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PASTERNAK & FIDIS REPORTER

Alimony in the D.C. Metropolitan Area

by Vicki Viramontes-LaFree

Family law practitioners face a challenge in advising clients on alimony outcomes in settlement negotiations or in court. There is simply no reliable way to predict the amount or duration of an alimony award when a couple divorces. A judge must consider a list of statutory criteria, such as the age of the parties, length of the marriage, work histories, current incomes and the parties' needs. Decisions vary by judge and jurisdiction. Results can be quite different even among similarly situated families. Judges and practitioners have begun to consider the use of a guideline – i.e., a formula -- to establish an amount and duration of alimony, but, to date, in Maryland, D.C. and Virginia, judges continue to establish alimony in the traditional manner. The law of child support furnishes an interesting contrast. Before child support guidelines were enacted in the 1980s, family practitioners faced the same problems in predicting child support awards. Pre-guideline law required trial judges to make detailed factual findings about the needs of the child and the parties' incomes. Awards were variable. Child support guidelines instead provided an objective standard to predict a child support award and greatly increased uniformity.

History of Child Support Guidelines In 1988 Congress mandated that every state enact child support guidelines, and all states complied

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Pair v. Queen and the Responsibilities of Personal Representatives

In the process of probating an estate, a court normally appoints a Personal Representative (PR) to determine what assets the decedent owned at the time of death, to file federal and state tax returns for the estate, and to distribute the remaining assets to the decedent's heirs and beneficiaries. The law provides that a PR can be held personally liable for financial losses suffered by the estate because of mistakes that the PR may have made in the probate process. But how far can that liability extend?

In a recent case argued successfully by Roger A. Hayden II, a partner in the Firm, the D.C. Court of Appeals provided important guidance concerning the right of a PR to rely on professionals he or she employs, such as a lawyer or accountant, to assist him or her in probating the estate. The case, *Pair v. Queen*, 2 A.3d 1063, was decided on August 26, 2010.

In the *Pair* case, the court held that a PR is not personally liable for mistakes made by the professional. The court also ruled that, when two or more personal representatives are acting together, one representative will not be held responsible for the mistake of another unless the first was also involved with the error.

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Linda J. Ravdin, Editor
Pasternak & Fidis, P.C.
7735 Old Georgetown Road
Suite 1100
Bethesda, Maryland
20814-6183
301-656-8850
Fax: 301-656-3053
www.pasternakfidis.com

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7735 Old Georgetown Road
Suite 1100
Bethesda, MD 20814-6183
301-656-8850
Fax: 301-656-3053
www.pasternakfidis.com

Estate Planning and Administration Group
Anne W. Coventry
Nancy G. Fax
Marcia C. Fidis
N. Alfred Pasternak
Oren Goldberg
Elizabeth S. Kim
Carolyn P. Vinson

Divorce and Family Law Group
Vicki Viramontes-LaFree
Linda J. Ravdin
Anne (Jan) White
Morriah H. Horani
Lucy E. Nichols

Business, Real Estate and Litigation Group
Mitchell I. Alkon
Roger A. Hayden, II
Jeremy D. Rachlin

Alimony in the D.C. Metropolitan Area

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with the mandate. In all three jurisdictions in the D.C. area, child support guidelines provide a predetermined basic support amount at each income level. That amount is allocated between the parents according to each party's percentage share of their combined incomes. Certain expenses are also allocated pro rata, such as work-related childcare, medical insurance premiums, and uninsured medical expenses. Guidelines limit judicial discretion and provide uniformity of result. They remove from courts the need for a detailed assessment of the actual expenses of each family. Family law practitioners are better able to settle child support disputes because the guidelines eliminate guesswork.

In Maryland and D.C., it can still be difficult to predict a child support award in an upper-income family. The child support guideline is not mandatory when the parents' total combined incomes exceed $180,000 in Maryland or $240,000 in D.C. In these cases a judge may use the traditional method of determining support, or may extrapolate from the guideline schedule. In Virginia the mandatory guidelines include all income levels in the basic schedule.

