

# MSBA

## SECTION OF ESTATE AND TRUST

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### Newsletter

Mary Alice Smolarek, *Editor*  
Mary Beth Beattie, *Editor*

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### Notes From The Chair

*Matthew A. Mace*  
*OBER KALER*

I am privileged to serve as Chair of the Section for the 2010 - 2011 year. I am very appreciative of all of the Section members who have worked so hard during 2009 - 2010 to provide an extraordinary year. We were able to accomplish a significant legislative agenda and move forward on a number of areas of concern.

By now, most of you have had the opportunity to look at and work with the new Maryland Uniform Power of Attorney Act. We are still seeking comments and input from the Section members as to the ways in which you are working with the new Act and issues that you are discussing with your clients. It is my understanding that some practitioners are using one of the two new forms and other practitioners are using one of the two new forms to supplement their existing powers of attorney. This is an opportunity for each of us to engage our clients and review their powers of attorney and determine how we can best help them anticipate and address their needs.

Just as when we began using the new advance directive form, I am sure that a number of our clients will have ques-

tions and raise issues with respect to their specific circumstances that need our attention.

Another piece of legislation which recently became effective is new Maryland Estates & Trusts Code §14-113. We now join several of the surrounding states in allowing our clients holding property as tenants by the entireties to transfer real estate into a revocable trust and maintain the tenants by the entireties creditor protection. There has been quite a

bit of discussion on the Section's listserv about the scope of this new provision. This is clearly an opportunity for us to bring another option to our clients which did not previously exist. As we approach the upcoming legislative session, we look forward to pursuing new matters on behalf of the Section before the legislature including the Maryland Trust Code, which is discussed in an article in this newsletter. Please take some time to review that material and the other matters covered.

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# Maryland Trust Code to be Proposed for Enactment

*By John P. Edgar*  
*OBER KALER*

The Maryland Trust Code, or MTC, will be proposed for enactment in the upcoming session of the General Assembly. The MTC is a comprehensive codification of the law of trusts, stating Maryland trust law with precision and clarity. As such, the MTC will provide a readily available source for determining Maryland law on trusts. The MTC also fills some gaps in existing Maryland trust law.

The MTC is an important bill, given the increasing popularity of trusts. More people are learning about trusts and are attracted to the benefits of trusts. For example, trusts provide a way to divide property among multiple beneficiaries (e.g., support my spouse for life then divide the remainder among my descendants). Trusts also permit competent management of assets for less sophisticated persons. Trusts can provide “spendthrift” protection against certain creditors of the beneficiaries. In addition, trusts can help reduce taxes. Creative attorneys and other planners continue to develop new benefits of using trusts.

The MTC is a comprehensive codification of the law of trusts. Current Maryland statutory law on trusts consists of a handful of discrete statutes on various points primarily found in Title 14 of the Estates and Trusts Article. In addition, Maryland has an extensive body of trust cases, some of them very old, addressing many issues. Other points are covered by the Restatement of the Law of Trusts, now in its third version, and the case law of other jurisdictions to which Maryland courts can look for guidance when no Maryland case is on point. With respect to procedural issues in litigated trust cases, the Maryland Rules contain a number of provisions applicable to trusts, which are helpful, but even these rules leave some questions unanswered. The MTC codifies rules from all of these sources in a comprehensive and organized manner, stating the law with greater precision and clarity than the variety of existing sources.

There are “gaps” in Maryland trust law, where no clear answer may be found. This is because Maryland appellate courts have not had opportunities to rule on every possible question regarding trusts. These gaps are inherent in any system of common law. The MTC will provide answers and fill in these gaps.

In preparing the MTC, the Section Council followed a policy of “codify, not modify.” The MTC is based on the Uniform Trust Code, or UTC. The UTC provided a comprehensive template for a trust code, but it did not always reflect Mary-

land trust law. The Section Council found that the majority of the UTC reflected Maryland trust law accurately. Those provisions of the UTC are included in the MTC without change. Where the UTC differed from Maryland trust law, it was changed to follow existing Maryland law.

Any codification requires legal concepts to be put into the form of statutes, instead of the language of court opinions, and thus could be said to be “different” from Maryland law. The Section Council believes, however, that the advantages of codification, as stated above, exceed any objections that may be raised as a result of potential changes. In addition, the MTC often provides a more modern statement of the rule than the language found in existing ancient court opinions. In any event, the Section Council has tried very hard to make sure that the codification is an accurate reflection of existing law and will not change the result when applied to future Maryland trust cases.

