . . . .	<b>16</b>	
<b>17</b>	Total of items 14 through 16 . . . . .	<b>17</b>	
<b>18</b>	Allowable amount of deductions from item 17 (see the instructions for item 18 of the Recapitulation) . . . . .	<b>18</b>	
<b>19</b>	Schedule L—Net Losses During Administration . . . . .	<b>19</b>	
<b>20</b>	Schedule L—Expenses Incurred in Administering Property Not Subject to Claims . . . . .	<b>20</b>	
<b>21</b>	Schedule M—Bequests, etc., to Surviving Spouse . . . . .	<b>21</b>	<b>3,000,000</b>
<b>22</b>	Schedule O—Charitable, Public, and Similar Gifts and Bequests . . . . .	<b>22</b>	
<b>23</b>	Estimated value of deductible assets subject to the special rule of Reg. section 20.2010-2(a)(7)(ii) . . . . .	<b>23</b>	
<b>24</b>	Tentative total allowable deductions (add items 18 through 23). Enter here and on line 2 of the Tax Computation . . . . .	<b>24</b>	<b>3,000,000</b>



Decedent's social security number

Estate of:

**Part 6—Portability of Deceased Spousal Unused Exclusion (DSUE)****Portability Election**

A decedent with a surviving spouse elects portability of the DSUE amount, if any, by completing and timely filing this return. No further action is required to elect portability of the DSUE amount to allow the surviving spouse to use the decedent's DSUE amount.

**Section A. Opting Out of Portability**

The estate of a decedent with a surviving spouse may opt out of electing portability of the DSUE amount. Check here and do not complete Sections B and C of Part 6 only if the estate opts **NOT** to elect portability of the DSUE amount. ☐

**Section B. Qualified Domestic Trust (QDOT)**

Yes No

Are any assets of the estate being transferred to a QDOT? ☐

If "Yes," the DSUE amount portable to a surviving spouse (calculated in Section C, below) is preliminary and shall be redetermined at the time of the final distribution or other taxable event imposing estate tax under section 2056A. See instructions for more details.

**Section C. DSUE Amount Portable to the Surviving Spouse** (To be completed by the estate of a decedent making a portability election.)

Complete the following calculation to determine the DSUE amount that can be transferred to the surviving spouse.

1	Enter the amount from line 9d, Part 2—Tax Computation . . . . .	1	11,700,000
2	Reserved . . . . .	2	
3	Enter the value of the cumulative lifetime gifts on which tax was paid or payable. See instructions . . . . .	3	0
4	Add lines 1 and 3 . . . . .	4	11,700,000
5	Enter amount from line 10, Part 2—Tax Computation . . . . .	5	0
6	Divide amount on line 5 by 40% (0.40) (do not enter less than zero) . . . . .	6	0
7	Subtract line 6 from line 4 . . . . .	7	11,700,000
8	Enter the amount from line 5, Part 2—Tax Computation . . . . .	8	4,000,000
9	Subtract line 8 from line 7 (do not enter less than zero) . . . . .	9	7,700,000
10	DSUE amount portable to surviving spouse (Enter lesser of line 9 or line 9a, Part 2—Tax Computation) . . . . .	10	7,700,000

**Section D. DSUE Amount Received From Predeceased Spouse(s)** (To be completed by the estate of a deceased surviving spouse with DSUE amount from predeceased spouse(s))

Provide the following information to determine the DSUE amount received from deceased spouses.

A	B	C		D	E	F	G
Name of Deceased Spouse (dates of death after December 31, 2010, only)	Date of Death (enter as mm/dd/yy)	Portability Election Made?		If "Yes," DSUE Amount Received From Spouse	DSUE Amount Applied by Decedent to Lifetime Gifts	Year of Form 709 Reporting Use of DSUE Amount Listed in col. E	Remaining DSUE Amount, if any (subtract col. E from col. D)
		Yes	No				
Part 1 — DSUE RECEIVED FROM LAST DECEASED SPOUSE							
Part 2 — DSUE RECEIVED FROM OTHER PREDECEASED SPOUSE(S) AND USED BY DECEDENT							
Total (for all DSUE amounts from predeceased spouse(s) applied)							

Add the amount from Part 1, column D, and the total from Part 2, column E. Enter the result on line 9b, Part 2—Tax Computation . . . . . ▶

Decedent's social security number

Estate of:

**SCHEDULE E—Jointly Owned Property**

(If you elect section 2032A valuation, you must complete Schedule E and Schedule A-1.)