Challenges in Determining Alimony Even under the best of circumstances, alimony decisions are quite challenging for attorneys and judges. Negotiating a settlement is difficult because there are no objective standards to predict a likely outcome. The principle behind alimony is to provide an economic means for both parties to deal with their new unmarried lives. Alimony is supposed to provide the opportunity for the receiving party to become self-supporting. Generally, courts expect the receiving spouse to engage in rehabilitative behavior to become financially independent. For example, a stay-at-home parent may need to retool and go back to school in order to obtain employment. Decisions are made on a case-by-case basis. The trial judge must make detailed factual findings about each party's needs, incomes and earning capacities. The statutes in each jurisdiction require the judge to consider several non-quantitative factors but provide little guidance on how these factors interrelate in a given case or how much weight to apply to each factor. Trial judges must balance the dollar amount and duration of an alimony award with the likely achievement of the receiving spouse's employment potential.

Alimony may be for an indefinite period or for a specified period of time. The latter is known as rehabilitative alimony and is the norm under Maryland law. Indefinite alimony is granted when the receiving spouse cannot reasonably be expected to become self-supporting or if the parties' standards of living will be unconscionably disparate. Indefinite alimony awards require more than simply a disparity in incomes; the disparity must be unconscionable. Before finding that an unconscionable disparity exists, a trial judge has to project into the future and estimate the parties' future incomes based on a receiving spouse achieving maximum financial progress. Unfortunately, there is no bright-line test to guide trial judges in finding whether an unconscionable disparity exists in a particular case.

Alimony Guidelines in the D.C. Metro Area---Are We There Yet In light of the detailed analysis required of trial judges, alimony guidelines would be a useful tool to assist them in reaching fair and equitable alimony awards. Guidelines would provide predictability for clients and could result in fewer alimony cases going to trial. Some counties and cities in Virginia (e.g., Fairfax, Loudoun, Richmond) have alimony guidelines, but only to set temporary alimony while a suit for divorce is pending.

There is a glimmer of hope for alimony guidelines in Maryland as a result of a recent Court of Appeals decision. In *Boemio v. Boemio*, after a 20-year marriage Ms. Seixas (formerly Boemio) was awarded $3,000 per month in indefinite alimony by a Montgomery County, Maryland Circuit Court judge. Mr. Boemio appealed. He argued that the trial court improperly used alimony guidelines created by the American Academy of Matrimonial Lawyers (AAML) to decide on the amount, to the exclusion of the 12 statutory factors a trial judge is required to use to make a decision. The Court of Appeals, Maryland's highest court, rejected Mr. Boemio's argument, finding instead that the trial judge did consider the statutory factors. Importantly, the Court of Appeals also recognized that it is appropriate for

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Vicki Viramontes-LaFree represented Cynthia Seixas, formerly Boemio, throughout *Boemio v. Boemio*, starting with the trial court proceedings and in the first appeal before the Maryland Court of Special Appeals which upheld the trial court's decision as to the amount and indefinite duration of alimony. Morriah Horani, an associate with the firm, made the winning argument before the Maryland Court of Appeals when Vicki fell ill. *Boemio v. Boemio*, No. 57 September Term, 2009

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Pair v. Queen and the Responsibilities of Personal Representatives

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The PR holds an important role under the law. He has fiduciary responsibilities to act in the best interest of the decedent to make sure the decedent's wishes are fulfilled. The PR also must act in the best interest of the beneficiaries to make sure they receive what they are entitled to. Under D.C. law, as in many other states, the PR is required to "settle and distribute the estate as would a prudent person in such matters."

The PR's duties can be time-consuming and complicated. The PR may employ a lawyer or accountant to assist him. This is especially true for larger estates that must pay estate taxes. If there are co-PRs, they will often divide the responsibilities between them: for example, one may take on the responsibility for organizing all of the decedent's papers and asset information, while the other will take responsibility for employing a professional to prepare and file the tax returns.

In the *Pair* case, the decedent died a resident of D.C. His estate assets had a value of approximately $6 million. The estate was required to pay both federal and local estate taxes. The decedent had hired an attorney to prepare his will. The will nominated the attorney, along with the decedent's son and granddaughter, to be the co-PRs. After the decedent's death, the court appointed all three to act as co-PRs to probate the estate.