In order to fit the MTC into the existing Estates and Trusts Article, the MTC repeals all of existing title 14, subtitle 1, of that Article, and re-enacts the provisions of that subtitle in their proper place within the MTC. No other changes to the Maryland Code or the Maryland Rules are needed.

The MTC will provide individuals with a readily available source for determining Maryland law on trusts. An industry of trust service providers has arisen to assist in the creation, management and investment of trusts. Trusts are administered by a wide variety of professional and non-professional trustees, including attorneys, legal assistants, corporate trust departments with their trust officers and other employees, and accountants and other financial professionals. Perhaps the largest category of trustee is, of course, family members and other individuals who are trusted by the trust settlor, but who may have no practical experience in trust administration. The MTC will make trust law more accessible to these individuals and the general public. Finding definitive answers to questions of trust law will be far easier in the MTC than searches through case law libraries or in search engines.

The MTC is a joint effort of the Maryland State Bar Association (through the Estate and Trust Section Council) and the Maryland Bankers Association. The UTC, on which the MTC was based, was drafted by the National Conference of Com-

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## Editor's Note

Our goal is for the *Estate and Trust Law Section Newsletter* to provide current, useful information on areas of interest to Section members. The Newsletter can be better tailored to suit members' needs with input from you. If you would like to suggest a future topic, change of format, or submit an article, please contact the Editors at:

Mary Beth Beattie  
109 North Adams Street  
Rockville, MD 20850  
(301) 309-3719 phone  
(301) 309-3849 fax  
[mbb@mbbeattie.com](mailto:mbb@mbbeattie.com)

Mary Alice Smolarek  
Wright, Constable & Skeen, LLP  
One Charles Center 16<sup>th</sup> Floor  
100 North Charles Street  
Baltimore, Maryland 21201-3812  
(410) 659-1318 phone  
(410) 659-1350 fax  
[masmolarek@wclsaw.com](mailto:masmolarek@wclsaw.com)



## Got News?

### MEMBER NEWS

Please send your professional news or announcements to one of the Editors at:

Mary Beth Beattie  
109 North Adams Street  
Rockville, MD 20850  
(301) 309-3719 phone  
(301) 309-3849 fax  
[mbb@mbbeattie.com](mailto:mbb@mbbeattie.com)

Mary Alice Smolarek  
Wright, Constable & Skeen, LLP  
One Charles Center 16<sup>th</sup> Floor  
100 North Charles Street  
Baltimore, Maryland 21201-3812  
(410) 659-1318 phone  
(410) 659-1350 fax  
[masmolarek@wclsaw.com](mailto:masmolarek@wclsaw.com)

### Maryland Trust Code to be Proposed. . .

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missioners on Uniform State Laws (NCCUSL), now known as the Uniform Law Commission, in 2000, and amended in 2001, 2003, 2004 and 2005. Many other states have enacted a version of the UTC. In our immediate area, a version of the UTC has been enacted in DC, Virginia and Pennsylvania. Nationwide, 23 jurisdictions have enacted a version of the UTC and a version was proposed in New Jersey in 2010. Trust practitioners in Maryland should become familiar with this bill.

## CHECK OUT THE 2011 MSBA VIDEO CONTEST

### *Rules of the Road*

CREATE A 1-3 MINUTE VIDEO ON  
THE IMPORTANCE OF THE RULES  
OF THE ROAD.

MORE INFO AT:  
[WWW.MSBA.ORG/?VIDEOCONTEST](http://WWW.MSBA.ORG/?VIDEOCONTEST)

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# Maryland Law Developments

By Charles S. Abell

L. Laurel Lea

Furey, Doolan & Abell, LLP

## CASELAW DEVELOPMENTS

### ***Effect of Divorce on Legacies***

Section 4-105(4) of the Estates & Trusts Article provides that upon divorce or annulment of a marriage, all provisions in a will “relating to the spouse” are deemed automatically revoked. In *Friedman v. Hannan*, 412 Md. 328, 987 A.2d 60 (Md. 2010), the Court of Appeals considered the breadth of the statute’s reach.