**PART 1. Qualified Joint Interests—Interests Held by the Decedent and His or Her Spouse as the Only Joint Tenants (Section 2040(b)(2))**

**Note:** If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entries in the last three columns.

Item number	Description. For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN.	CUSIP number or EIN, where applicable	Alternate valuation date	Alternate value	Value at date of death
1	124 Bloomingdale AVE Wayne, PA				2,000,000
Total from continuation schedules (or additional statements) attached to this schedule . . . . .					
<b>1a</b>	Totals . . . . .		<b>1a</b>		2,000,000
<b>b</b>	Amounts included in gross estate (one-half of line 1a) . . . . .		<b>1b</b>		1,000,000

**PART 2. All Other Joint Interests**

**2a** State the name and address of each surviving co-tenant. If there are more than three surviving co-tenants, list the additional co-tenants on an attached statement.

Name	Address (number and street, city, state, and ZIP code)
A.	
B.	
C.	

Item number	Enter letter for co-tenant	Description (including alternate valuation date, if any). For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN	CUSIP number or EIN, where applicable	Percentage includible	Includible alternate value	Includible value at date of death
1						
Total from continuation schedules (or additional statements) attached to this schedule . . . . .						
<b>b</b>		Total other joint interests . . . . .		<b>2b</b>		
<b>3</b>		Total includible joint interests (add lines 1b and 2b). Also enter on Part 5—Recapitulation, page 3, at item 5 . . . . .		<b>3</b>		1,000,000

(If more space is needed, attach the continuation schedule from the end of this package or additional statements of the same size.)



Decedent's social security number

Estate of:

**SCHEDULE M—Bequests, etc., to Surviving Spouse**

**Note:** If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entry in the last column.

		Yes	No
1	Did any property pass to the surviving spouse as a result of a qualified disclaimer? . . . . . If "Yes," attach a copy of the written disclaimer required by section 2518(b).	1	
2a	In what country was the surviving spouse born? _____		
b	What is the surviving spouse's date of birth? _____		
c	Is the surviving spouse a U.S. citizen? . . . . .	2c	
d	If the surviving spouse is a naturalized citizen, when and where did the surviving spouse acquire citizenship? _____		
e	If the surviving spouse is not a U.S. citizen, of what country is the surviving spouse a citizen? _____		
3	<b>Election Out of QTIP Treatment of Annuities.</b> Do you elect under section 2056(b)(7)(C)(ii) not to treat as qualified terminable interest property any joint and survivor annuities that are included in the gross estate and would otherwise be treated as qualified terminable interest property under section 2056(b)(7)(C)? See instructions	3	

Item number	Description of property interests passing to surviving spouse. For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN	Amount
QTIP property:		
A1	Avalon Property	2,000,000
All other property:		
B1		
Total from continuation schedules (or additional statements) attached to this schedule . . . . .		
4	<b>Total</b> amount of property interests listed on Schedule M . . . . .	4 2,000,000
5a	Federal estate taxes payable out of property interests listed on Schedule M . . . . .	5a
b	Other death taxes payable out of property interests listed on Schedule M . . . . .	5b
c	Federal and state GST taxes payable out of property interests listed on Schedule M . . . . .	5c
d	Add items 5a, 5b, and 5c . . . . .	5d
6	Net amount of property interests listed on Schedule M (subtract item 5d from item 4). Also enter on Part 5—Recapitulation, page 3, at item 21 . . . . .	6 2,000,000

(If more space is needed, attach the continuation schedule from the end of this package or additional statements of the same size.)

Form **706**

(Rev. August 2019)

Department of the Treasury  
Internal Revenue Service**United States Estate (and Generation-Skipping Transfer)  
Tax Return**► Estate of a citizen or resident of the United States (see instructions). To be filed for  
decedents dying after December 31, 2018.► Go to [www.irs.gov/Form706](http://www.irs.gov/Form706) for instructions and the latest information.