The attorney also played a second role. The estate employed him to be the lawyer for the estate. As the estate's lawyer, he was responsible for preparing and filing the estate tax returns. However, he failed to file the returns on time. As a result, the IRS and the D.C. Office of Tax and Revenue charged penalties and interest in excess of $1 million. When the son and granddaughter discovered the attorney's mistake, the attorney stepped down both as the lawyer for the estate and as a co-PR, leaving the son and granddaughter as the remaining co-PRs. They brought in Pasternak & Fidis partner Nancy Fax to act as the estate's lawyer to deal with the IRS and D.C. She was able to convince the tax authorities to greatly reduce the amount of the penalties and interest the estate was required to pay.

The son and granddaughter also employed Pasternak & Fidis to file a lawsuit in D.C. Superior Court against the attorney to recover the amount of the penalties and interest. The lawsuit made two claims. The first claim was against the attorney for professional malpractice – that is, for his negligence in the performance of his duties as the lawyer for the estate. The second claim was for breach of fiduciary duty. As co-PR, the attorney had taken on the responsibility to make sure that the estate tax returns were filed on time, which he failed to do.

The trial court dismissed both claims. It ruled that the estate could not recover the losses from the attorney. The court held that a PR of an estate has an independent duty to know when the estate tax returns must be filed and to make sure they are filed on time. The PR cannot delegate that duty to a professional such as a lawyer or accountant. Therefore, the estate could not hold the attorney, in his role as the lawyer for the estate, financially responsible because the estate tax returns were not filed on time.

The trial court also ruled that the estate could not sue the attorney for breach of fiduciary duty in his role as the co-PR responsible for the taxes. It held that all three co-PRs were equally responsible for the failure to file the estate tax returns on time. Therefore, the son and granddaughter were not allowed to bring the second claim as the remaining co-PRs for the estate, because they were also negligent.

The son and granddaughter appealed to the D.C. Court of Appeals, which reversed the trial judge. The Court of Appeals held that a PR acts prudently if he or she employs and relies on a professional to assist with filing the estate tax returns for the estate. The PR is not personally liable for losses to the estate because the estate tax returns are filed late if the lawyer or accountant misinformed the PR about the correct time when the returns must be filed or failed to file them on time. The professional is responsible for the mistake, and the estate can sue him to recover the losses.

The appeals court also ruled that co-PRs can divide tasks between them. It recognized the general rule that co-PRs are equally liable for errors made in the probate of an estate if they acted together or if one approves or acquiesces in the improper conduct of the other. However, if one co-PR accepts a responsibility, such as making sure the estate tax returns are filed on time, and fails to fulfill his or her responsibility, the other co-PR will not be held responsible unless he or she was involved with the error.

The Court of Appeals ordered the case sent back to the trial court to complete the litigation in accordance with its rulings. Because the case was originally dismissed, neither side in the dispute had a chance to present their evidence. The Court of Appeals ruling is not final yet because the losing side has asked for reconsideration and that motion is pending.

The *Pair* decision is important. Had the trial court's rulings not been reversed, the result would have been that a PR cannot rely on a lawyer or accountant to ensure the timely filing of tax returns by the estate. Many PRs do not have the knowledge or expertise to understand the complex maze of tax laws and regulations. Also, if there are co-PRs, it would be cumbersome and inefficient for them to do everything together. Co-PRs should be able to divide the responsibilities and rely on one another. Otherwise, there would be an atmosphere of mistrust, making the probate of the estate difficult. Many people would be unwilling to accept the position of PR if they could be held responsible for mistakes made by others.

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Roger A. Hayden, II, partner in the Business, Real Estate & Litigation Group, argued and won *Pair v. Queen* 2 A.3d 1063 (2010), discussed in more detail in the accompanying article. In the case, the District of Columbia Court of Appeals established new legal principles about the responsibilities of an estate's personal representative and the lawyers and other professionals, such as accountants, that the estate may employ. Associate **Jeremy Rachlin** served as co-counsel. The Business, Real Estate & Litigation Group provides litigation and counseling services in real estate, employment, business and contested wills, trust and estates matters.

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2010 Gifting Opportunities

By Nancy G. Fax

Thanks to the Economic Growth and Recovery Act of 2001 and Congress' failure to deal with the federal transfer tax rules before the end of 2009, this is a unique year for making transfers to descendants and other beneficiaries.