James Hannan and Anna Zelinski were divorced in 2001, after nearly 20 years of marriage. They had no descendants. Mr. Hannan died in 2006, not having changed or revoked his will executed during the marriage. That will left all of Mr. Hannan’s assets to Ms. Zelinski; those provisions obviously were revoked by operation of §4-105(4). The will’s contingent residuary clause left the estate to a number of people who were specifically named, including Ms. Zelinski’s sisters and nieces. The Circuit Court held that the bequests to Ms. Zelinski’s family members were deemed revoked by §4-105(4), and directed that the entire residue be distributed to the remaining residuary beneficiaries (who were members of Mr. Hannan’s family).

The Court of Special Appeals affirmed the Circuit Court decision that the bequests to Ms. Zelinski’s family were revoked. The Court held that the reach of §4-105(4) was not limited to provisions that directly benefit the spouse, but that it also could affect provisions that indirectly “relate” to the spouse, particularly when those provisions are motivated primarily by the marriage (or by the spouse’s requests), rather than the testator’s independent personal relationship with the legatees. The Court did not set forth a test to determine whether a provision relates to a former spouse, a very fact-dependent determination, which is left to the trial court.

### ***Standing to File Exception to Probate Account***

The Court of Special Appeals in *Spry v. Gooner*, 190 Md. App. 1, 985 A.2d 606 (Md. Ct. Spec. App. 2010), *cert. denied* 414 Md. 331, 995 A.2d 297 (May 14, 2010), held that the beneficiaries of a revocable trust have standing to file exceptions to a probate account.

Decedent William L. Spry had created a revocable trust, which provided for distribution of the residue to his two sons. Mr. Spry did not transfer all of his assets to his trust during

life, so there were assets passing through probate, into the trust under his pour-over will. In the course of probate administration, his personal representatives filed an account (which they then revised). The Spry sons sought to file exceptions to that account. The Orphans’ Court dismissed those exceptions on the grounds that the Spry sons lacked standing.

The Spry sons, as beneficiaries of the revocable trust, argued that they had standing to except pursuant to the Court of Appeals decision in *Carrier v. Crestar Bank*, 316 Md. 700, 561 A.2d 227 (1989). In the *Carrier* decision, the Court of Appeals held that the beneficiary of a residuary trust was an interested person, and also that one did not necessarily need to be an interested person to have standing to file exceptions.

The personal representatives argued that the legislature had overruled *Carrier* in 1990, when it re-enacted §1-101 of the Estates & Trusts Article to confirm that the beneficiary of a trust was not an interested person in an estate. The Court of Special Appeals agreed that the legislature’s actions confirmed that the Spry sons were not interested persons. However, it held that legislature had not overruled *Carrier*’s holding that common law also extended standing to beneficiaries of trusts (whether testamentary, as in *Carrier*, or inter vivos, as in the present case). In support of its holding, the Court reasoned that such standing would be the only way for beneficiaries of a trust to protect their interests. If they had to wait to sue the trustee for failure to challenge an account, enforcement likely would come too late.

### ***Trial Within a Trial in Malpractice Action***

In *Suder v. Whiteford, Taylor & Preston*, 413 Md. 230, 992 A.2d 413 (Md. 2010), the Court of Appeals considered a malpractice case brought as a result of its earlier decision in *Downes v. Downes*, 388 Md. 561, 880 A.2d 343 (2005). In the *Downes* case, the Court held that a petition filed by Petitioner Suder to extend her time to elect against her husband’s will could not be granted because it had not been timely filed. The denied petition was Ms. Suder’s fifth; she had received extensions the previous four times. Ms. Suder brought a claim for malpractice against the attorneys who advised her with respect to that petition.

The attorneys argued that they had not been the proximate

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## Maryland Law Developments. . .

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cause of Ms. Suder's losses, because her first petition for extension, which she filed *pro se*, also was untimely, and could have provided grounds to preclude her right to elect. Ms. Suder argued that this argument could not be raised, because the personal representative had not challenged that first petition for extension. The Court of Appeals held that Whiteford, Taylor could raise that defense, since the Orphans' Court grant of the first extension was a voidable order, and could be challenged by the personal representative at any time. In remanding the case, the Court noted that consideration of this defense would require application of the "trial-within-a-trial" doctrine, and that such application is appropriate in a malpractice case.