OMB No. 1545-0015

<b>Part 1—Decedent and Executor</b>	<b>1a</b> Decedent's first name and middle initial (and maiden name, if any) <b>Mary</b>	<b>1b</b> Decedent's last name <b>Smith</b>		<b>2</b> Decedent's social security no. <b>000 00 0000</b>	
	<b>3a</b> City, town, or post office; county; state or province; country; and ZIP or foreign postal code <b>Wayne, PA</b>	<b>3b</b> Year domicile established	<b>4</b> Date of birth	<b>5</b> Date of death <b>2026</b>	
		<b>6b</b> Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code) and phone no. <b>800 E Lancaster AVE Villanova, PA 19085</b>			
	<b>6a</b> Name of executor (see instructions) <b>XXXXXX</b>	<b>6c</b> Executor's social security number (see instructions) <b>111 11 1111</b>			
<b>6d</b> If there are multiple executors, check here <input type="checkbox"/> and attach a list showing the names, addresses, telephone numbers, and SSNs of the additional executors.					
<b>7a</b> Name and location of court where will was probated or estate administered					<b>7b</b> Case number
<b>8</b> If decedent died testate, check here <input type="checkbox"/> and attach a certified copy of the will. <b>9</b> If you extended the time to file this Form 706, check here <input type="checkbox"/>					
<b>10</b> If Schedule R-1 is attached, check here <input type="checkbox"/> <b>11</b> If you are estimating the value of assets included in the gross estate on line 1 pursuant to the special rule of Reg. section 20.2010-2(a)(7)(i), check here <input type="checkbox"/>					
<b>Part 2—Tax Computation</b>	<b>1</b> Total gross estate less exclusion (from Part 5—Recapitulation, item 13)				<b>16,000,000</b>
	<b>2</b> Tentative total allowable deductions (from Part 5—Recapitulation, item 24)				<b>0</b>
	<b>3a</b> Tentative taxable estate (subtract line 2 from line 1)				<b>16,000,000</b>
	<b>b</b> State death tax deduction				<b>0</b>
	<b>c</b> Taxable estate (subtract line 3b from line 3a)				<b>16,000,000</b>
	<b>4</b> Adjusted taxable gifts (see instructions)				<b>0</b>
	<b>5</b> Add lines 3c and 4				<b>16,000,000</b>
	<b>6</b> Tentative tax on the amount on line 5 from Table A in the instructions				<b>6,345,800</b>
	<b>7</b> Total gift tax paid or payable (see instructions)				<b>0</b>
	<b>8</b> Gross estate tax (subtract line 7 from line 6)				<b>6,345,800</b>
	<b>9a</b> Basic exclusion amount				<b>5,000,000</b>
	<b>b</b> Deceased spousal unused exclusion (DSUE) amount from predeceased spouse(s), if any (from Section D, Part 6—Portability of Deceased Spousal Unused Exclusion)				<b>7,700,000</b>
	<b>c</b> Restored exclusion amount (see instructions)				<b>0</b>
	<b>d</b> Applicable exclusion amount (add lines 9a, 9b, and 9c)				<b>12,700,000</b>
	<b>e</b> Applicable credit amount (tentative tax on the amount in line 9d from Table A in the instructions)				<b>5,025,800</b>
	<b>10</b> Adjustment to applicable credit amount (May not exceed \$6,000. See instructions.)				<b>0</b>
	<b>11</b> Allowable applicable credit amount (subtract line 10 from line 9e)				<b>5,025,800</b>
	<b>12</b> Subtract line 11 from line 8 (but do not enter less than zero)				<b>1,320,000</b>
	<b>13</b> Credit for foreign death taxes (from Schedule P). (Attach Form(s) 706-CE.)				<b>0</b>
	<b>14</b> Credit for tax on prior transfers (from Schedule Q)				<b>0</b>
<b>15</b> Total credits (add lines 13 and 14)				<b>0</b>	
<b>16</b> Net estate tax (subtract line 15 from line 12)				<b>1,320,000</b>	
<b>17</b> Generation-skipping transfer (GST) taxes payable (from Schedule R, Part 2, line 10)				<b>0</b>	
<b>18</b> Total transfer taxes (add lines 16 and 17)				<b>1,320,000</b>	
<b>19</b> Prior payments (explain in an attached statement)				<b>0</b>	
<b>20</b> Balance due (or overpayment) (subtract line 19 from line 18)				<b>1,320,000</b>	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than the executor) is based on all information of which preparer has any knowledge.