Lifetime Gifts

For 2010, the gift tax exemption is $1 million and the gift tax rate is 35% - the lowest rate since the 1930s. (In 2009, the gift and estate tax rate was 45%, and the rate is scheduled to increase to 55% in 2011). Accordingly, in certain situations, it may be advantageous to make large taxable gifts in 2010 and pay a 35% gift tax because it is unlikely that any future gift or estate tax rate will be lower.

As a general rule, lifetime gifts are always more efficient than transfers at death because the gift tax is "tax exclusive" -- it is assessed only on the amount the beneficiary actually receives. By contrast, the estate tax is "tax inclusive" -- it is assessed on the whole estate – so that there is a tax on the tax itself. So, even if the gift tax and the estate tax bear the same rate, it is generally less expensive to pay gift tax than estate tax. In addition, a gift made during one's lifetime removes appreciation and income on the gifted asset from the estate for estate tax purposes and removes the gifted asset as well as the appreciation and income from the estate for state estate tax purposes. These reasons for lifetime gifts always apply. What makes 2010 special is the added bonus of the historically low 35% gift tax rate.

Lifetime Gifts to Grandchildren

For 2010, there is no generation-skipping transfer (GST) tax. Therefore, grandparents can make unlimited outright gifts to grandchildren (or to lower generations) without the imposition of any GST tax (although such gifts would be subject to the gift tax as described above). In 2009, the maximum amount that a grandparent could give to grandchildren without incurring a GST tax was $3.5 million. Any excess amount would have been subject to a gift tax of 45% plus a GST tax of 45%. In 2011 (under current law), the maximum combined amount that a grandparent can give to grandchildren will decrease to approximately $1,350,000, and the maximum GST tax rate is scheduled to increase to 55%. Accordingly, in some situations, it may be advantageous for grandparents to consider making large taxable gifts to their grandchildren (or to lower generations) in 2010 and paying only a 35% gift tax because, in the future, similar gifts may be subject to both a gift tax and the GST tax.

Distributions to Grandchildren from GST Non-Exempt Trusts

For 2010, distributions from irrevocable trusts that are not exempt from GST tax (GST Non-Exempt Trusts) to a grandchild of the creator of the trust will not be subject to a GST tax. However, in 2011, and in future years, similar distributions from a GST Non-Exempt Trust to a grandchild will be subject to a GST tax. Because of the absence of a GST tax in 2010, it may be advisable to distribute assets from a GST Non-Exempt Trust this year to the grandchildren of the creator of the trust because such assets may in the future be subject to estate tax upon the death of the parents of such grandchildren, which would substantially reduce the amount that would pass to the grandchildren.

Risk Considerations

There is a mortality risk associated with making taxable gifts in 2010. Because there is no federal estate tax this year, the risk is that the donor might incur the gift tax and then die in 2010, when no estate tax is due. In this situation, the gift tax would have been paid unnecessarily. To reduce this mortality risk, it is generally advisable to wait until the very end of the year to make the taxable gift.

In addition, the gift tax on 2010 gifts will be due April 15, 2011. The payment of estate tax, of course, is postponed until the death of the donor, and it is unknown what the transfer tax rates will be at that time.

There has been much discussion about the possibility that Congress will enact legislation that would retroactively eliminate or reduce the potential benefits described above. As time goes by, it seems less and less likely that there will be any laws with retroactive effect, but the possibility exists and must be taken into account.

Questions?

If you have questions or wish to discuss any of these unique 2010 estate planning opportunities, contact any of the attorneys in our Estate Planning and Administration Group.

Nancy Fax has been elected to a three-year term on the Board of Directors of the Bethesda-Chevy Chase High School Educational Foundation. The Foundation funds programs that provide support for B-CC High School students to reach their academic potential and help them build a pathway to college.

Managing partner **Nancy Fax** was quoted in the August 2010 issue of *Financial Advisor Magazine*. In an article by Ben Mattlin entitled "Tension Tamers: Here's How to Help Your Clients Avert Inheritance Lawsuits Between Their Kids and a New Spouse," Nancy comments on the varied uses of a prenuptial agreement: "Most people with significant assets who remarry do enter into prenuptial agreements . . . In these situations, divorce is not the primary concern. Protecting assets for the children of the first marriage is critical."