### **Enforcement of Lien Against Estate**

In *Elder v. Smith*, 412 Md. 288, 987 A.2d 36 (Md. 2010), the Court of Appeals affirmed the holding of the Court of Special Appeals that a lien obtained after death was not entitled to the special treatment afforded to pre-death liens under Title 8 of the Estates & Trusts Article.

The case arose from the divorce of Emma Elder from her husband Percy Elder. Pursuant to the divorce proceedings, Emma obtained a monetary award against Percy, though the award was not reduced to judgment or satisfied prior to Percy's death on November 8, 2005. Emma filed a claim against the estate on May 9, 2006. Seven days later, she sought and obtained an order reducing her award to judgment. On December 29, 2006, she sought a lien against real property owned by Percy. The personal representative of Percy's estate later discovered this lien while trying to sell the property in the course of administration.

The personal representative of Percy's estate, having disallowed Emma's claim against the estate, sought to remove the lien pursuant to §8-114(a) of the Estates & Trusts Article, which generally prohibits attachment or levy of estate property. Emma argued that her lien was protected by §8-114(b) of the Estates and Trusts Article, which excepts mortgages, liens, pledges, or other secured interests from the provisions §8-114(a). She also argued that her claim could not be denied as untimely pursuant to §8-103(d), which provides an exception for security interests from the normal presentation requirements.

The Court disagreed. It upheld the Court of Special Appeals' decision that § 8-114(b) makes exception only for secured creditors who obtain their liens prior to the decedent's death. Similarly, the Court held that §8-103(d) applies only to secured claims that were in existence prior to death (and therefore had attached to property while owned by the dece-

dent, not the estate). Therefore, the Court reasoned, Emma's claims were not entitled to any special priority.

The Court of Appeals did hold that the Orphans' Court erred in ordering Emma to release her lien, however. The Court noted that the Orphans' Court is a court of limited jurisdiction, and that determination of title to property is outside that jurisdiction. Therefore, the Court held that release of the lien must be pursued by different means.

### **Constructive Trust; Right of Contribution**

The Court of Special Appeals considered the doctrine of constructive trusts in *Meyer v. Meyer*, 193 Md.App. 640, 998 A.2d 921 (Md. Ct. Spec. App. 2010). The Court held that when a transfer is made to a person who is the natural object of the transferor's bounty, there is a presumption that the transfer was intended to be a gift, and the burden rests on the transferor to show otherwise by clear and convincing evidence.

The case involved a house that had been owned by William Meyer and his wife, Kimberly O'Neill. After their separation, Mr. Meyer and Ms. O'Neill executed a deed that conveyed title to their marital home to Mr. Meyer and their two children, as joint tenants with rights of survivorship. At the time the children were ages six and three. For more than fifteen years, Mr. Meyer made all mortgage payments and paid all taxes and insurance on the property from his own assets. During this period, there apparently was a falling out between Mr. Meyer and his children. In 2007, Mr. Meyer and the children filed competing complaints to force a sale of the property.

As part of his complaint, Mr. Meyer sought to reduce the children's share of the sale proceeds, on the grounds that the children were required to contribute towards the mortgage, tax, and insurance payments he had made over the years. The children argued that these payments were gifts from their father, and therefore that they had no obligation to repay them. The Circuit Court granted Mr. Meyer's petition, and ordered the children to contribute to the various payments that Mr. Meyer had made.

The Court of Special Appeals reversed, and refused to impose a constructive trust to enforce contribution. Citing the *Restatement (Second) of Trusts* and Maryland case law, the Court held that a transfer to children is presumed to be a gift. The transferor can rebut this presumption by showing

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## Maryland Law Developments. . .

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that he intended to retain a beneficial interest (such as the right to impose a constructive trust for contribution towards property expenses). The Court noted that the evidence must show the transferor's intent at the time of transfer; events subsequent to transfer (such as a falling out between parties) are irrelevant. In the present case, the Court found that Mr. Meyer had not produced sufficient evidence to show that he intended that his children be obliged to contribute towards the property expenses.

The Court of Special Appeals also remanded the case to the Circuit Court for reconsideration of whether Ms. O'Neill was entitled to part of the sales proceeds pursuant to her Separation Agreement with Mr. Meyer.

### ***Constructive Trust; Resulting Trust***

The Court of Special Appeals also considered the doctrine of constructive trusts in *Porter v. Zuromski*, 195 Md. App. 361, 6 A.3d 372 (Md. Ct. Spec. App. 2010). The case involved a very fact-driven analysis of rights when unmarried cohabitating parties purchase real property.