**Sign Here**

Signature of executor

Date

Signature of executor

Date

**Paid Preparer Use Only**

Print/Type preparer's name

**Neil Yahn**

Preparer's signature

Date

Check ☐ if self-employed

PTIN

Firm's name ► **JSDC LLP**

Firm's EIN ►

Firm's address ► **11 E Chocolate AVE, Hershey, PA 17033**

Phone no.



Decedent's social security number

## Estate of:

## Part 3—Elections by the Executor

**Note:** For information on electing portability of the decedent's DSUE amount, including how to opt out of the election, see Part 6—Portability of Deceased Spousal Unused Exclusion.

**Note:** Some of the following elections may require the posting of bonds or liens.

Please check "Yes" or "No" for each question. See instructions.

	Yes	No
1 Do you elect alternate valuation?	1	
2 Do you elect special-use valuation? If "Yes," you must complete and attach Schedule A-1	2	
3 Do you elect to pay the taxes in installments as described in section 6166? If "Yes," you must attach the additional information described in the instructions. <b>Note: By electing section 6166 installment payments, you may be required to provide security for estate tax deferred under section 6166 and interest in the form of a surety bond or a section 6324A lien.</b>	3	
4 Do you elect to postpone the part of the taxes due to a reversionary or remainder interest as described in section 6163?	4	

## Part 4—General Information

**Note:** Please attach the necessary supplemental documents. **You must attach the death certificate.** See instructions.

Authorization to receive confidential tax information under Reg. section 601.504(b)(2)(i); to act as the estate's representative before the IRS; and to make written or oral presentations on behalf of the estate:

Name of representative (print or type)	State	Address (number, street, and room or suite no., city, state, and ZIP code)	
I declare that I am the <input type="checkbox"/> attorney/ <input type="checkbox"/> certified public accountant/ <input type="checkbox"/> enrolled agent (check the applicable box) for the executor. I am not under suspension or disbarment from practice before the Internal Revenue Service and am qualified to practice in the state shown above.			
Signature	CAF number	Date	Telephone number

1 Death certificate number and issuing authority (attach a copy of the death certificate to this return).

2 Decedent's business or occupation. If retired, check here ☐ and state decedent's former business or occupation.

3a Marital status of the decedent at time of death:

☐ Married ☐ Widow/widower ☐ Single ☐ Legally separated ☐ Divorced

3b For all prior marriages, list the name and SSN of the former spouse, the date the marriage ended, and whether the marriage ended by annulment, divorce, or death. Attach additional statements of the same size if necessary.

4a Surviving spouse's name	4b Social security number	4c Amount received (see instructions)
----------------------------	---------------------------	---------------------------------------

5 Individuals (other than the surviving spouse), trusts, or other estates who receive benefits from the estate (do not include charitable beneficiaries shown in Schedule O) (see instructions).

Name of individual, trust, or estate receiving \$5,000 or more	Identifying number	Relationship to decedent	Amount (see instructions)

All unascertainable beneficiaries and those who receive less than \$5,000

**Total**

If you answer "Yes" to any of the following questions, you must attach additional information as described.

	Yes	No
6 Is the estate filing a protective claim for refund? If "Yes," complete and attach two copies of Schedule PC for each claim.		
7 Does the gross estate contain any section 2044 property (qualified terminable interest property (QTIP) from a prior gift or estate)? See instructions		
8a Have federal gift tax returns ever been filed? If "Yes," attach copies of the returns, if available, and furnish the following information.		
b Period(s) covered	c Internal Revenue office(s) where filed	
9a Was there any insurance on the decedent's life that is not included on the return as part of the gross estate?		
b Did the decedent own any insurance on the life of another that is not included in the gross estate?		