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Client Alert: OPM Expands Definition of Family for Federal Employees

On July 14, 2010, under new regulations from the Office of Personnel Management, federal employees became permitted to use sick leave, funeral leave, and other benefits to attend to the needs of their domestic partners, whether of the same or the opposite sex.

OPM's expanded definition of the families of federal employees, which took effect that day, also includes a child of a same-sex relationship, even if the employee has not adopted the child, as well as a child of a domestic partner's prior relationship.

The new regulations relate to the rights of employees to use sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer to attend to the needs of their families. For example, a federal employee is now permitted to use sick leave to care for his or her domestic partner who is ill, rather than use annual leave (vacation time) for this purpose.

In the past, a federal agency was permitted to consider a same-sex domestic partner as a family member. However, agency interpretations were inconsistent. The new regulations should create consistency across all agencies.

OPM made these modifications to implement the President's June 17, 2009, *Memorandum on Federal Benefits and Non-Discrimination,* which was intended to encourage the federal government to consider the needs of a diverse workforce and to enable employees to balance their work and family obligations.

Before finalizing the modified regulations, OPM considered a number of comments and suggestions from interested agencies, groups and individuals. An overwhelming majority of the comments supported the change. One suggestion that OPM rejected was to include pets. An employee who needs to take care of a sick pet will still have to use annual leave or unpaid leave for this purpose.

OPM does not have authority to make statutory changes. Therefore, the new regulations do not authorize an employee to take leave under the Family and Medical Leave Act to care for a domestic partner. Only Congress can amend FMLA to include members of non-traditional families in its application.

Client Alert: Maryland General and Limited Power of Attorney Act

In 2010, the Maryland General Assembly enacted the Maryland General and Limited Power of Attorney Act. The act for the first time codifies an agent's responsibilities to the principal, gives an extended list of interested persons with standing to petition a court to construe a power of attorney or to review an agent's conduct, makes powers of attorney generally enforceable as to third parties dealing with the agent, and provides statutory forms whose acceptance is enforceable by court order. If a person wrongfully refuses to honor a statutory form power of attorney, the statute imposes liability for reasonable attorney's fees and costs. Powers of attorney executed on or after October 1, 2010 must be executed with the same formalities as a will and acknowledged before a notary public. The statute expressly permits the notary public to also serve as one of the two witnesses.

Because the statutory form power of attorney is enforceable by court order and there is liability for attorney's fees and costs associated with an action to enforce a statutory form power of attorney, it is anticipated that statutory form powers of attorney will become the norm in Maryland. However, it is not yet clear whether and to what extent the terms of a power of attorney may deviate from the forms provided in the statute and still be considered a statutory form power of attorney that is enforceable. Until we know whether we may alter the terms of the statutory forms in order to optimize their usefulness, we will continue to have our clients execute our carefully crafted powers of attorney in addition to a statutory form.

Pair v. Queen and the Responsibilities of Personal Representatives

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Decedents and estate beneficiaries would not have the security of having family members and others they know and trust serve as PR because the risks would be too great.

If you are called upon to act as a fiduciary, such as the personal representative of an estate, you must understand your responsibilities. If you choose to employ a professional, such as a lawyer or accountant, be sure to discuss with him or her exactly what his or her responsibilities will be and the tasks you will be responsible for. Likewise, if you are serving with another fiduciary, you should reach agreement about who will be responsible for particular duties. The *Pair* decision makes it clear that you will not be held responsible for mistakes made by others unless you were also involved with the error. However, even if a responsibility is assigned to a professional or another fiduciary, you should keep tabs to ensure that he or she is properly fulfilling his or her obligations.

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Linda Ravdin Named to Board of Trustees of Round House Theatre

Partner Linda Ravdin has been appointed a member of the Board of Trustees of the Bethesda-based Round House Theatre. Round House Theatre is a critically acclaimed performing arts institution that is celebrating its 32nd season. Its mission includes the production of classic and contemporary works for the stage as well as the development of community-based education programs.

With Linda's appointment to the board, the firm and the theater continue to expand their partnership. Earlier this year, the firm sponsored a nearly month-long run of a play at the theater and will be sponsoring another play in early 2011.