After several years of romantic involvement (including engagement, but with an indefinitely postponed wedding date), Mr. Porter and Ms. Zuromski decided to purchase a house together in 1997. For several reasons, including Ms. Zuromski's poor credit rating and impending bankruptcy, the parties decided that Mr. Porter would purchase and own the house in his sole name, though Ms. Zuromski would contribute to the down payment and monthly mortgage payments. Ms. Zuromski made those financial contributions,

and Mr. Porter repeatedly represented that she was in effect a co-owner of the house.

In January 2007, the parties terminated their engagement; in July they terminated their relationship. Mr. Porter ordered Ms. Zuromski to vacate the house, refused her request to divide the equity in the house, and undertook a refinancing that cashed out most of that equity. Ms. Zuromski filed suit, and the Circuit Court imposed a constructive trust.

The Court of Special Appeals affirmed the Circuit Court's action. It noted that a constructive trust is proper when property has been acquired by fraud, misrepresentation, or other improper methods, or where circumstances render it inequitable for the party holding title to retain it. Without necessarily deciding whether there had been misrepresentation or other improper action, the Court agreed that Ms. Zuromski's significant financial contributions and Mr. Porter's representations made it inequitable for Mr. Porter to be sole beneficiary of the house's value. It further noted that there likely was a confidential relationship between the parties, and that a constructive trust also could be imposed based on abuse of that relationship.

Ms. Zuromski also asked for imposition of a resulting trust, which is a broad equitable remedy designed to prevent unjust enrichment when a party holds title to property even though another party pays for the property. The Court noted that a resulting trust also might be an appropriate remedy, but declined to decide the question, because the Circuit Court had not considered it (likely because the constructive trust provided adequate relief).

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# MSBA ANNUAL MEETING

## OCEAN CITY, MARYLAND

The MSBA annual meeting in Ocean City will be held from  
Wednesday, June 8 through Saturday, June 11, 2011.

For more information, visit [www.msbaannualmeeting.org](http://www.msbaannualmeeting.org) or call  
Wanda Claiborne of the MSBA at 410-685-7878.



## SEA. YOU. THERE.

## ESTATE AND GIFT TAX STUDY GROUP UPCOMING EVENTS 2011

<u>DATE</u>	<u>TOPIC</u>	<u>SPEAKER</u>
January 20, 2011	Review of Heckerling	Kelly Moore Nowotnick
February 24, 2011	TBA	TBA
March 24, 2011	TBA	TBA
April 21, 2011	TBA	TBA
May 19, 2011	TBA	TBA

Meetings are held at noon and are generally located at:

### **Bank of America**

Tower 1, 4th Floor  
100 South Charles Street  
Baltimore, MD 21202

For additional information please contact the co-chairs:

#### **Lisa A. Stern, Esquire, Co-Chair**

Robert A. Rombro, PA  
22 Light Street, Suite 402  
Baltimore, Maryland 21202  
[lstern@rombropa.com](mailto:lstern@rombropa.com)  
(410) 752-6595

#### **Victoria L. Grace, Esquire, Co-Chair**

Wase, Wase and Grace, LLC  
The Creighton Center  
1400 Front Street, #202  
Lutherville, Maryland 21093  
[vgrace@grace-law.com](mailto:vgrace@grace-law.com)  
(410) 828-5388

## SEARCHING THE MSBA ESTATE AND TRUST LAW EMAIL LIST ARCHIVES

For those persons wishing to review past messages on the MSBA Estate and Trust Law Email Lists, they are archived and can be accessed as follows:



1. Enter the following address in your Internet browser: [http://lists.msba.org/scripts/lyris.pl?enter=msbaetl&text\\_mode=&lang=english](http://lists.msba.org/scripts/lyris.pl?enter=msbaetl&text_mode=&lang=english)
2. When the log in screen appears, type your email address into the requested box and leave the password box blank
3. Click on "Click here to enter msbaetl"
4. This leads to the "msbaetl" screen.
5. Click on "Search" leaving empty the box to the left of this button.
6. At the "Read Messages" screen, you can search the archives for particular words, for messages from a given date, or for a designated number of archived messages sorted by date, author, or particular subject threads. To review a designated number of archived messages sorted by date, author, or particular subject threads, you merely designate the number of messages to be show, how these messages are to be organized, and click on the "Show" button.
7. Showing messages sorted by subject matter thread is particularly helpful because you see the original inquiry and all the responses sent to that inquiry.