Decedent's social security number

**Estate of:****Part 4—General Information** (continued)

If you answer "Yes" to any of the following questions, you must attach additional information as described.		Yes	No
<b>10</b>	Did the decedent at the time of death own any property as a joint tenant with right of survivorship in which (a) one or more of the other joint tenants was someone other than the decedent's spouse, and (b) less than the full value of the property is included on the return as part of the gross estate? If "Yes," you must complete and attach Schedule E . . . . .		
<b>11a</b>	Did the decedent, at the time of death, own any interest in a partnership (for example, a family limited partnership), an unincorporated business, or a limited liability company; or own any stock in an inactive or closely held corporation? . . . . .	✓	
<b>b</b>	If "Yes," was the value of any interest owned (from above) discounted on this estate tax return? If "Yes," see the instructions on reporting the total accumulated or effective discounts taken on Schedule F or G . . . . .	✓	
<b>12</b>	Did the decedent make any transfer described in sections 2035, 2036, 2037, or 2038? See instructions. If "Yes," you must complete and attach Schedule G . . . . .		
<b>13a</b>	Were there in existence at the time of the decedent's death any trusts created by the decedent during his or her lifetime? . . . . .		
<b>b</b>	Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship? . . . . .		
<b>c</b>	Was the decedent receiving income from a trust created after October 22, 1986, by a parent or grandparent? . . . . . If "Yes," was there a GST taxable termination (under section 2612) on the death of the decedent? . . . . .		
<b>d</b>	If there was a GST taxable termination (under section 2612), attach a statement to explain. Provide a copy of the trust or will creating the trust, and give the name, address, and phone number of the current trustee(s).		
<b>e</b>	Did the decedent at any time during his or her lifetime transfer or sell an interest in a partnership, limited liability company, or closely held corporation to a trust described in line 13a or 13b? . . . . . If "Yes," provide the EIN for this transferred/sold item. ►		
<b>14</b>	Did the decedent ever possess, exercise, or release any general power of appointment? If "Yes," you must complete and attach Schedule H		
<b>15</b>	Did the decedent have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? . . . . .		
<b>16</b>	Was the decedent, immediately before death, receiving an annuity described in the "General" paragraph of the instructions for Schedule I or a private annuity? If "Yes," you must complete and attach Schedule I . . . . .		
<b>17</b>	Was the decedent ever the beneficiary of a trust for which a deduction was claimed by the estate of a predeceased spouse under section 2056(b)(7) and which is not reported on this return? If "Yes," attach an explanation . . . . .		

**Part 5—Recapitulation.** **Note:** If estimating the value of one or more assets pursuant to the special rule of Reg. section 20.2010-2(a)(7)(ii), enter on both lines 10 and 23 the amount noted in the instructions for the corresponding range of values. See instructions for details.