"I am delighted to join Round House's Board of Trustees," said Linda. "I love the theatre and I believe in the growth and expansion of the arts in our community. As a board member, I hope to make a contribution to Round House's continued success."

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a trial court to ". . . consult guidelines developed by a reliable and neutral source that do not conflict with or undermine any of the considerations expressed in the statute…"

At the time of the *Boemio* trial in 2007, the AAML alimony guidelines were fairly new to the D.C. area and were the only guidelines circulating at that time. Since the *Boemio* decision, the Women's Law Center of Maryland introduced the Kaufman Alimony Guidelines in 2008. The AAML guidelines use two formulas to calculate a dollar amount and duration of alimony and focus on the parties' incomes and length of marriage. The Kaufman guidelines look at the parties' income, number of children, age and education level of potential recipient, custodial arrangements, and certain child-related expenses in determining an amount and term of alimony.

Where Do We Go From Here Some 20 years after the adoption of child support guidelines, we now have two models of alimony guidelines in the D.C. metro area--the Kaufman and the AAML alimony guidelines. Until alimony guidelines are adopted by law, their use in divorce cases remains unsettled. To date *Boemio* is the only case in the three jurisdictions that has dealt with whether a trial judge may consider alimony guidelines. Still, attorneys are using the AAML and Kaufman alimony guidelines to settle their cases and to make their arguments at trial. The existence of these guidelines has ushered in debates about which alimony guidelines are most appropriate or whether a combination of both models should be considered, and whether trial judges should use them at all. It appears family law practitioners may be one step closer to having a clear formula to provide consistent and predictable alimony results.

Business, Real Estate & Litigation associate **Jeremy Rachlin** will be serving an additional term as a representative on the Montgomery County Circuit Court Bench-Bar Committee, which is composed of local attorneys, judges, representatives from the Sheriff's Office and the Clerk's office, and court administrators. The goal of the Committee is to establish an open dialogue to maintain the high quality of service and practice before the County's Circuit Court. In addition to this position Jeremy will also serve as Chair of the Chamber Chat Committee for the Montgomery County Bar. Jeremy will organize monthly lunches that are hosted by a Montgomery County Circuit Court judge and open to members of the Bar. These brown-bag lunches are designed to allow members of the Bar to engage with and gain critical practice tips from a judge in an informal setting.

At the International Academy of Collaborative Professionals Forum, held on October 28-31, partner **Jan White** led a presentation on the D. C. Metro Area Protocols for Collaborative Divorce, a how-to manual for collaborative practitioners that is widely used in the D. C. Metro area. Jan chaired the Committee that developed these Protocols.

Three Pasternak & Fidis collaborative attorneys will be participating in the newly opened Collaborative Practice Center, located at 1630 Connecticut Ave., NW, Suite 400, near Dupont Circle. **Vicki Viramontes-LaFree**, **Linda Ravdin**, and **Jan White**, along with other collaboratively trained attorneys, mental health professionals, and financial planners will use this site to host collaborative meetings and events. The Center is the first office space in the D.C. Metro area where collaborative professionals have joined to provide a central location for collaborative services.

Managing Partner, **Nancy Fax**,was included in the November 2010 issue of *Washingtonian* as one of the area's best financial planners. "They Know Money" is a survey of hundreds of area financial professionals who were asked "Whom would you trust with your own money?" The listing describes Nancy as a specialist in high net worths and nontraditional families.

Roger A. Hayden II, will be teaching a seminar for the National Business Institute (NBI) in *Resolving Title Issues*, on December 7, 2010 in Baltimore, Maryland. His real estate practice includes representing clients in title insurance matters and he often acts as an expert witness. For more information about the seminar, please contact Roger or NBI.

Partner, **Roger A. Hayden II**, recently participated in a presentation to the Montgomery County, Maryland American Inns of Court about the current foreclosure crisis and how to deal with the lender when a borrower is unable to pay the mortgage. His areas of practice include real estate and representing property owners, buyers and lenders. The mission of the Americans Inns of Court, a national organization of attorneys, is to foster excellence in professionalism, ethics, civility, and legal skills. Roger is a Master of the Bench member of the Montgomery County, Maryland chapter.

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7735 Old Georgetown Road

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Bethesda, Maryland

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