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# REALITY BYTES 10.0

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

(If you are reading this article on a printed page, you are missing all of the links to Internet sites in the online version, like the link to All Things Digital at the beginning of the next paragraph. To read this column online, go to: <http://technobytesmd.blogspot.com/>.)

## **BUILDING BETTER PASSWORDS**

One of the weakest links in computer security may be the passwords that we use. We all struggle with how to keep track of the various passwords and PINs that we need to navigate in the computer age. I am as guilty as many, many others. So, let's all take a moment and try to learn something from Mozilla, the non-profit that make the Firefox browser, which has page entitled "Choosing More Secure Passwords."

## **WHERE ARE WE GOING? (PART I): THE PC IS DEAD! (OR IS IT?)**

All Things Digital ("ATD") is a rather good website for commentary on technology and the business of technology. It features two Wall Street Journal standouts, Walt Mossberg, who authors the WSJ Personal Technology column/blog, and Kara Swisher, who does the same for BoomTown. A few years back, ATD decided to host a conference about, well ... all things digital. In early June, this year's conference, D8 rolled around and the opening night featured an expansive Mossberg/Swisher interview of a modern day Lazarus of sorts, Steve Jobs.

In case you have been out of touch, Steve Jobs is legend. Having co-founded Apple somewhere around the dawn of the personal computer age, Jobs helped steer the company to be one of the only true alternatives to the hegemony of Bill Gates' Microsoft. He left Apple for a while, and then returned when Apple seemed to be foundering. During this return engagement, Jobs has reshaped Apple and the world of computing yet again, revitalizing Apple's core line of computers, both desktops and laptops, and revolutionizing a somewhat definition-less space loosely called personal computing devices. A few years back, personal computing devices amounted to not much more than a few smart-phones that were struggling to become smarter and more integrated through wireless connection to the Internet.

Jobs did a flanking maneuver with a personal music player called the iPod. He built an online store called iTunes and started selling music to fill iPods. The industry took this as a noble little gesture befitting of Apple's technology wizardry:

a sleek little device to entertain us, but hardly a big threat. Still, people seemed to like this idea and started buying iPods, filling them with their own music and downloading songs from iTunes. Soon other things came along, like a new thing called a "podcast" and videos. Other companies brought out generic MP3 players. Microsoft thought that it could compete in this market and launched a player of its own, Zune.

The first iPods were relatively primitive. (I know, because I still have a second generation Mini, which but for the lack of any battery life, still works.) By the time that Zune arrived, however, Apple had newer versions of the iPod that were better and fancier and started to do more things, like play video that could be downloaded from iTunes. The first generation Zune never had a chance. Nowadays, I am told that there is an outstanding new generation Zune that outperforms the iPod in a number of areas. Unfortunately, not many people care. Apple's iPod dominates.

This pattern bears watching, because Apple repeats it. Jobs admits that Apple needed to make much more strategic choices. Apple is a hardware company that does particularly innovative things with the software it develops for that hardware. Its computers remain a much smaller part to the market compared to the legion of computers that run Microsoft's Windows operating system. What Apple does is look for openings in the market where it can excel and innovate. It has succeeded and, in doing so, has moved the market toward Apple.

Apple brought out the iPhone to take on other smart-phones that were having trouble figuring out how to integrate their functionally with the Internet. Several generations of iPhones down the line, Apple dominates the creative side of this space, with the rest of the industry still trying to keep up. It has made this market interesting enough to draw Google into the operating system competition. Microsoft recently released a new version of its mobile phone operating system, again trying to catch up in this competition.

Apple also brought out an iPod called the "Touch" or "iTouch" that connected to the Internet via WiFi. Built with many features in common with the iPhone, the iTouch started to capture the attention of users who wanted mobile access to the Internet for emailing and social networking, but did not

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## Reality Bytes. . .

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necessarily want to, or could not, get an iPhone (just yet).