Item no.	Gross estate	Alternate value	Value at date of death
<b>1</b>	Schedule A—Real Estate . . . . .	<b>1</b>	<b>5,000,000</b>
<b>2</b>	Schedule B—Stocks and Bonds . . . . .	<b>2</b>	<b>8,000,000</b>
<b>3</b>	Schedule C—Mortgages, Notes, and Cash . . . . .	<b>3</b>	
<b>4</b>	Schedule D—Insurance on the Decedent's Life (attach Form(s) 712) . . . . .	<b>4</b>	
<b>5</b>	Schedule E—Jointly Owned Property (attach Form(s) 712 for life insurance) . . . . .	<b>5</b>	
<b>6</b>	Schedule F—Other Miscellaneous Property (attach Form(s) 712 for life insurance) . . . . .	<b>6</b>	<b>3,000,000</b>
<b>7</b>	Schedule G—Transfers During Decedent's Life (att. Form(s) 712 for life insurance) . . . . .	<b>7</b>	
<b>8</b>	Schedule H—Powers of Appointment . . . . .	<b>8</b>	
<b>9</b>	Schedule I—Annuities . . . . .	<b>9</b>	
<b>10</b>	Estimated value of assets subject to the special rule of Reg. section 20.2010-2(a)(7)(ii)	<b>10</b>	
<b>11</b>	Total gross estate (add items 1 through 10) . . . . .	<b>11</b>	<b>16,000,000</b>
<b>12</b>	Schedule U—Qualified Conservation Easement Exclusion . . . . .	<b>12</b>	
<b>13</b>	Total gross estate less exclusion (subtract item 12 from item 11). Enter here and on line 1 of Part 2—Tax Computation . . . . .	<b>13</b>	<b>16,000,000</b>
Item no.	Deductions	Amount	
<b>14</b>	Schedule J—Funeral Expenses and Expenses Incurred in Administering Property Subject to Claims . . . . .	<b>14</b>	<b>0</b>
<b>15</b>	Schedule K—Debts of the Decedent . . . . .	<b>15</b>	<b>0</b>
<b>16</b>	Schedule K—Mortgages and Liens . . . . .	<b>16</b>	<b>0</b>
<b>17</b>	Total of items 14 through 16 . . . . .	<b>17</b>	<b>0</b>
<b>18</b>	Allowable amount of deductions from item 17 (see the instructions for item 18 of the Recapitulation) . . . . .	<b>18</b>	<b>0</b>
<b>19</b>	Schedule L—Net Losses During Administration . . . . .	<b>19</b>	<b>0</b>
<b>20</b>	Schedule L—Expenses Incurred in Administering Property Not Subject to Claims . . . . .	<b>20</b>	<b>0</b>
<b>21</b>	Schedule M—Bequests, etc., to Surviving Spouse . . . . .	<b>21</b>	<b>0</b>
<b>22</b>	Schedule O—Charitable, Public, and Similar Gifts and Bequests . . . . .	<b>22</b>	<b>0</b>
<b>23</b>	Estimated value of deductible assets subject to the special rule of Reg. section 20.2010-2(a)(7)(ii) . . . . .	<b>23</b>	<b>0</b>
<b>24</b>	Tentative total allowable deductions (add items 18 through 23). Enter here and on line 2 of the Tax Computation	<b>24</b>	<b>0</b>



Decedent's social security number

Estate of:

**Part 6—Portability of Deceased Spousal Unused Exclusion (DSUE)****Portability Election**

A decedent with a surviving spouse elects portability of the DSUE amount, if any, by completing and timely filing this return. No further action is required to elect portability of the DSUE amount to allow the surviving spouse to use the decedent's DSUE amount.

**Section A. Opting Out of Portability**

The estate of a decedent with a surviving spouse may opt out of electing portability of the DSUE amount. Check here and do not complete Sections B and C of Part 6 only if the estate opts **NOT** to elect portability of the DSUE amount. ☐

**Section B. Qualified Domestic Trust (QDOT)**

Yes No

Are any assets of the estate being transferred to a QDOT? ☐

If "Yes," the DSUE amount portable to a surviving spouse (calculated in Section C, below) is preliminary and shall be redetermined at the time of the final distribution or other taxable event imposing estate tax under section 2056A. See instructions for more details.

**Section C. DSUE Amount Portable to the Surviving Spouse** (To be completed by the estate of a decedent making a portability election.)

Complete the following calculation to determine the DSUE amount that can be transferred to the surviving spouse.

1	Enter the amount from line 9d, Part 2—Tax Computation . . . . .	1	
2	Reserved . . . . .	2	
3	Enter the value of the cumulative lifetime gifts on which tax was paid or payable. See instructions . . . . .	3	
4	Add lines 1 and 3 . . . . .	4	
5	Enter amount from line 10, Part 2—Tax Computation . . . . .	5	
6	Divide amount on line 5 by 40% (0.40) (do not enter less than zero) . . . . .	6	
7	Subtract line 6 from line 4 . . . . .	7	
8	Enter the amount from line 5, Part 2—Tax Computation . . . . .	8	
9	Subtract line 8 from line 7 (do not enter less than zero) . . . . .	9	
10	DSUE amount portable to surviving spouse (Enter lesser of line 9 or line 9a, Part 2—Tax Computation) . . . . .	10	

**Section D. DSUE Amount Received From Predeceased Spouse(s)** (To be completed by the estate of a deceased surviving spouse with DSUE amount from predeceased spouse(s))

Provide the following information to determine the DSUE amount received from deceased spouses.