Finally, Jobs unveiled the iPad this year. The iPad is a tablet computer that appears to be redefining the non-desktop computer sector. Of course, we still have laptop computers, which thanks to Apple's leadership again, are getting smaller and lighter, but are capable of providing full-function computing on a par with a desktop computer. We also have "netbooks," devices that are smaller than a laptop, which connect to the Internet and provide some computing capability, but lack the memory and other features of laptops. Finally, we have e-readers for electronic books, such as Kindle, Nook, etc. Building off the iPod, the iPad is a uniquely different computing device. Through it, Apple definitely has designs on furthering its emergence as a media company. Apple is making a play for the market held by e-readers like the

Kindle. The iPad also is designed to build on the iTouch and provide more utility as an access point to the web. The competition has followed Apple's lead by announcing its own tablet computers.

Through all this, Microsoft largely has been missing in action. It failed to mount any meaningful competition to the iPod. It has meandered around in the cell-phone operating systems wars without much distinction. Google's Droid operating system is a more formidable challenge to the iPhone. Apple recently surpassed Microsoft in market capitalization. And, Jobs dodged the grim reaper in his bout with liver disease. So, getting him to sit down and talk on opening night of D8 was huge.

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## ***Section Council Committees***

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

### **Committee**

**Chair**  
**Legislation**  
**Website/Technology**  
**Publications**  
  
**Probate Rules/Reform**  
**Alternative Dispute Resolution**  
**Membership**  
**Programs**  
**Section Meetings**  
**Orphans' Court liaison**  
**Registers of Wills liaison**  
**Estate and Gift Tax Study Group Liaison**  
**Elder Law Section Liaison**

### **Contact**

**Matthew A. Mace**  
**Matthew A. Mace**  
**Brian R. Della Rocca**  
**Mary Beth Beattie**  
**Mary Alice Smolarek**  
**Allan J. Gibber**  
**Robert C. Young**  
**John M. Burdette**  
**Frank S. Baldino**  
**Eileen O'Brien**  
**Sharon J. Ritter**  
**Jonathan D. Eisner**  
**Danielle M. Cruttenden**  
**Danielle M. Cruttenden**

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## Reality Bytes. . .

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There are significant problems in the forgoing success story, some of which are attributable to Jobs' insistence on doing things the "right" way (his way?). First, the iPhone has only been available on the ATT network, which, for all its technical synergy with the iPhone, is universally viewed as a lousy network. Apple will now be selling a lot more iPhones, as the rumors that the iPhone will be available on Verizon next year appear to be confirmed.

Second, and more problematic, Jobs could not get satisfaction out of Adobe over weaknesses in its Flash Player, so none of the iTouch, iPhone or the iPad run Flash Player. As Flash Player is integral to the operation of many website audio/visual clips, particularly on Google's YouTube site, Apple has wonderful devices to reach the Internet, but spotty content once you get there. No word at this writing on how this standoff will end, but Jobs is asked about it in the interview.

Finally, the newest iPhone model, iPhone4, received bruising criticism for reception problems related to the device itself (not ATT's network). The New York Times reported that Consumer Reports would not recommend the iPhone4 because of a flaw with its antenna. The furor dragged down Apple's stock price for a while, but seem to have blown over.

With apologies for the long lead above if you already knew all this stuff, what I want to discuss are comments by Jobs at D8 on the future of the computer and a response from Microsoft CEO Steve Ballmer on the last morning of D8. Let's clarify terminology first. The term "PC" seems to be a bit of a sore spot between Jobs and Ballmer. My take on these interviews is that Jobs uses the term to refer to full size desktop computers generally and to some extent fully functional laptops (with hard drive memory and CD/DVD capabilities). At one point he says as much to Walt Mossberg, describing himself and Walt "as people from the PC world" and saying that "PCs have taken people like us a long way." Ballmer seems to respond as if he interpreted the remarks to apply strictly to "PCs," i.e. -- computers running Microsoft Windows (or the next OS from Microsoft, which may not be called Windows anything).

Remember that Apple is a hardware manufacturer. Microsoft is a software company. Except for the Xbox game system, Microsoft has not really succeeded in developing any significant hardware business; it makes its money on operating systems that are installed in the vast majority of full scale desktop and laptop computers. So, Ballmer may simply be defensive about Microsoft losing market share, but he comes off sounding like the PC half of those famous Apple Mac-PC ads. (Ballmer is certainly defensive about a lot of things these days; listen to his comments about Google and Android and

Chrome. Here is a mash-up putting the Jobs and Ballmer comments side by side in a point-counter point debate.)

Jobs essentially made an analogy that the full scale desktop computer is like a truck: it has great utility and will continue to have great utility to accomplish the jobs for which we need a full scale computer. (And, like trucks, there will be some people "driving" a full scale computer when they do not really need one.) Jobs thinks, however, that we have already entered an era where typical computing needs can be handled by smaller devices, that there is a paradigm shift under way.

Ballmer made some jokes about "Mac trucks" and offered some backward-looking platitudes about Windows PCs being "mass popularizers," but ultimately conceded that there will be smaller devices that serve different functions. Jobs, of course, does not say that the iPad is going make the PC obsolete (at least not any time soon), but that a new order is coming.

Microsoft is really besieged on several sides by the forces of change. Google (which Ballmer called a "behemoth," as if Microsoft is somehow the new David to Google's Goliath) is focused on more and more functionally occurring online, with the need for resident operating systems and programs in our personal computers becoming less important.

My take on this is that Ballmer's smugness hides an unease about Microsoft's ability to adapt. With the desktop computers beginning to wane and Microsoft missing in action on most other fronts, Microsoft faces the prospect of watching its operating system business for PCs slowly (or rapidly) disappear.

One can only hope Ballmer and others at Microsoft can read their own corporate history and understand its implication for the future. After all, what Jobs said embodies and extends the vision that Bill Gates had many years ago when he foresaw the personal computer becoming a part of everyday life, empowering people and moving us out of the era of mainframe computer.

Ballmer seems to lack a vision of the future. His comments are reminiscent of a backward looking discussion last year by Microsoft's chief strategist, Craig Mundie. Jobs is not clairvoyant. He is just a keen observer of what has happened with computer technology and where the future lies. Historically, as Gates foresaw, computers and computing devices have gotten smaller, more affordable, have empowered more and more people and have rapidly broken down definitional lines in the process. The Internet has driven this process even

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faster by allowing people to do many things online that they used to need a desktop (or mainframe computer) to do.

Interestingly, in September, IBM CEO Sam Palmisano declared the PC business dead in an interview with The Wall Street Journal's Viewpoints. Remember that IBM invented the PC. IBM sold its PC business several years ago for a reasonable price. Palmisano went so far as to say that he "could not give [the PC business] away today."

I think that there is little doubt that we will see a growing use of smaller computing "devices," more use of the Internet in place of the desktop and more freedom and power to use this technology in the hands of more and more people. The desktop will still be around. Netbooks may or may not survive the advances represented by the iPad. Our cell phones will get smarter. We yet may see widespread availability of connectivity through WiFi. (Google is certainly pushing in this direction. The major wireless carriers better take notice because their monopolistic pricing structure will be vulnerable to competition for access that is more fairly and properly priced.) Microsoft's challenge seems to be finding its place in this future. Jobs is at the crest of the next hill telling us what he sees beyond. Ballmer is still huffing and puffing his way up to get a peak.

Look at the people around you, at work, at home, at leisure. Increasingly, people are doing many things without a desktop computer (PC or Mac). Laptops have become more common place, even within offices. Whether they are using a netbook, a iPhone, a Droid phone, an iPad, an iPod Touch,

other similar devices, people are connecting and computing through the Internet from home or office or places in between. The Wall Street Journal ran a story recently on the surging sales of portable communication devices, including the iPad, at big box retailer Best Buys. The article also noted that the iPad was drawing customers away from laptops.

Whether at work, on vacation or at the gym, people are reading email, listening to music, going to websites, linking to their workplace network, making dinner reservations, checking out local movie listings. I typed part of this column on a laptop at an ACTEC meeting in Pennsylvania. It is fairly clear that a new paradigm has emerged. The next part of this series of columns will discuss some of the reasons why the desktop computer and even the traditional laptop computer, while still important, are increasingly secondary in the modern world.

(Disclosure: The author holds stock in Microsoft, Apple and Google.)

### DAVID BEATS A GOLIATH

New York Times Technology writer David Pogue has written for some time about the abuses of the giant telecommunications companies. I have mentioned this in a prior Reality Byte's post. Now comes "Verizon Comes Clean," in which David reports on Verizon's admission that it has been collecting millions of dollars from \$1.99 charges it assessed on users who inadvertently connected to the Internet on their flip phones. Verizon will be paying out a \$90 million refund. Read David's full report by clicking on the link above.

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