Provide the following information to determine the DSUE amount received from deceased spouse(s).							
A	B	C		D	E	F	G
Name of Deceased Spouse (dates of death after December 31, 2010, only)	Date of Death (enter as mm/dd/yy)	Portability Election Made?		If "Yes," DSUE Amount Received From Spouse	DSUE Amount Applied by Decedent to Lifetime Gifts	Year of Form 709 Reporting Use of DSUE Amount Listed in col. E	Remaining DSUE Amount, if any (subtract col. E from col. D)
		Yes	No				
Part 1 — DSUE RECEIVED FROM LAST DECEASED SPOUSE							
Bill Smith	2021						7,700,000
Part 2 — DSUE RECEIVED FROM OTHER PREDECEASED SPOUSE(S) AND USED BY DECEDENT							
Total (for all DSUE amounts from predeceased spouse(s) applied)							

Add the amount from Part 1, column D, and the total from Part 2, column E. Enter the result on line 9b, Part 2—Tax Computation . . . . .

7,700,000

Decedent's social security number

Estate of:

**SCHEDULE A—Real Estate**

- For jointly owned property that must be disclosed on Schedule E, see instructions.
- Real estate that is part of a sole proprietorship should be shown on Schedule F.
- Real estate that is included in the gross estate under sections 2035, 2036, 2037, or 2038 should be shown on Schedule G.
- Real estate that is included in the gross estate under section 2041 should be shown on Schedule H.
- If you elect section 2032A valuation, you must complete Schedule A and Schedule A-1.

**Note:** If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entries in the last three columns.

Item number	Description	Alternate valuation date	Alternate value	Value at date of death
1	Cocoa AVE, Hershey, PA 124 Bloomingdale AVE Wayne, PA			3,000,000 2,000,000
Total from continuation schedules or additional statements attached to this schedule . . . . .				
<b>TOTAL</b> (Also enter on Part 5—Recapitulation, page 3, at item 1.) . . . . .				<b>5,000,000</b>

(If more space is needed, attach the continuation schedule from the end of this package or additional statements of the same size.)

Decedent's social security number

Estate of:

**SCHEDULE B—Stocks and Bonds**

(For jointly owned property that must be disclosed on Schedule E, see instructions.)

**Note:** If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entries in the last four columns.

Item number	Description, including face amount of bonds or number of shares and par value for identification. Give CUSIP number. If trust, partnership, or closely held entity, give EIN.	Unit value	Alternate valuation date	Alternate value	Value at date of death
1	Apple Inc Stock				2,000,000
	Rite Aid Stock				1,000,000
	Hershey Stock				1,000,000
	Cocoa LLC				4,000,000
Total from continuation schedules (or additional statements) attached to this schedule .					
TOTAL (Also enter on Part 5—Recapitulation, page 3, at item 2.) . . . . .					8,000,000

(If more space is needed, attach the continuation schedule from the end of this package or additional statements of the same size.)



Decedent's social security number

Estate of:

**SCHEDULE F—Other Miscellaneous Property Not Reportable Under Any Other Schedule**

(For jointly owned property that must be disclosed on Schedule E, see instructions.)  
 (If you elect section 2032A valuation, you must complete Schedule F and Schedule A-1.)

**Note:** If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entries in the last three columns.

	Yes	No
1 Did the decedent own any works of art, items, or any collections whose artistic or collectible value at date of death exceeded \$3,000? . . . . . If "Yes," submit full details on this schedule and attach appraisals.		
2 Has the decedent's estate, spouse, or any other person received (or will receive) any bonus or award as a result of the decedent's employment or death? . . . . . If "Yes," submit full details on this schedule.		
3 Did the decedent at the time of death have, or have access to, a safe deposit box? . . . . . If "Yes," state location, and if held jointly by decedent and another, state name and relationship of joint depositor.		

If any of the contents of the safe deposit box are omitted from the schedules in this return, explain fully why omitted.

Item number	Description. For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN	CUSIP number or EIN, where applicable	Alternate valuation date	Alternate value	Value at date of death
1	Avalon Property				3,000,000
Total from continuation schedules (or additional statements) attached to this schedule .					
<b>TOTAL</b> (Also enter on Part 5—Recapitulation, page 3, at item 6.) . . . . .					3,000,000

(If more space is needed, attach the continuation schedule from the end of this package or additional statements of the same size.)